

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/1. The legislation relating to value added tax.

## VALUE ADDED TAX (

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### 1. INTRODUCTION

#### 1. The legislation relating to value added tax.

Value added tax ('VAT') was introduced in 1972<sup>1</sup> and first became chargeable on 1 April 1973<sup>2</sup>. The principal provisions relating to the tax have been consolidated in the Value Added Tax Act 1994 which came into force on 1 September 1994<sup>3</sup>. There is also a considerable body of subordinate legislation which regulates the operation of the tax<sup>4</sup>.

<sup>1</sup> See the Finance Act 1972, which implemented EC Council Directive 67/227 (OJ 71, 14.4.67, p 1301) on the harmonisation of legislation of member states concerning turnover taxes (subsequently amended by EC Council Directive 69/463 (OJ L320 20.12.69, p 34); and EC Council Directive 77/388 (OJ L145 13.6.77, p 1)) and EC Council Directive 67/228 (OJ 71, 14.4.67, p 1303) on the harmonisation of legislation of member states concerning turnover taxes (repealed). See also the Green Paper on Value Added Tax (Cmnd 4621) issued at the time of the budget statement in 1971 and the White Paper on Value Added Tax (Cmnd 4929) which was issued concurrently with the budget statement in 1972 and contained the provisions of the tax to be included in the Finance Bill 1972 in advance of publication of the entire bill. The tax was substantially altered with effect from 1 January 1978 by the restatement of VAT effected by the Finance Act 1977 s 14, Sch 6 (repealed), which implemented EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) the Sixth Council Directive on the harmonisation of legislation of member states concerning turnover taxes ('the Sixth Directive'), relating to the scope of VAT. The tax underwent a further substantial revision on 1 January 1993, with the implementation by the Finance (No 2) Act 1992 s 14, Sch 3 (now repealed) and related subordinate legislation of the transitional arrangements for the abolition of fiscal frontiers within the European Community following the amendment of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) by EC Council Directive 91/680 (OJ L376, 31.12.91, p 1). Further changes were made on 1 June 1996 by the Finance Act 1996 ss 25-29, Sch 3, which introduced a fiscal warehousing regime and other simplification measures in order to give effect to EC Council Directive 95/7 (OJ L102, 5.5.95, p 18) ('the Second VAT Simplification Directive') (as amended): see PARA 146 et seq post.

<sup>2</sup> See the Finance Act 1972 s 47(1) (repealed).

<sup>3</sup> Value Added Tax Act 1994 s 101(1).

<sup>4</sup> See in particular the Value Added Tax Regulations 1995, SI 1995/2518 (amended by the Finance Act 1999 s 19(4); the Postal Services Act 2000 s 127(4), Sch 8 para 23; SI 1995/3043; SI 1995/3147; SI 1996/210; SI 1996/542; SI 1996/1198; SI 1996/1250; SI 1996/2960; SI 1997/1086; SI 1997/1431; SI 1997/1525; SI 1997/1614; SI 1997/2437; SI 1997/2887; SI 1998/59; SI 1998/765; SI 1999/438; SI 1999/599; SI 1999/1374; SI 1999/3029; SI 1999/3114; SI 2000/258; SI 2000/634; SI 2000/794; SI 2001/630; SI 2001/677; SI 2001/1149; SI 2001/3828; SI 2002/1074; SI 2002/1142; SI 2002/2918; SI 2002/3027; SI 2003/532; SI 2003/1069; SI 2003/1114; SI 2003/1485; SI 2003/2096; SI 2003/2318; SI 2003/3220; SI 2004/767; SI 2004/1082; SI 2004/1675; SI 2004/3140; SI 2005/762; SI 2005/2231); and the Value Added Tax Tribunals Rules 1986, SI 1986/590 (amended by SI 1986/2290; SI 1991/186; SI 1994/2617; SI 1997/255; SI 2001/3073; SI 2002/2851; SI 2003/2757; SI 2004/1032); and PARAS 16 et seq, 343 et seq post.

### UPDATE

#### 1 The legislation relating to value added tax

NOTE 1--EC Council Directives 67/227, 77/388: replaced by EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 4--SI 1995/2518 further amended: SI 2006/3292. SI 1986/590 revoked: SI 2009/56.

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## 2. The European legislative basis of value added tax.

Although the statutory basis of value added tax in United Kingdom law is the Value Added Tax Act 1994, the Act itself is derived from the Sixth Directive<sup>1</sup>. As an adherent to the Treaty establishing the European Community, the United Kingdom is required to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or which result from action taken by Community institutions<sup>2</sup>. Although the United Kingdom has a discretion as to the form and method by which it implements the Sixth Directive, it is obliged to ensure that the results intended by that directive are in fact achieved by its domestic legislation<sup>3</sup>. In practice there is a need to have constant reference to the Sixth Directive and to the various decisions of the European Court of Justice in relation to VAT and allied topics in order properly to interpret and apply the domestic legislation.

<sup>1</sup> The EC Council Directive 77/388 (OJ L 145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') (as amended). See note 2 *infra*.

<sup>2</sup> See the EC Treaty (Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmd 5179)) art 5; and the European Communities Act 1972 s 2 (as amended). The implementing provisions in domestic law are presently to be found in the Value Added Tax Act 1994 and regulations made thereunder: see PARA 4 *et seq* post.

EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) does not prevent a member state from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that those taxes, duties or charges do not, in trade between member states, give rise to formalities connected with the crossing of frontiers: see art 33 (substituted by EC Council Directive 91/680 (OJ L376, 31.12.91, p 1)). In Case C-109/90 *Giant NV v Gemeente Overijse* [1991] ECR I-1385, [1993] STC 651, [1992] 3 CMLR 629, ECJ, it was held that a tax was a turnover tax for the purpose of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 33 (as originally enacted) if it had the effect of compromising the functioning of the common system of VAT by levying a charge on the movement of goods and services and on commercial transactions in the same way as VAT, following Case 295/84 *Rousseau Wilmot SA v Caisse de Compensation de l'Organisation Autonome Nationale de l'Industrie et du Commerce (Organic)* [1985] ECR 3759, [1986] 3 CMLR 677, ECJ; and Case 252/86 *Bergandi v Directeur Général des Impôts* [1988] ECR 1343, [1991] STC 529, [1989] 2 CMLR 933, ECJ; followed in Case C-208/91 *Beaulande v Directeur des Services Fiscaux de Nantes* [1992] ECR I-6709, [1996] STC 1111, [1993] 1 CMLR 765, ECJ; therefore an 'entertainment tax', levied on entrance fees and cloakroom charges, was not such a tax because it was not a general tax, being applicable only to a limited class of goods or services, it was not charged at each stage of production and distribution, and it was charged not on value added at each stage but on the gross amount charged at one stage. An 'employment market levy' which was charged at each stage of the production and distribution process as a percentage of the undertaking's sales, with a deduction of purchases on which the levy had been imposed at an earlier stage, was, however, precluded by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 33 (as originally enacted): Case C-200/90 *Dansk Denkavit ApS and P Poulsen Trading ApS supported by Monsanto-Searle A/S v Skatteministeriet* [1992] ECR I-2217, [1994] STC 482, [1994] 2 CMLR 377, ECJ (which also deals with the issue whether the effect of a decision of the European Court of Justice that national law was incompatible with the Sixth Directive should be limited *ratione temporis*: held, it was inappropriate to limit the effect of the judgment since the prohibition was quite apparent from the terms of the Sixth Directive and the European Commission had drawn the Danish Government's attention to the issue a few weeks after the introduction of the levy). Levy payable by members of chambers of commerce exceeding a certain turnover and calculated on the basis of VAT included in the price of goods and services supplied to them was not precluded by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 33 (as substituted) as it was not calculated on the basis of the supply of goods or services or imports by the taxable person but on the basis of the amount payable on goods and services acquired by him for his business; the basis of assessment was not the amount obtained or to be obtained by way of consideration for the taxpayer's business operations nor was it proportionate to the price of the goods and services supplied by the taxable person; and the levy was not imposed at all stages of production and distribution: Case C-318/96 *SPAR Österreichische Warenhandels AG v Finanzlandesdirektion für Salzburg* [1998] ECR I-785, [1998] STC 960. A tourism promotion charge on certain traders levied on the basis of the traders' annual local turnover is not precluded under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 33 (as substituted) as it did not provide for deduction of amounts paid as input tax and were not passed on to the final consumer in a manner characteristic of VAT: Joined Cases C-

338/97, C-344/97 and C-390/97 *Pelzl v Steiermärkische Landesregierung; Wiener Städtische Allgemeine Versicherungs AG v Tiroler Landesregierung; Stuaug Bauaktiengesellschaft v Kärntner Landesregierung* [1999] ECR I-3319, [2000] 3 CMLR 889, [1999] All ER (D) 584, ECJ. A duty imposed on beverages and ice cream including any containers or accessories sold with them, is not a general tax and not precluded under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 33 (as substituted): Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien* [2000] ECR I-1157, [2001] All ER (EC) 735, [2001] 3 CMLR 832, ECJ. Insurance premium tax (see INSURANCE vol 25 (2003 Reissue) PARA 831 et seq) is not precluded by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 33 (as substituted) as it applies only to a specific service, is not levied at each stage of the production and distribution process and does not apply to the added value of the goods and service: Case C-308/01 *GIL Insurance Ltd v Customs and Excise Comrs* [2004] All ER (EC) 954, [2004] STC 961, ECJ.

In Case C-62/93 *BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greece* [1995] ECR I-1883, [1995] All ER (EC) 684, [1995] STC 805, ECJ, it was held that a system of collecting VAT on the full consumer price of petroleum products at the beginning of the marketing process, with intermediate companies being neither obliged to account for VAT nor entitled to deduct input tax, was contrary to the fundamental principle of VAT by which VAT was applied at each stage of the production or distribution process after deduction of the VAT which had been levied directly on transactions relating to outputs.

3 See the EC Treaty (Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmdnd 5179)) art 189 (substituted by the Maastricht Treaty (Treaty on European Union (Maastricht, 7 February 1992; Cm 1934)) Title II art G(60)); and Case 6/64 *Costa v ENEL* [1964] ECR 585, [1964] CMLR 425, ECJ. For an example of the interaction between Community law and domestic law see Case C-96/91 *EC Commission v Spain* [1992] ECR I-3789, [1996] STC 672, ECJ, where it was held that Spain was in breach of its obligation to enable travellers exporting goods in their personal luggage to obtain remission of VAT, by requiring them to present to Customs a 'special invoice', which had to be purchased from the Spanish tax authorities; by imposing this requirement, Spain went beyond what was necessary to ensure the correct levying of VAT and had rendered the exercise of the right of remission practically impossible, or excessively difficult. See also Joined Cases 123/87, 330/87 *Jorion, née Jeunehomme, et Société Anonyme d'étude et de gestion immobilière 'EGI' v Belgium* [1988] ECR 4517, ECJ. The principle of equal treatment expressed in EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 22(8) (see PARA 64 note 2 post) was intended only to regulate trade transactions between member states and not transactions which took place within a single member state: Case C-217/94 *Eismann Alto Adige Srl v Ufficio IVA di Bolzano* [1996] ECR I-5287, [1996] STC 1374, ECJ. See also Case C-359/97 *EC Commission v United Kingdom* [2000] 3 CMLR 919, ECJ (United Kingdom's failure to levy VAT on road tolls collected by traders governed by private law was a breach of obligations under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1)). In the present state of harmonisation of the laws of the member states relating to the common system of VAT, the Community principle of equal treatment does not preclude legislation of a member state which, in accordance with Directive 77/388 (OJ L145, 13.6.77, p 1) art 28(3)(b), Annex F point 17, continues to exempt international passenger transport by air but taxes international transport by coach: Case C-36/99 *Idéal Tourisme SA v Belgian State* [2000] ECR I-6049, [2001] STC 1386, ECJ.

## UPDATE

### 2 The European legislative basis of value added tax

TEXT AND NOTES--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended). Directive 2006/112 also repeals and replaces Directive 67/277. The structure and wording are recast but no material changes are brought about in the legislation. There are some substantive changes consequent on the recasting exercise: see arts 2(3), 44, 59(1), 399, Annex III point (18). To comply with those changes member state implementing measures should be in place by 1 January 2008. Otherwise references to the repealed directives should be construed as references to Directive 2006/112: art 411, Annex XII.

NOTE 2--As to implementing measures for EC Council Directive 77/388, see EC Council Regulation 1777/2005 (OJ L288, 29.10.2005, p 1). See also Case C-475/03 *Banca Popolare Di Cremona Soc. Coop. Arl v Agenzia Entrate Ufficio Cremona* [2007] 1 CMLR 863, ECJ; Case C-502/07 *K-1 sp z o o v Dyrektor Izby Skarbowej w Bydgoszczy* [2009] 2 CMLR 599, [2009] All ER (D) 76 (Jan), ECJ.

NOTE 3--While exemptions under EC Council Directive 77/388 art 15 must be strictly interpreted, it does not mean that terms used to specify exemptions must be constructed in such a way as to deprive those exemptions of their intended effect:

Case C-97/06 *Navicon SA v Administración del Estado* [2008] STC 2693, ECJ (art 15(5) precluded national legislation granting benefit of exemption from VAT only in the case of full chartering of ship).

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### 3. The status of Community law.

In consequence of the European Communities Act 1972<sup>1</sup>, the courts are empowered to consider whether United Kingdom legislation complies with the Community legislation to which it purports to give effect. A court which is required to construe domestic legislation must proceed from the assumption that the terms of the United Kingdom statute are consonant with the terms of directives in the same field<sup>2</sup>. The courts are not, however, obliged to distort the meaning of a British statute to conform with Community law if that law is not directly applicable<sup>3</sup>. In an action against the state, in a case where the statute does not conform with Community law, an individual may rely on the Community provision in preference to the domestic legislation provided that the relevant Community provision is of direct effect<sup>4</sup>. In the context of a directive, a provision is of direct effect if, so far as its subject-matter is concerned, it is unconditional and sufficiently precise<sup>5</sup>. In matters relating to value added tax, where actions will generally involve disputes with the Commissioners for Her Majesty's Revenue and Customs<sup>6</sup>, the taxpayer is therefore entitled to rely on the direct effect of appropriate provisions of the Sixth Directive; whilst the Commissioners are obliged to have regard only to domestic legislation<sup>7</sup>. In addition, the United Kingdom courts are obliged to take judicial notice not only of decisions of the European Court of Justice or any court attached to it but also of any expression of opinion by such a court on any question of the meaning or effect of any Community instrument<sup>8</sup>. Where such a question is raised before a court or tribunal, the court or tribunal may request the European Court of Justice to give a preliminary ruling on the matter, if it considers that the question is necessary to enable it to give judgment<sup>9</sup>.

It is contrary to Community law to apply a domestic procedural rule which precludes a national court acting within the scope of its jurisdiction from considering of its own motion the compatibility of a measure of domestic law with Community law<sup>10</sup>.

1 The European Communities Act 1972 s 2 (as amended): see PARA 2 ante.

2 This rule of construction obtains whether the directive precedes or postdates the statute in question: Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, [1986] 2 CMLR 430, ECJ; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, [1992] 1 CMLR 305, ECJ; Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-3567, [1994] QB 718, [1994] 4 All ER 115, ECJ (applied *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] 4 All ER 577, [1995] 1 WLR 1454, HL). Where necessary, the court will imply words into the statute to ensure that the United Kingdom complies with its treaty obligations: *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546, [1989] 1 All ER 1134, HL. However, cf the decision in *Robert Gordon's College v Customs and Excise Comrs* [1996] 1 WLR 201, [1995] STC 1093, HL (where, on a strict literal reading of a statutory provision, the domestic legislation appears to be inconsistent with the relevant EC Directive, then, in the case of a dispute between an individual and the state (in the form of the Commissioners), the court is entitled to disregard the domestic legislation and apply the directive without more).

3 *Duke v GEC Reliance Ltd* [1988] AC 618 at 640-642, [1988] 1 All ER 626 at 636-637, HL, per Lord Templeman. 'Directly applicable' in this context probably means 'directly effective'. Not all provisions of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') are directly effective; thus some articles expressly permit a member state to derogate from their application in whole or in part: see eg arts 6(2), 10(2) (amended by EC Council Directive 2000/65 (OJ L269, 21.10.2000, p 44) and EC Directive 2001/115 (OJ L15, 17.1.2002, p 24)), EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(4) (added by EC Directive 1994/5 (OJ L60, 3.3.1994, p 16)), and EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(C)(1). Others leave a margin of discretion in their application: eg art 20(4). In addition, art 27(1) (art 27(1)-(4) substituted by EC Council Directive 2004/77 (OJ L323, 26.10.04, p 23)) enables member states to apply for authorisation from the EC Commission and Council to introduce measures intended to simplify the procedure for charging VAT; and EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 27(5) enabled member states which applied such simplification measures on 1 January

1977 to retain such measures, provided that they notified the Commission of them before 1 January 1978. In reliance on these derogating provisions, the United Kingdom introduced a number of simplification measures, such as the system of retail schemes (see PARAS 199-201 post). The EC Council has also given the United Kingdom permission to effect certain simplification measures, see eg: (1) a tax accounting scheme for gold, to prevent fraud or tax evasion (EC Council Decision 84/469 (OJ L264, 5.10.84, p 27) on the application of Article 27 of the Sixth Council Directive of 17 May 1977 on value added tax (authorisation of a derogation, requested by the United Kingdom, with a view to avoiding certain types of fraud or tax evasion)); (2) a flat-rate system for determining the amount of fuel used for private purposes in company cars (EC Council Decision 86/356 (OJ L212, 2.8.86, p 35)); (3) a simplified calculation of the VAT chargeable on long stays in hotels; (4) a system requiring taxable traders selling by retail through unregistered traders to account for VAT on the open market retail price (EC Council Decision 89/534 (OJ L280, 29.9.89, p 54) authorising the United Kingdom to apply, in respect of certain supplies to unregistered resellers, a measure derogating from article 11A(1)(a) of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes); (5) a flat-rate restriction of recovery of input tax on the purchase or leasing of passenger cars intended for partial private use (EC Council Decision 95/252 (OJ L159, 11.07.95, p 19) authorising the United Kingdom to apply a measure derogating from articles 6 and 17 of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1)). In Case 5/84 *Direct Cosmetics Ltd v Customs and Excise Comrs* [1985] ECR 617, [1985] STC 479, ECJ, it was held that the subsequent legislative amendment of national legislation which had been notified to the Commission under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 27 (as originally enacted) itself required to be notified and approved; and, in the absence of such approval, could not be relied on against an individual before the national courts. As to the Sixth Directive see PARA 1 note 1 ante.

4 The phrase 'individual' has a broad meaning in the context of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1): it has been held to encompass any person who or which is subject qua taxpayer to the domestic provisions implementing the Directive, for example, local authorities: *Joined Cases 231/87, 129/88 Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino and Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* [1989] ECR 3233, [1991] STC 205, ECJ. Member states are obliged to make good damage caused to individuals by breaches of Community law attributable to the state, even where the national legislature is responsible for the breach; the rule of Community law breached must, however, be intended to confer rights on the individuals, the breach must be sufficiently serious and there must be a direct causal link between the breach and the damage sustained by them: see *Joined Cases C-46/93, C-48/93 Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex p Factortame Ltd* [1996] QB 404, [1996] All ER (EC) 301, ECJ.

5 See Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53 at 71, [1982] 1 CMLR 499 at 512-513, ECJ.

6 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 post.

7 However, the Commissioners will be entitled to ask the court if possible to construe the United Kingdom statute as conforming with the directive.

8 See the European Communities Act 1972 s 3(1), (2) (amended by the European Communities (Amendment) Act 1986 s 2; extended to decisions and expressions of opinion by the EFTA Court by the European Economic Area Act 1993 s 4(a)); and STATUTES vol 44(1) (Reissue) PARA 1352.

9 EC Treaty (Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) art 177 (substituted by the Maastricht Treaty Title II art G(56)). The domestic court or tribunal must bring the matter before the European Court if it is a court or tribunal against whose decision there is no judicial remedy under national law: EC Treaty art 177 (as so substituted). The Court of Appeal has identified certain matters which a judge should bear in mind in deciding whether to make a reference: (1) whether the point is conclusive; (2) whether there has been a previous ruling which decides or substantially decides the point; (3) whether the point is reasonably clear and free from doubt ('acte claire'): if it is, it is simply necessary to apply, rather than to interpret, Community law; (4) that it is necessary for the facts to have been decided before a reference can be made: *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 422-425, [1974] 2 All ER 1226 at 1234-1235, CA, per Lord Denning MR; *BLP Group plc v Customs and Excise Comrs, Swallowfield plc v Customs and Excise Comrs* [1994] STC 41, CA (referred Case C-4/94 *BLP Group plc v Customs and Excise Comrs* [1995] ECR I-983, [1995] All ER (EC) 401). See also Case 283/81 *CILFIT Srl and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 at 3430-3431, [1983] 1 CMLR 472 at 490-491, ECJ; *Customs and Excise Comrs v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)* [1983] 1 All ER 1042, [1983] 3 CMLR 194; *Lord Bethell v SABENA* [1983] 3 CMLR 1; *R v Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, CA (referred *Joined Cases 266/87, 267/87 R v Royal Pharmaceutical Society of GB, ex p Association of Pharmaceutical Importers, R v Secretary of State for Social Services, ex p Association of Pharmaceutical Importers* [1990] 1 QB 534, [1989] 2 All ER 758, ECJ); *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex p Else* [1993] QB 534 at 545, [1993] 1 All ER 420 at 426, CA, per Bingham MR; and *Conoco Ltd v Customs and Excise Comrs* [1995] STC 1022.

10 See Case C-312/93 *SCS Peterbroeck, Van Campenhout & Cie v Belgium* [1995] ECR I-4599, [1996] All ER (EC) 242, [1996] 1 CMLR 793, ECJ.

## **UPDATE**

### **3 The status of Community law**

NOTES 3, 4--EC Council Directive 77/388: replaced by EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).



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#### **4. The scope and nature of value added tax.**

Value added tax ('VAT'<sup>1</sup>) is charged on the supply<sup>2</sup> of goods or services in the United Kingdom<sup>3</sup>, on the acquisition in the United Kingdom of any goods from other member states of the European Community<sup>4</sup> and on the importation of goods from places outside those member states<sup>5</sup>. The tax is a tax on the final consumer, in as much as the final consumer is unable to recover or claim credit for the VAT included in the cost of supplies made to him. Its administration involves a credit mechanism system whereby a taxable person who is charged tax on the supplies which he receives is entitled, subject to certain exceptions<sup>6</sup>, to set off that tax against the tax charged by him on the supplies which he makes to other persons. He is thus accountable only for the excess of the tax on the supplies made by him over the tax on the supplies made to him<sup>7</sup>. Where the tax on the supplies to him for which he is entitled to credit exceeds the tax on the supplies made by him, he is entitled to claim payment of the excess from the Commissioners for Her Majesty's Revenue and Customs<sup>8</sup>.

The VAT on the supply to a taxable person of any goods or services for the purpose of a business<sup>9</sup> carried on or to be carried on by him<sup>10</sup>, the VAT on the acquisition by a taxable person of any goods from another member state<sup>11</sup> and the VAT paid or payable by a taxable person on the importation of any goods from a place outside the member states used or to be used for the purpose of a business carried on or to be carried on by him<sup>12</sup> are known as his 'input tax'<sup>13</sup> and form the basis of the taxable person's entitlement to credit in computing his liability to VAT<sup>14</sup>.

The VAT on the supplies made by the taxable person, or on the acquisition of goods by him from another member state<sup>15</sup> is known as his 'output tax'<sup>16</sup>. It is these amounts for which, subject to his entitlement to credit for input tax incurred, the taxable person must account to the Commissioners<sup>17</sup>.

VAT is chargeable on a supply of goods or services only where: (1) the supply is a taxable supply<sup>18</sup>; (2) the goods or services are supplied by a taxable person in the course of a business carried on by him; and (3) the supply is made in the United Kingdom<sup>19</sup>. It is a liability of the person making the supply<sup>20</sup>. However, VAT on any acquisition of goods from another member state is a liability of the person who acquires the goods<sup>21</sup>. VAT on the importation of goods from places outside the member states is chargeable and payable as if it were a duty of customs<sup>22</sup>.

The Provisional Collection of Taxes Act 1968, which allows for the collection of taxes during the period from the expiration of an annual tax until the coming into force of the new Finance Act<sup>23</sup>, applies in relation to VAT<sup>24</sup>. Where, by virtue of a resolution having effect thereunder, VAT has been paid at a rate specified in the resolution on the supply of any goods or services, or on the acquisition of goods from another member state, by reference to a value determined<sup>25</sup> in accordance with statute, then:

- 1 (a) if any of that VAT is subsequently repayable<sup>26</sup> in consequence of the restoration in relation to that supply or acquisition of a lower rate, the amount repayable is the difference between the VAT paid by reference to that value at the rate specified in the resolution and the VAT that would have been payable by reference to that value at the lower rate<sup>27</sup>;
- 2 (b) if before the VAT is paid it ceases to be chargeable at that rate in consequence of the restoration in relation to that supply or acquisition of a lower rate, the VAT chargeable at the lower rate is charged by reference to the same

value as that by reference to which VAT would have been chargeable at the rate specified in the resolution<sup>28</sup>.

The VAT that may be credited as input tax<sup>29</sup> or refunded<sup>30</sup> does not, however, include VAT that has been repaid by virtue of head (a) above<sup>31</sup> or that would be so repayable if it had been paid<sup>32</sup>.

1 References in the Value Added Tax Act 1994 to VAT are references to value added tax: Value Added Tax Act 1994 s 1(1).

2 Ie including anything treated as such a supply: *ibid* s 1(1)(a). For the meaning of 'supply' see PARA 27 post; and as to deemed supplies see PARA 30 post.

3 *Ibid* s 1(1)(a). For the purposes of the Value Added Tax Act 1994, references to the United Kingdom include the territorial sea of the United Kingdom: s 96(11). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See, however, the Value Added Tax (Isle of Man) Order 1982, SI 1982/1067; and PARA 15 post; and see generally CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

4 Value Added Tax Act 1994 ss 1(1)(b), 96(1). As to the territories treated for the purposes of VAT as excluded from, or included in, the European Community see PARA 16 post.

5 *Ibid* s 1(1)(c). Prior to 1 January 1993, VAT was levied on the importation of goods from other countries, whether within or outside the European Community. VAT was abolished on the importation of goods from other member states with effect from 1 January 1993; thenceforward VAT is imposed on the acquisition from other member states of: (1) goods by a taxable person; and (2) new means of transport (whether or not by a taxable person): see s 10(1); and PARA 19 post. For the meaning of 'taxable person' see PARA 63 post.

6 Eg a congestion-charging scheme and tolled bridges, tunnels or roads operated by a central or local government body under a public statute is outside the scope of VAT: Customs and Excise Business Brief 03/03 [2003] STI 525; Case C-359/97 *European Commission v United Kingdom* [2000] ECR I-6355, [2000] 3 CMLR 919, [2000] STC 777. See also PARA 155 et seq post.

7 See the Value Added Tax Act 1994 s 25(2); and PARA 216 post. For the exceptions to the right to deduct input tax see PARA 218 et seq post.

8 See *ibid* s 25(3); and PARA 216 post. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 post.

9 For the meaning of 'business' see PARA 23 post.

10 Value Added Tax Act 1994 s 24(1)(a). The supply of legal services to an employee under a company contract of insurance is not a supply of services to the company: *Revenue and Customs Comrs v Jeancharm Ltd (t/a Beaver International)* [2005] EWHC 839 (Ch), [2005] STC 918.

11 Value Added Tax Act 1994 s 24(1)(b).

12 *Ibid* s 24(1)(c).

13 See *ibid* s 24(1).

14 See PARA 215 post.

15 Subject to the Value Added Tax Act 1994 s 93(1) (see PARA 16 post), 'another member state' means any member state of the European Community other than the United Kingdom; and 'other member states' is to be construed accordingly: s 96(1).

16 See *ibid* s 24(2).

17 See PARA 216 post.

18 For the meaning of 'taxable supply' see PARA 18 note 3 post.

19 See the Value Added Tax Act 1994 s 4(1); and PARA 18 post. In many instances the place of supply will vary, according to whether the supply is determined to be one of goods or services: see eg Case C-231/94 *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] ECR I-2395, [1996] All ER (EC) 656, [1996] STC 774, ECJ (a supply of a meal in a restaurant on a ferry operating between Denmark and Germany was a supply of services, and thus supplied where the ferry operator had established his business (Denmark) and not where the supply was made (German territorial waters), as would have been the case had the supply been one of goods). See EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes, art 9(1); the Value Added Tax Act 1994 s 7 (as amended); and PARA 45 et seq post.

20 See *ibid* s 1(2).

21 *Ibid* s 1(3).

22 *Ibid* s 1(4). As such it is payable by the importer, ordinarily on making an entry of the goods for customs clearance purposes: see the Customs and Excise Management Act 1979 s 37A (as added and amended), s 43(1); the Customs Controls on Importation of Goods Regulations 1991, SI 1991/2724, reg 5 (as amended); and CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 82; CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 963-964. As to deferment of tax see the Customs Duties (Deferred Payment) Regulations 1976, SI 1976/1223 (as amended); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 976-979.

23 See INCOME TAXATION vol 23(1) (Reissue) PARA 18.

24 See the Provisional Collection of Taxes Act 1968 s 1(1) (amended by, *inter alia*, the Value Added Tax Act 1983 s 50(1), Sch 9 para 1).

25 *Ie* a value determined under the Value Added Tax Act 1994 s 19(2) (see PARA 94 post) or s 20(3) (see PARA 108 post): s 90(1)(a).

26 *Ie* by virtue of the Provisional Collection of Taxes Act 1968 s 1(6) or (7) or s 5(3) (failure of resolution): see INCOME TAXATION vol 23(1) (Reissue) PARAS 18, 20.

27 Value Added Tax Act 1994 s 90(1).

28 *Ibid* s 90(2).

29 *Ie* under *ibid* s 25: see PARA 216 post.

30 *Ie* under *ibid* s 33 (as amended), s 33A (as added), s 35 (as amended) or s 40: see PARAS 304-306, 310 post.

31 *Ie* repaid by virtue of the provisions mentioned therein: see note 30 *supra*.

32 Value Added Tax Act 1994 s 90(3) (amended by the Finance Act 2001 s 98(1), (8)).

## UPDATE

### 4 The scope and nature of value added tax

NOTE 19--EC Council Directive 77/388: replaced by EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/5. Rate of value added tax; in general.

## **5. Rate of value added tax; in general.**

The standard rate of value added tax is 17.5 per cent<sup>1</sup>. The tax is charged:

- 3 (1) on a supply<sup>2</sup> of goods or services, by reference to the value of the supply<sup>3</sup>;
- 4 (2) on an acquisition of goods from another member state<sup>4</sup>, by reference to the value of the acquisition<sup>5</sup>; and
- 5 (3) on an importation of goods from a place outside the member states<sup>6</sup>, by reference to the value of the goods<sup>7</sup>,

the relevant value in each case being determined in accordance with the Value Added Tax Act 1994<sup>8</sup>.

The Treasury may by order increase or decrease the rate of VAT for the time being in force<sup>9</sup> by such percentage (not exceeding 25 per cent of the rate in force) as may be specified in the order<sup>10</sup>. Any such order ceases to have effect at the expiration of the period of one year unless continued in force by a further order<sup>11</sup>.

In addition to the standard rate there are two other rates of VAT in force. The zero rate is given to certain supplies of goods and services specified in Schedule 8 to the Value Added Tax Act 1994 as well as to supplies of goods where the goods are exported to a place outside the European Union<sup>12</sup>. The effect of a supply being zero-rated is that, whilst no VAT is actually levied on the supply itself, a registered person who makes such supplies is able to recover as input tax<sup>13</sup> any tax charged on supplies made to him for the purpose of the onward zero-rated supply<sup>14</sup>. A reduced rate of 5 per cent is levied on supplies, acquisitions and importation in relation to a number of goods and services including children's car seats, women's sanitary products, fuel (other than road fuels) and power for domestic use or for use by a charity otherwise than in the course or furtherance of a business<sup>15</sup>.

1 Value Added Tax Act 1994 s 2(1) (amended by the Finance Act 1995 s 21(2), (6)). Originally, the rate of VAT was 10%. This was reduced to 8% on 27 July 1974 by the Value Added Tax (Change of Rate) Order 1974, SI 1974/1224 (revoked), except in relation to certain hydrocarbon oils, in respect of which the rate was increased to 25% on 18 November 1974. This rate ('the higher rate') was extended to a range of 'luxury' items on 1 May 1975 by the Finance Act 1975 s 17, Sch 17 (repealed); was reduced to 12.5% on 12 April 1976 by the Finance Act 1976 s 17 (repealed); and was abolished with effect from 18 June 1979 when the standard rate of VAT was increased to 15% by the Finance (No 2) Act 1979 s 1(1) (repealed). The rate of VAT was further increased to 17.5% with effect from 1 April 1991 by the Finance Act 1991 s 13 (repealed).

2 For the meaning of 'supply' see PARA 27 post.

3 Value Added Tax Act 1994 s 2(1)(a).

4 For the meaning of 'another member state' see PARA 4 note 15 ante. As to the acquisition of goods from another member state see *ibid* s 11; and PARA 19 post.

5 *Ibid* s 2(1)(b).

6 As to VAT on the importation of goods from outside the member states see PARA 113 et seq post.

7 Value Added Tax Act 1994 s 2(1)(c).

8 *Ibid* s 2(1). As to the manner of determining the relevant values see s 19, Sch 6 (as amended); and PARA 94 et seq post.

9 le the rate of VAT for the time being in force under *ibid* s 2 (and not, for example, the reduced rate: see PARA 6 et seq post): s 2(2) (s 2(2), (3) amended by the Finance Act 2001 s 99(6), Sch 31 para 2). In relation to an order to continue, vary or replace a previous such order, this reference to the rate for the time being in force (ie under the Value Added Tax Act 1994 s 2 (as amended)) is a reference to the rate which would be in force if no order had been made under s 2(2) (as amended): s 2(3) (as so amended). The effect is that it is not open to the Treasury, by incremental adjustments, to increase or decrease the rate of VAT by more than 25% of the rate last fixed by statute.

10 *Ibid* s 2(2). For an example of such an order see the Value Added Tax (Change of Rate) Order 1974, SI 1974/1224 (revoked). At the date at which this volume states the law no orders had been made or had effect under the Value Added Tax Act 1994 s 2 (as amended). As to the general power to make orders under that Act see PARA 14 post. An order increasing the rate of tax must be laid before the House of Commons and requires an affirmative resolution: see s 97(4)(c)(i) (as amended); and PARA 14 post. As to affirmative resolutions see STATUTES vol 44(1) (Reissue) PARA 1518.

11 *Ibid* s 2(2).

12 See PARA 174 et seq post.

13 For the meaning of 'input tax' see PARAS 4 ante, 215 post.

14 See PARA 217 et seq post. As to registration see PARA 64 et seq post.

15 See the Value Added Tax Act 1994 s 29(A), Sch 7A (added by the Finance Act 2001 s 99(1), (4), (5), Sch 31 Pt I para 1); and PARA 6 et seq post. Such domestic use or use by a charity is a 'qualifying use' for those purposes: see the Value Added Tax Act 1994 Sch 7A Pt II Group 1 notes para 3 (as so added). For the meaning of 'qualifying use' see PARA 7 post. As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 post.

## **UPDATE**

### **5 Rate of value added tax; in general**

TEXT AND NOTE 1--From 1 December 2008 to 30 November 2009, the rate was reduced to 15%: Value Added Tax (Change of Rate) Order 2008, SI 2008/3020 (in force until 1 January 2010: Finance Act 2009 s 9(1)).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/6. The reduced rate charge.

## 6. The reduced rate charge.

Value added tax charged on any supply<sup>1</sup> that is of a description for the time being specified in provisions of the Value Added Tax Act 1994<sup>2</sup>, or any equivalent acquisition or importation<sup>3</sup>, is charged at the rate of five per cent<sup>4</sup>; and an 'equivalent acquisition or importation', in relation to any supply that is of a description for the time being specified in those provisions<sup>5</sup>, is any acquisition from another member state of goods<sup>6</sup> the supply of which would be such a supply<sup>7</sup>, or any importation from a place outside the member states of any such goods<sup>8</sup>.

1 For the meaning of 'supply' see PARA 27 post.

2 Value Added Tax Act 1994 s 29A(1)(a) (s 29A added by the Finance Act 2001 s 99(1), (4)). A supply that is of a description for the time being specified is one specified in the Value Added Tax Act 1994 s 29A, Sch 7A (added by the Finance Act 2001 s 99(5), Sch 31 Pt 1 para 1): see PARAS 7-12 post. The Treasury may by order vary the Value Added Tax Act 1994 Sch 7A (as added) by adding to or deleting from it any description of supply or by varying any description of supply for the time being specified in it: s 29A(3) (as so added). This power may be exercised so as to describe a supply of goods or services by reference to matters unrelated to the characteristics of the goods or services themselves and in the case of a supply of goods those matters include, in particular, the use that has been made of the goods: s 29A(4) (as so added). Schedule 7A (as added) is to be interpreted in accordance with the notes contained in it and accordingly the powers conferred by the Value Added Tax Act 1994 to vary Sch 7A (as added) include a power to add to, delete or vary those notes: s 96(9) (amended by the Finance Act 2001 s 99(6), Sch 31 para 5). As to the orders made under the Value Added Tax Act 1994 s 29A (as added) and subsequent amendments to Sch 7A (as added) see PARAS 7-12 post.

3 Ibid s 29A(1)(b) (as added: see note 2 supra).

4 Ibid s 29A(1) (as added: see note 2 supra).

5 I.e. specified under ibid Sch 7A (as added) (see PARAS 7-12 post).

6 For the meaning of 'another member state' see PARA 4 note 15 ante. As to the acquisition of goods from another member state see ibid s 11; and PARA 19 post.

7 Ibid s 29A(2)(a) (as added: see note 2 supra).

8 Ibid s 29A(2)(b) (as added: see note 2 supra). As to VAT on the importation of goods from outside the member states see PARA 113 et seq post.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/7. Reduced rate charge: supplies of domestic fuel or power.

## **7. Reduced rate charge: supplies of domestic fuel or power.**

Value added tax at the reduced rate<sup>1</sup> is charged on supplies for qualifying use of: (1) coal, coke or other solid substances held out for sale solely as fuel<sup>2</sup>; (2) coal gas, water gas, producer gases or similar gases<sup>3</sup>; (3) petroleum gases, or other gaseous hydrocarbons, whether in a gaseous or liquid state<sup>4</sup>; (4) fuel oil, gas oil or kerosene<sup>5</sup>; or (5) electricity, heat or air-conditioning<sup>6</sup>.

For these purposes<sup>7</sup>, 'qualifying use' means domestic use<sup>8</sup> or use by a charity otherwise than in the course or furtherance of a business<sup>9</sup>; and where there is a supply of goods partly for qualifying use and partly not, then, if at least 60 per cent of the goods are supplied for qualifying use, the whole supply is treated as a supply for qualifying use<sup>10</sup> and, in any other case, an apportionment must be made to determine the extent to which the supply is a supply for qualifying use<sup>11</sup>.

1 As to the reduced rate see PARA 6 ante.

2 Value Added Tax Act 1994 s 29A, Sch 7A Pt II Group 1 item 1(a) (s 29A, Sch 7A added by the Finance Act 2001 s 99(1), (4), (5), Sch 31 Pt 1 para 1). Head (1) in the text is deemed to include combustible materials put up for sale for kindling fires, but does not include matches: Value Added Tax Act 1994 Sch 7A Pt II Group 1 notes para 1(1) (as so added).

3 Ibid Sch 7A Pt II Group 1 item 1(b) (as added: see note 2 supra). Heads (2)-(3) in the text do not include any road fuel gas (within the meaning of the Hydrocarbon Oil Duties Act 1979 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 529)) on which a duty of excise has been charged or is chargeable: Value Added Tax Act 1994 Sch 7A Pt II Group 1 notes para 1(2) (as added: see note 2 supra).

4 Ibid Sch 7A Pt II Group 1 item 1(c) (as added: see note 2 supra).

5 Ibid Sch 7A Pt II Group 1 item 1(d) (as added: see note 2 supra). Head (4) in the text does not include hydrocarbon oil on which a duty of excise has been or is to be charged without relief from, or rebate of, such duty by virtue of the provisions of the Hydrocarbon Oil Duties Act 1979 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARAS 508-584): Value Added Tax Act 1994 Sch 7A Pt II Group 1 notes para 1(3) (as added: see note 2 supra). For the purpose of Sch 7A Pt II Group 1 (as added), 'fuel oil' means heavy oil which contains in solution an amount of asphaltenes of not less than 0.5% or which contains less than 0.5% but not less than 0.1% of asphaltenes and has a closed flash point not exceeding 150°C (Sch 7A Pt II Group 1 notes para 2(1) (as added: see note 2 supra)); 'gas oil' means heavy oil of which not more than 50% by volume distils at a temperature not exceeding 240°C and of which more than 50% by volume distils at a temperature not exceeding 340°C (Sch 7A Pt II Group 1 notes para 2(2) (as added: see note 2 supra)); and 'kerosene' means heavy oil of which more than 50% by volume distils at a temperature not exceeding 240°C (Sch 7A Pt II Group 1 notes para 2(3) (as added: see note 2 supra)). For the purpose of Sch 7A Pt II Group 1 para 2 (as added), 'heavy oil' means hydrocarbon oil other than light oil: Hydrocarbon Oil Duties Act 1979 s 1(4); applied by the Value Added Tax Act 1994 Sch 7A Pt II Group 1 notes para 2(4) (as added: see note 2 supra).

6 Ibid Sch 7A Pt II Group 1 item 1(e) (as added: see note 2 supra).

7 Ibid Sch 7A Pt II Group 1 notes para 3(a) (as added: see note 2 supra). For these purposes, the following supplies are always for domestic use:

- 1 (1) a supply of not more than one tonne of coal or coke held out for sale as domestic fuel (Sch 7A Pt II Group 1 notes para 5(a) (as added: see note 2 supra));
- 2 (2) a supply of wood, peat or charcoal not intended for sale by the recipient (Sch 7A Pt II Group 1 notes para 5(b) (as added: see note 2 supra));
- 3 (3) a supply to a person at any premises of piped gas (ie gas within head (2) of the text, or petroleum gas in a gaseous state, provided through pipes) where the gas (together with any

other piped gas provided to him at the premises by the same supplier) was not provided at a rate exceeding 150 therms a month or, if the supplier charges for the gas by reference to the number of kilowatt hours supplied, 4,397 kilowatt hours a month (Sch 7A Pt II Group 1 notes para 5(c) (as added: see note 2 supra));

- 4 (4) a supply of petroleum gas in a liquid state where the gas is supplied in cylinders the net weight of each of which is less than 50 kilogrammes and either the number of cylinders supplied is 20 or fewer or the gas is not intended for sale by the recipient (Sch 7A Pt II Group 1 notes para 5(d) (as added: see note 2 supra));
- 5 (5) a supply of petroleum gas in a liquid state, otherwise than in cylinders, to a person at any premises at which he is not able to store more than two tonnes of such gas (Sch 7A Pt II Group 1 notes para 5(e) (as added: see note 2 supra));
- 6 (6) a supply of not more than 2,300 litres of fuel oil, gas oil or kerosene (Sch 7A Pt II Group 1 notes para 5(f) (as added: see note 2 supra));
- 7 (7) a supply of electricity to a person at any premises where the electricity (together with any other electricity provided to him at the premises by the same supplier) was not provided at a rate exceeding 1,000 kilowatt hours a month (Sch 7A Pt II Group 1 notes para 5(g) (as added: see note 2 supra)).

For the purposes of Sch 7A Pt II Group 1 (as added), supplies not within heads (1)-(7) supra are for domestic use if, and only if, the goods supplied are for use in a building, or part of a building, that consists of a dwelling or a number of dwellings; a building, or part of a building, used for a relevant residential purpose; self-catering holiday accommodation; a caravan; or a houseboat: Sch 7A Pt II Group 1 notes para 6 (as added: see note 2 supra). For the purposes of Sch 7A Pt II Group 1 (as added), 'use for a relevant residential purpose' means use as:

- 8 (a) a home or other institution providing residential accommodation for children (Sch 7A Pt II Group 1 notes para 7(1)(a) (as added: see note 2 supra));
- 9 (b) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, or past or present mental disorder (Sch 7A Pt II Group 1 notes para 7(1)(b) (as added: see note 2 supra));
- 10 (c) a hospice (Sch 7A Pt II Group 1 notes para 7(1)(c) (as added: see note 2 supra));
- 11 (d) residential accommodation for students or school pupils (Sch 7A Pt II Group 1 notes para 7(1)(d) (as added: see note 2 supra));
- 12 (e) residential accommodation for members of any of the armed forces (Sch 7A Pt II Group 1 notes para 7(1)(e) (as added: see note 2 supra));
- 13 (f) a monastery, nunnery or similar establishment (Sch 7A Pt II Group 1 notes para 7(1)(f) (as added: see note 2 supra));
- 14 (g) an institution which is the sole or main residence of at least 90% of its residents (Sch 7A Pt II Group 1 notes para 7(1)(g) (as added: see note 2 supra)),

except use as a hospital, a prison or similar institution, or a hotel or inn or similar establishment (Sch 7A Pt II Group 1 notes para 7(1) (as added: see note 2 supra)).

For the purposes of Sch 7A Pt II Group 1 (as added), 'self-catering holiday accommodation' includes any accommodation advertised or held out as such: Sch 7A Pt II Group 1 notes para 7(2) (as added: see note 2 supra). For the purposes of Sch 7A Pt II Group 1 notes para 6 (as added), 'houseboat' means a boat or other floating decked structure designed or adapted for use solely as a place of permanent habitation and not having means of, or capable of being readily adapted for, self-propulsion: Sch 7A Pt II Group 1 notes para 7(3) (as added: see note 2 supra).

See *Oval (717) Ltd v Customs and Excise Comrs* [2002] V & DR 581 (taxpayer who re-supplied fuel to university for use in student accommodation which was purchased from outside suppliers not 'qualifying use').

8 le for the purposes of the Value Added Tax Act 1994 Sch 7A Pt II Group 1 (as added).

9 Ibid Sch 7A Pt II Group 1 notes para 3(b) (as added: see note 2 supra).

10 Ibid Sch 7A Pt II Group 1 notes para 4(a) (as added: see note 2 supra).



- 11 Ibid Sch 7A Pt II Group 1 notes para 4(b) (as added: see note 2 supra).

## **UPDATE**

### **7 Reduced rate charge: supplies of domestic fuel or power**

TEXT AND NOTE 5--Head (4) includes kerosene in respect of which a relevant declaration has been made under the Hydrocarbon Oil Duties Act 1979 s 13AC(3) (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 539) and oil in respect of which a relevant declaration has been made under s 14E(3) (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 550); Value Added Tax Act 1994 Sch. 7A Group 1 note 1(3) (amended by SI 2008/2676).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/8. Reduced rate charge: installation of energy-saving materials.

## **8. Reduced rate charge: installation of energy-saving materials.**

Value added tax at the reduced rate<sup>1</sup> is charged on: (1) supplies of services of installing energy-saving materials in residential accommodation,<sup>2</sup> or in a building intended for use solely for a relevant charitable purpose<sup>3</sup>; and (2) supplies of such materials by a person who so installs them<sup>4</sup>.

1 As to the reduced rate see PARA 6 ante.

2 Value Added Tax Act 1994 s 29A, Sch 7A Pt II Group 2 item 1(a) (s 29A, Sch 7A added by the Finance Act 2001 s 99(1), (4), (5), Sch 31 Pt 1 para 1). For the purposes of the Value Added Tax Act 1994 Sch 7A Pt II Group 2 (as added), 'energy-saving materials' means: (1) insulation for walls, floors, ceilings, roofs or lofts, or for water tanks, pipes or other plumbing fittings; (2) draught stripping for windows and doors; (3) central heating system controls (including thermostatic radiator valves); (4) hot water system controls; (5) solar panels; (6) wind turbines; (7) water turbines; (8) ground source heat pumps; (9) air source heat pumps; or (10) micro combined heat and power units: Sch 7A Pt II Group 2 notes para 1 (as so added and amended by the Value Added Tax (Reduced Rate) Order 2004, SI 2004/777, arts 2, 3; and the Value Added Tax (Reduced Rate) Order 2005, SI 2005/726, arts 2, 3). For the purposes of the Value Added Tax Act 1994 Sch 7A Pt II Group 2 (as added), 'residential accommodation' means a building, or part of a building, that consists of a dwelling or a number of dwellings; a building, or part of a building, used for a relevant residential purpose; a caravan used for a place of permanent habitation; or a houseboat: Sch 7A Pt II Group 2 notes para 2(1) (as so added).

3 Ibid Sch 7A Pt II Group 2 item 1(b) (as added: see note 2 supra). For the meanings of 'use for a relevant residential purpose' and 'houseboat' see PARA 7 note 7 ante (definitions applied by Sch 7A Pt II Group 2 notes para 2(2), (3) (as added: see note 2 supra)). For the purpose of Sch 7A Pt II Group 2 (as added), 'use for a relevant charitable purpose' means use by a charity in either or both of the following ways, namely: (1) otherwise than in the course or furtherance of a business; (2) as a village hall or similarly in providing social or recreational facilities for a local community: Sch 7A Pt II Group 2 notes para 3 (as added: see note 2 supra).

4 Ibid Sch 7A Pt II Group 2 item 2 (as added: see note 2 supra).

## **UPDATE**

## **8 Reduced rate charge: installation of energy-saving materials**

NOTE 2--'Energy-saving materials' also includes (10) boilers designed to be fuelled solely by wood, straw or similar vegetal matter: Value Added Tax Act 1994 Sch 7A Pt II Group 2 note (1)(k) (added by SI 2005/3329).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/9. Reduced rate charge: grant-funded installation of heating equipment or security goods or connection of gas supply.

**9. Reduced rate charge: grant-funded installation of heating equipment or security goods or connection of gas supply.**

Value added tax at the reduced rate<sup>1</sup> is charged on:

- 6 (1) supplies to a qualifying person<sup>2</sup> of any services of installing heating appliances<sup>3</sup> in the qualifying person's sole or main residence<sup>4</sup>;
- 7 (2) supplies of heating appliances made to a qualifying person by a person who installs those appliances in the qualifying person's sole or main residence<sup>5</sup>;
- 8 (3) supplies to a qualifying person of services of connecting, or reconnecting, a mains gas supply to the qualifying person's sole or main residence<sup>6</sup>;
- 9 (4) supplies of goods made to a qualifying person by a person connecting, or reconnecting, a mains gas supply to the qualifying person's sole or main residence, being goods the installation of which is necessary for the connection, or reconnection, of the mains gas supply<sup>7</sup>;
- 10 (5) supplies to a qualifying person of services of installing, maintaining or repairing a central heating system<sup>8</sup> in the qualifying person's sole or main residence<sup>9</sup>;
- 11 (6) supplies of goods made to a qualifying person by a person installing, maintaining or repairing a central heating system in the qualifying person's sole or main residence, being goods the installation of which is necessary for the installation, maintenance or repair of the central heating system<sup>10</sup>;
- 12 (7) supplies consisting in the leasing of goods that form the whole or part of a central heating system installed in the sole or main residence of a qualifying person<sup>11</sup>;
- 13 (8) supplies of goods that form the whole or part of a central heating system installed in a qualifying person's sole or main residence and that, immediately before being supplied, were goods leased under arrangements such that the consideration for the supplies consisting in the leasing of the goods was, in whole or in part, funded by a grant made under a relevant scheme<sup>12</sup>;
- 14 (9) supplies to a qualifying person of services of installing, maintaining or repairing a renewable source heating system<sup>13</sup> in the qualifying person's sole or main residence<sup>14</sup>;
- 15 (10) supplies of goods made to a qualifying person by a person installing, maintaining or repairing a renewable source heating system in the qualifying person's sole or main residence, being goods the installation of which is necessary for the installation, maintenance or repair of the system<sup>15</sup>;
- 16 (11) supplies to a qualifying person of services of installing qualifying security goods<sup>16</sup> in the qualifying person's sole or main residence<sup>17</sup>;
- 17 (12) supplies of qualifying security goods made to a qualifying person by a person who installs those goods in the qualifying person's sole or main residence<sup>18</sup>.

Each of heads (1) to (7) and (9) to (12) above applies to a supply only to the extent that the consideration for the supply is, or is to be, funded by a grant made under a relevant scheme<sup>19</sup>; and head (8) above applies only to the extent that the consideration for the supply is, or is to be, so funded, or is a payment becoming due only by reason of the termination (whether by the passage of time or otherwise) of the leasing of the goods in question<sup>20</sup>.

Where a grant is made under a relevant scheme in order to fund a supply of a description within any of heads (1) to (12) above ('the relevant supply'), and also to fund a supply which is not within any of those heads ('the non-relevant supply'), the proportion of the grant that is to be attributed, for the purposes of these provisions<sup>21</sup>, to the relevant supply is to be the same proportion as the consideration reasonably attributable to that supply bears to the consideration for that supply and the non-relevant supply<sup>22</sup>.

1 As to the reduced rate see PARA 6 ante.

2 For the purposes of the Value Added Tax Act 1994 s 29A, Sch 7A Pt II Group 3 (s 29A, Sch 7A added by the Finance Act 2001 s 99(1), (4), (5), Sch 31 Pt 1 para 1), a person to whom a supply is made is a 'qualifying person' if at the time of the supply he is aged 60 or over, or is in receipt of one or more of the following benefits:

- 15 (1) council tax benefit under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq) (Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 6(1), (2)(a), (3) (as so added));
- 16 (2) disability living allowance under the Social Security Contributions and Benefits Act 1992 Pt III (ss 63-79) (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 102 et seq) or under the Social Security Contributions and Benefits (Northern Ireland) Act 1992 Pt III (Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 6(1), (2)(b), (3) (as so added));
- 17 (3) any element of child tax credit other than the family element, working tax credit (see SOCIAL SECURITY AND PENSIONS), housing benefit (see HOUSING vol 22 (2006 Reissue) PARA 140 et seq) or income support under the Social Security Contributions and Benefits Act 1992 Pt VII (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 176 et seq) or under the Social Security Contributions and Benefits (Northern Ireland) Act 1992 Pt VII (Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 6(1), (2)(c), (3) (as so added; Sch 7A Pt II Group 3 notes para 6(2)(c) amended by the Tax Credits Act 2002 s 47, Sch 3 paras 47, 48));
- 18 (4) an income-based jobseeker's allowance within the meaning of the Jobseekers Act 1995 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 271) or the Jobseekers (Northern Ireland) Order 1995, SI 1995/275, art 3(4) (Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 6(1), (2)(d) (as so added));
- 19 (5) disablement pension under the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111) (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 141 et seq) or under the Social Security Contributions and Benefits (Northern Ireland) Act 1992 Pt V (Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 6(1), (2)(e), (3) (as so added));
- 20 (6) war disablement pension under the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 1983, SI 1983/883, which is payable at the increased rate provided for under art 14 (as substituted) (constant attendance allowance) or art 26A (as added and amended) (mobility supplement) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 595 et seq) (Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 6(1), (2)(f) (as so added)).

3 For the purposes of ibid Sch 7A Pt II Group 3 items 1, 2 (as added), 'heating appliances' means any of the following: (1) gas-fired room heaters that are fitted with thermostatic controls; (2) electric storage heaters; (3) closed solid fuel fire cassettes; (4) electric dual immersion water heaters with factory-insulated hot water tanks; (5) gas-fired boilers; (6) oil-fired boilers; and (7) radiators: Sch 7A Pt II Group 3 notes para 4 (as added (see note 2 supra); and amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 3(c)).

4 Value Added Tax Act 1994 Sch 7A Pt II Group 3 item 1 (as added: see note 2 supra).

5 Ibid Sch 7A Pt II Group 3 item 2 (as added: see note 2 supra). See also note 3 supra.

6 Ibid Sch 7A Pt II Group 3 item 3 (as added: see note 2 supra).

7 Ibid Sch 7A Pt II Group 3 item 4 (as added: see note 2 supra).

8 For the purposes of ibid Sch 7A Pt II Group 3 items 5-8 (as added), 'central heating system' includes a system which generates electricity: Sch 7A Pt II Group 3 notes para 4A (Sch 7A Pt II Group 3 notes paras 4A, 4B added by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 3(d)).

- 9 Value Added Tax Act 1994 Sch 7A Pt II Group 3 item 5 (as added: see note 2 supra).
- 10 Ibid Sch 7A Pt II Group 3 item 6 (as added: see note 2 supra). See note 8 supra.
- 11 Ibid Sch 7A Pt II Group 3 item 7 (as added: see note 2 supra). See note 8 supra.
- 12 Ibid Sch 7A Pt II Group 3 item 8 (as added: see note 2 supra). For the purposes of Sch 7A Pt II Group 3 (as added), a scheme is a 'relevant scheme' if it has as one of its objectives the funding of the installation of energy-saving materials in the homes of any persons who are qualifying persons; and it disburses, whether directly or indirectly, its grants in whole or in part out of funds made available to it in order to achieve that objective: (1) by the Secretary of State; (2) by the Scottish Ministers; (3) by the National Assembly for Wales; (4) by a minister (within the meaning given by the Northern Ireland Act 1998 s 7(3)) or a Northern Ireland department; (5) the European Community; (6) under an arrangement approved by the Gas and Electricity Markets Authority; (7) under an arrangement approved by the Director General of Electricity Supply for Northern Ireland; or (8) by a local authority: Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 2(1)-(3) (as added: see note 2 supra). The reference in head (6) supra to an arrangement approved by the Gas and Electricity Markets Authority includes a reference to an arrangement approved by the Director General of Electricity Supply, or the Director General of Gas Supply, before the transfer, under the Utilities Act 2000 (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 708 et seq), of his functions to the Authority: Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 2(4) (as added: see note 2 supra). See note 8 supra.
- 13 For the purposes of ibid Sch 7A Pt II Group 3 items 8A, 8B (as added), 'renewable source heating system' means a space or water heating system which uses energy from renewable sources, including solar, wind and hydroelectric power; or from near-renewable sources, including ground and air heat: Sch 7A Pt II Group 3 notes para 4B (as added: see note 8 supra).
- 14 Ibid Sch 7A Pt II Group 3 item 8A (Sch 7A Pt II Group 3 notes paras 8A, 8B added by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 3(a)).
- 15 Value Added Tax Act 1994 Sch 7A Pt II Group 3 item 8B (as added: see note 14 supra). See note 13 supra.
- 16 For the purposes of ibid Sch 7A Pt II Group 3 items 9, 10 (as added), 'qualifying security goods' means locks or bolts for windows; locks, bolts or security chains for doors; spy holes; and smoke alarms: Sch 7A Pt II Group 3 notes para 5 (as added: see note 2 supra).
- 17 Ibid Sch 7A Pt II Group 3 item 9 (as added: see note 2 supra).
- 18 Ibid Sch 7A Pt II Group 3 item 10 (as added: see note 2 supra). See note 16 supra.
- 19 Ibid Sch 7A Pt II Group 3 notes para 1(1) (as added (see note 2 supra); and amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 3(b)).
- 20 Value Added Tax Act 1994 Sch 7A Pt II Group 3 notes para 1(2) (as added: see note 2 supra).
- 21 For the purposes of ibid Sch 7A Pt II Group 3 notes para 1 (as added) (see the text and notes 19-20 supra).
- 22 Ibid Sch 7A Pt II Group 3 notes para 3 (as added: see note 2 supra).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/10. Reduced rate charge: women's sanitary products and children's car seats.

## **10. Reduced rate charge: women's sanitary products and children's car seats.**

Value added tax at the reduced rate<sup>1</sup> is charged on supplies of women's sanitary products<sup>2</sup> and children's car seats<sup>3</sup>.

<sup>1</sup> As to the reduced rate see PARA 6 ante.

<sup>2</sup> Value Added Tax Act 1994 s 29A, Sch 7A Pt II Group 4 item 1 (s 29A, Sch 7A added by the Finance Act 2001 s 99(1), (4), (5), Sch 31 Pt 1 para 1). For these purposes, 'women's sanitary products' means women's sanitary products of any of the following descriptions: (1) subject to head (2) infra, products that are designed, and marketed, as being solely for use for absorbing, or otherwise collecting, lochia or menstrual flow (but excluding protective briefs or any other form of clothing); (2) panty liners (other than those designed as being primarily for use as incontinence products); and (3) sanitary belts: Value Added Tax Act 1994 Sch 7A Pt II Group 4 notes para 1 (as so added).

<sup>3</sup> Ibid Sch 7A Pt II Group 5 item 1 (as added: see note 2 supra). For this purpose, the following are 'children's car seats': (1) a safety seat; (2) the combination of a safety seat and a related wheeled framework; (3) a booster seat; (4) a booster cushion: Sch 7A Pt II Group 5 notes para 1(1) (as added: see note 2 supra). For the purposes of Sch 7A Pt II Group 5 (as added), 'safety seat' means a seat: (a) designed to be sat in by a child in a road vehicle; (b) designed so that, when in use in a road vehicle, it can be restrained: (i) by a seat belt fitted in the vehicle; (ii) by belts, or anchorages, that form part of the seat being attached to the vehicle; or (iii) in either of those ways; and (c) incorporating an integral harness, or integral impact shield, for restraining a child seated in it: Sch 7A Pt II Group 5 notes para 2 (as added: see note 2 supra). A wheeled framework is 'related' to a safety seat if the framework and the seat are each designed so that when the seat is not in use in a road vehicle it can be attached to the framework and, when the seat is so attached, the combination of the seat and the framework can be used as a child's pushchair: Sch 7A Pt II Group 5 notes para 3 (as added: see note 2 supra). 'Booster seat' means a seat designed to be sat in by a child in a road vehicle and so that, when in use in a road vehicle, it and a child seated in it can be restrained by a seat belt fitted in the vehicle; and 'booster cushion' means a cushion similarly designed: see Sch 7A Pt II Group 5 notes paras 4-5 (as added: see note 2 supra). 'Child' means a person aged under 14 years: Sch 7A Pt II Group 5 notes para 1(2) (as added: see note 2 supra).

## **UPDATE**

## **10 Reduced rate charge: women's sanitary products and children's car seats**

TEXT AND NOTES--The reduced rate is also chargeable on the following: (1) the supply of contraceptive products, other than relevant exempt supplies: Value Added Tax Act 1994 Sch 7A Pt II Group 8 (Sch 7A Pt II Group 8 added by the Value Added Tax (Reduced Rate) Order 2006, SI 2006/1472). 'Contraceptive products' means any product designed for the purposes of human contraception (but does not include any product designed for the purposes of monitoring fertility); and 'relevant exempt supplies' means supplies which fall within the 1994 Act Sch 9 Pt II Group 7 item 4 (see PARA 166 head (4)): Sch 7A Pt II Group 8 notes 1, 2 (as so added). (2) The supply of welfare advice or information by a charity or a state-regulated private welfare institution or agency, but excluding (a) supplies that would be exempt by virtue of Sch 9 Pt II Group 6 (see PARA 165) if they were made by an eligible body within the meaning of Group 6, (b) supplies of goods, unless the goods are supplied wholly or almost wholly for the purposes of conveying the advice or information, and (c) supplies of advice or information provided solely for the benefit of a particular individual or according to his personal circumstances: Sch 7A Pt II Group 9 item 1 note (3) (Sch 7A Pt II Group 9 added by SI 2006/1472). 'Welfare advice or information' means advice or information which directly relates to the physical or mental welfare of elderly, sick,

distressed or disabled persons, or to the care or protection of children and young persons; and 'state-regulated' has the same meaning as in the Value Added Tax Act 1994 Sch 9 Group 7 (see Sch 9 Group 7 note (8); and PARA 166 NOTE 7); Sch 7A Pt II Group 9 notes (1), (2).

Supplies of pharmaceutical products designed to help people to stop smoking tobacco are subject to the reduced-rate charge: Sch 7A Pt II Group 11 (Group 10 added by the Value Added Tax (Reduced Rate) Order 2007, SI 2007/1601).

NOTE 3--A 'children's car seat' now includes a related base unit for a safety seat: Value Added Tax Act 1994 Sch 7A Pt 2 Group 5 Note 1(1) (amended by SI 2009/1359). In the definition of 'safety seat', now head (b)(iii) by a related base unit: Value Added Tax Act 1994 Sch 7A Pt II Group 5 note 2 (amended by SI 2009/1359). As to the meaning of 'related base unit' see Value Added Tax Act 1994 Sch 7A Pt 2 Group 5 note 2A (added by SI 2009/1359).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/11. Reduced rate charge: residential conversions.

## **11. Reduced rate charge: residential conversions.**

Value added tax at the reduced rate<sup>1</sup> is charged on: (1) the supply, in the course of a qualifying conversion, of qualifying services<sup>2</sup> related to the conversion<sup>3</sup>; and (2) the supply of building materials if: (a) the materials are supplied by a person who, in the course of a qualifying conversion, is supplying qualifying services related to the conversion<sup>4</sup>; and (b) those services include the incorporation of the materials in the building concerned or its immediate site<sup>5</sup>.

A 'qualifying conversion' means<sup>6</sup>: (i) a changed number of dwellings conversion<sup>7</sup>; (ii) a house in multiple occupation conversion<sup>8</sup>; or (iii) a special residential conversion<sup>9</sup>. A qualifying conversion includes any garage works related to the conversion concerned<sup>10</sup>; but a conversion is not a qualifying conversion if any statutory planning consent, or any statutory building control approval, needed for the conversion has not been granted<sup>11</sup>.

1 As to the reduced rate see PARA 6 ante.

2 In the case of a conversion of a building, 'supply of qualifying services' means a supply of services that consists in: (1) the carrying out of works to the fabric of the building; or (2) the carrying out of works within the immediate site of the building that are in connection with: (a) the means of providing water, power, heat or access to the building; (b) the means of providing drainage or security for the building; or (c) the provision of means of waste disposal for the building: Value Added Tax Act 1994 s 29A, Sch 7A Pt II Group 6 notes para 11(1) (s 29A, Sch 7A added by the Finance Act 2001 s 99(1), (4), (5), Sch 31 Pt 1 para 1). In the case of a conversion of part of a building, 'supply of qualifying services' means a supply of services that consists in: (i) the carrying out of works to the fabric of the part; or (ii) the carrying out of works to the fabric of the building, or within the immediate site of the building, that are in connection with: (A) the means of providing water, power, heat or access to the part; (B) the means of providing drainage or security for the part; or (C) the provision of means of waste disposal for the part: Value Added Tax Act 1994 Sch 7A Pt II Group 6 notes para 11(2) (as so added). References in Sch 7A Pt II Group 5 notes para 11 (as added) to the carrying out of works to the fabric of a building do not include the incorporation, or installation as fittings, in the building of any goods that are not building materials; and references to the carrying out of works to the fabric of part of a building do not include the incorporation, or installation as fittings, in the part of any goods that are not building materials: Sch 7A Pt II Group 6 notes para 11(3) (as so added). 'Building materials' has the meaning given by Sch 8 Pt II Group 5 notes paras 22-23 (as added) (see PARA 179 note 23 post): Sch 7A Pt II Group 6 notes para 12 (as so added).

3 Ibid Sch 7A Pt II Group 6 item 1 (as added: see note 2 supra). Where a supply of services is only in part a supply to which Sch 7A Pt II Group 6 item 1 (as added) applies, the supply, to the extent that it is one to which that item applies, is taken to be a supply to which that item applies; and an apportionment may be made to determine that extent: Sch 7A Pt II Group 6 notes para 1 (as added: see note 2 supra). Where the qualifying conversion is a special residential conversion (see note 9 infra), Sch 7A Pt II Group 6 items 1 and 2 (as added) do not apply to a supply unless: (1) it is made to a person who intends to use the premises being converted for the relevant residential purpose; and (2) before it is made, the person to whom it is made has given to the person making it a certificate in such form as may be specified in a notice published by the Commissioners for Her Majesty's Revenue and Customs, and which states that the conversion is a special residential conversion: Sch 7A Pt II Group 6 notes para 8(1)-(3) (as added: see note 2 supra). For this purpose, 'the relevant residential purpose' means the purpose within Sch 7A Pt II Group 6 notes para 6 (as added) (see note 8 infra) for which the premises being converted are intended to be used after the conversion: Sch 7A Pt II Group 6 notes para 8(4) (as added: see note 2 supra). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 post.

4 Ibid Sch 7A Pt II Group 6 item 2(a) (as added: see note 2 supra). See note 3 supra.

5 Ibid Sch 7A Pt II Group 6 item 2(b) (as added: see note 2 supra). See note 3 supra.

6 This is subject to ibid Sch 7A Pt II Group 6 notes paras 9, 10 (as added): Sch 7A Pt II Group 6 notes para 1(3) (as added: see note 2 supra).

7 Ibid Sch 7A Pt II Group 6 notes para 2(1)(a) (as added: see note 2 supra). A 'changed number of dwellings conversion' is: (1) a conversion of premises consisting of a building where: (a) after the conversion the premises



being converted contain a number of single household dwellings that is different from the number (if any) that the premises contained before the conversion, and is greater than, or equal to, one; and (b) that there is no part of the premises being converted that is a part that after the conversion contains the same number of single household dwellings (whether zero, one or two or more) as before the conversion; or (2) a conversion of premises consisting of part of a building, in relation to which part the conditions set out in head (1)(a) and (b) supra are satisfied: Sch 7A Pt II Group 6 notes para 3 (as added: see note 2 supra). For the purposes of Sch 7A Pt II Group 6 (as added), 'single household dwelling' means a dwelling that is designed for occupation by a single household, and in respect of which certain conditions are satisfied: Sch 7A Pt II Group 6 notes para 4(1) (as added: see note 2 supra). The conditions are: (i) that the dwelling consists of self-contained living accommodation; (ii) that there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling; (iii) that the separate use of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision; and (iv) that the separate disposal of the dwelling is not prohibited by any such terms: Sch 7A Pt II Group 6 notes para 4(3) (as added: see note 2 supra). For the purposes of Sch 7A Pt II Group 6 notes para 4 (as added), a dwelling is 'designed' for occupation of a particular kind if it is so designed: (A) as a result of having been originally constructed for occupation of that kind and not having been subsequently adapted for occupation of any other kind; or (B) as a result of adaptation: Sch 7A Pt II Group 6 notes para 4(4) (as added: see note 2 supra). 'Part' must be large enough to be capable of containing a single household dwelling, although it may contain more than one; it must be identifiable by reference to physical boundaries, normally floors, walls and ceilings, after the conversion; a notional line in the middle of a room is not sufficient; a transfer of space to or from a 'part' does not prevent the result from being a 'part': *Wellcome Trust v Customs and Excise Comrs* [2003] V & DR 572 (elements of previous dwelling not contained in physical space occupied by converted flat (ie some cupboards and ceiling space) not substantial enough to deprive converted flat of character of single household dwelling).

8 Value Added Tax Act 1994 Sch 7A Pt II Group 6 notes para 2(1)(b) (as added: see note 2 supra). A 'house in multiple occupation conversion' is: (1) a conversion of premises consisting of a building where: (a) before the conversion the premises being converted do not contain any multiple occupancy dwellings; (b) after the conversion those premises contain only a multiple occupancy dwelling or two or more such dwellings; and (c) the use to which those premises are intended to be put after the conversion is not to any extent use for a relevant residential purpose; or (2) a conversion of premises consisting of part of a building, in relation to which part the conditions set out in head (1)(a)-(c) supra are satisfied: Sch 7A Pt II Group 6 notes para 5 (as added (see note 2 supra); and amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 4(b)). For the purposes of the Value Added Tax Act 1994 Sch 7A Pt II Group 6 (as added), 'multiple occupancy dwelling' means a dwelling that is designed for occupation by persons not forming a single household; that is not to any extent used for a relevant residential purpose; and in relation to which the conditions set out in Sch 7A Pt II Group 6 notes para 4(3) (as added) (see note 7 heads (i)-(iv) supra) are satisfied: Sch 7A Pt II Group 6 notes para 4(2) (as added (see note 2 supra); and amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 4(a)).

For the purposes of the Value Added Tax Act 1994 Sch 7A Pt II Group 6 (as added), 'use for a relevant residential purpose' means use (except use as a hospital, a prison or similar institution, or a hotel or inn or similar establishment) as: (i) a home or other institution providing residential accommodation for children; (ii) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, or past or present mental disorder; (iii) a hospice; (iv) residential accommodation for students or school pupils; (v) residential accommodation for members of any of the armed forces; (vi) a monastery, nunnery or similar establishment; (vii) an institution which is the sole or main residence of at least 90% of its residents: Sch 7A Pt II Group 6 notes para 6 (as added: see note 2 supra).

9 Ibid Sch 7A Pt II Group 6 notes para 2(1)(c) (as added: see note 2 supra). A 'special residential conversion' is a conversion of premises consisting of:

- 21 (1) a building or two or more buildings (Sch 7A Pt II Group 6 notes para 7(1)(a) (as added: see note 2 supra));
- 22 (2) a part of a building or two or more parts of buildings (Sch 7A Pt II Group 6 notes para 7(1)(b) (as added: see note 2 supra)); or
- 23 (3) a combination of a building or two or more buildings, and a part of a building or two or more parts of buildings (Sch 7A Pt II Group 6 notes para 7(1)(c) (as added: see note 2 supra)),

where certain conditions are satisfied (Sch 7A Pt II Group 6 notes para 7(1) (as added: see note 2 supra)). The conditions that must be satisfied are:

- 24 (a) the use to which the premises being converted were last put before the conversion was not to any extent use for a relevant residential purpose, and those premises are intended to be used solely for a relevant residential purpose after the conversion (see Sch 7A Pt II Group 6 notes para 7(2) (as added (see note 2 supra); and substituted by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 4(c)(i));

- 25 (b) where the relevant residential purpose for which the premises are intended to be used is an institutional purpose, the premises being converted must be intended to form after the conversion the entirety of an institution used for that purpose (see the Value Added Tax Act 1994 Sch 7A Pt II Group 6 notes para 7(6) (as added (see note 2 supra); and amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 4(c)(iii)).

'Institutional purpose' means a purpose within the Value Added Tax Act 1994 Sch 7A Pt II Group 6 notes para 6(a)-(c), (f) or (g) (as added) (see note 8 heads (i)-(iii), (vi), (vii) supra): Sch 7A Pt II Group 6 notes para 7(7) (as added: see note 2 supra). As to where the qualifying conversion is also a special residential conversion see note 3 supra.

10 Ibid Sch 7A Pt II Group 6 notes para 9(1) (as added: see note 2 supra). For the purposes of Sch 7A Pt II Group 6 notes para 9 (as added), 'garage works' means the construction of a garage, or a conversion of a non-residential building, or of a non-residential part of a building, that results in a garage; and for this purpose, garage works are 'related' to a conversion if they are carried out at the same time as the conversion, and the resulting garage is intended to be occupied with: (1) where the conversion concerned is a changed number of dwellings conversion, a single household dwelling that will after the conversion be contained in the building, or part of a building, being converted; (2) where the conversion concerned is a house in multiple occupation conversion, a multiple occupancy dwelling that will after the conversion be contained in the building, or part of a building, being converted; or (3) where the conversion concerned is a special residential conversion, the institution or other accommodation resulting from the conversion: Sch 7A Pt II Group 6 notes para 9(2), (3) (as added: see note 2 supra). For these purposes, 'non-residential' means neither designed nor adapted for use as a dwelling or two or more dwellings, or for a relevant residential purpose: Sch 7A Pt II Group 6 notes para 9(4) (as added: see note 2 supra).

- 11 See *ibid* Sch 7A Pt II Group 6 notes para 10 (as added: see note 2 supra).

## UPDATE

### 11 Reduced rate charge: residential conversions

TEXT AND NOTES--The reduced rate charge is extended to (1) the supply of services of installing mobility aids for use in domestic accommodation by a person who, at the time of the supply, is aged 60 or over; and (2) the supply of mobility aids by a person installing them for use in domestic accommodation by a person who, at the time of the supply, is aged 60 or over: Value Added Tax Act 1994 Sch 7A Pt II Group 10 (Sch 7A Pt II Group 10 added by the Value Added Tax (Reduced Rate) Order 2007, SI 2007/1601). 'Mobility aids' means any of the following: grab rails, lamps, stair lifts, bath lifts, built-in shower seats or showers containing built-in shower seats, and walk-in baths fitted with sealable doors: 1994 Act Sch 7A Pt II Group 10 Note 1 (Sch 7A Pt II Group 10 as so added). 'Domestic accommodation' means a building, or part of a building, that consists of a dwelling or a number of dwellings: Sch 7A Pt II Group 10 Note 2 (Sch 7A Pt II Group 10 as so added).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/12. Reduced rate charge: residential renovations and alterations.

## **12. Reduced rate charge: residential renovations and alterations.**

Value added tax at the reduced rate<sup>1</sup> is charged on: (1) the supply, in the course of the renovation or alteration<sup>2</sup> of qualifying residential premises<sup>3</sup>, related to the renovation or alteration<sup>4</sup>; and (2) the supply of building materials<sup>5</sup> if: (a) the materials are supplied by a person who, in the course of the renovation or alteration of qualifying residential premises, is supplying qualifying services<sup>6</sup> related to the renovation or alteration; and (b) those services include the incorporation of the materials in the dwelling concerned or its immediate site<sup>7</sup>. For these purposes, a renovation or alteration of any premises includes any garage works related thereto<sup>8</sup>.

Heads (1) and (2) above do not apply to a supply unless: (i) the first empty home condition is satisfied; or, if the premises are a single household dwelling, either of the empty home conditions is satisfied<sup>9</sup>; and (ii) any statutory planning consent, or any statutory building control approval needed for the renovation or alteration has been granted<sup>10</sup>.

1 As to the reduced rate see PARA 6 ante.

2 For the purposes of the Value Added Tax Act 1994 s 29A, Sch 7A Pt II Group 7 (as added and amended), 'alteration' includes extension: Sch 7A Pt II Group 7 notes para 2(1) (Sch 7A added by the Finance Act 2001 Sch 31 Pt 1; the Value Added Tax Act 1994 Sch 7A Pt II Group 7 notes para 2 substituted by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(d)).

3 For the purposes of the Value Added Tax Act 1994 Sch 7A Pt II Group 7 (as added and amended), 'qualifying residential premises' means: (1) a single household dwelling; (2) a multiple occupancy dwelling; or (3) a building, or part of a building, which, when it was last lived in, was used for a relevant residential purpose: Sch 7A Pt II Group 7 notes para 2(1) (as added and substituted: see note 2 supra). Where a building, when it was last lived in, formed part of a relevant residential unit then, to the extent that it would not be so regarded otherwise, the building is treated as having been used for a relevant residential purpose: Sch 7A Pt II Group 7 notes para 2(2) (as added and substituted: see note 2 supra). A building forms part of a relevant residential unit at any time when it is one of a number of buildings on the same site, and the buildings are used together as a unit for a relevant residential purpose: Sch 7A Pt II Group 7 notes para 2(3) (as added and substituted: see note 2 supra). For the meaning of 'single household dwelling' see PARA 11 note 7, ante; and for the meanings of 'multiple occupancy dwelling' and 'use for a relevant residential purpose' see PARA 11 note 8 ante (definitions applied by Sch 7A Pt II Group 7 notes para 2(4) (as added and substituted: see note 2 supra)).

4 Ibid Sch 7A Pt II Group 7 item 1 (as added (see note 2 supra); and amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(b)).

5 For the purposes of the Value Added Tax Act 1994 Sch 7A Pt II Group 7 (as added and amended), 'building materials' has the meaning given by Sch 8 Pt II Group 5 notes 22, 23 (as added) (see PARA 179 note 23 post): Sch 7A Pt II Group 7 notes para 6 (as added: see note 2 supra).

6 'Supply of qualifying services' means a supply of services that consists in: (1) the carrying out of works to the fabric of the premises; or (2) the carrying out of works within the immediate site of the premises that are in connection with: (a) the means of providing water, power, heat or access to the premises; (b) the means of providing drainage or security for the premises; or (c) the provision of means of waste disposal for the premises: ibid Sch 7A Pt II Group 7 notes para 5(1) (as added (see note 2 supra); Sch 7A Pt II Group 8 notes para 5 amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(h)). In head (1) supra, the reference to the carrying out of works to the fabric of the premises does not include the incorporation, or installation as fittings, in the premises of any goods that are not building materials: Value Added Tax Act 1994 Sch 7A Pt II Group 7 notes para 5(2) (as so added and amended).

7 Ibid Sch 7A Pt II Group 7 item 2 (as added (see note 2 supra); and amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(b), (c)). Where a supply of services is only in part a supply to which head (1) in the text applies, the supply, to the extent that it is one to which that head applies, is taken

to be a supply to which that head applies; and an apportionment must be made to determine that extent: Value Added Tax Act 1994 Sch 7A Pt II Group 7 notes para 1 (as added: see note 2 supra).

8 Ibid Sch 7A Pt II Group 7 notes para 3A(1) (Sch 7A Pt II Group 7 notes para 3A added by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(f)). For these purposes, 'garage works' means the construction of a garage, the conversion of a building, or part of a building, that results in a garage, or the renovation or alteration of a garage; and garage works are 'related' to a renovation or alteration if they are carried out at the same time as the renovation or alteration of the premises concerned, and the garage is intended to be occupied with the premises: Value Added Tax Act 1994 Sch 7A Pt II Group 7 notes para 3A(2), (3) (as so added).

Heads (1) and (2) in the text do not apply to a supply if the premises in question are a building, or part of a building, which, when it was last lived in, was used for a relevant residential purpose unless: (1) the building or part is intended to be used solely for such a purpose after the renovation or alteration; and (2) before the supply is made the person to whom it is made has given to the person making it a certificate stating that intention: Sch 7A Pt II Group 7 notes para 4A(1) (Sch 7A Pt II Group 7 notes para 4A added by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(g)). Where a number of buildings on the same site are renovated or altered at the same time, and intended to be used together as a unit solely for a relevant residential purpose, then each of those buildings, to the extent that it would not be so regarded otherwise, is treated as intended for use solely for a relevant residential purpose: Value Added Tax Act 1994 Sch 7A Pt II Group 7 notes para 4A(2) (as so added).

9 Ibid Sch 7A Pt II Group 7 notes para 3(1) (as added (see note 2 supra); and substituted by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(e)(ii)).

The first 'empty home condition' is that neither the premises concerned, nor where those premises are a building, or part of a building, which when it was lived in formed part of a relevant residential unit any of the other buildings that formed part of the unit, have been lived in during the period of 3 years ending with the commencement of the relevant works: Value Added Tax Act 1994 Sch 7A Pt II Group 7 notes para 3(2) (as added (see note 2 supra); and substituted by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(e)(iii)). For the purposes of the Value Added Tax Act 1994 Sch 7A Pt II Group 7 notes para 3 (as added and amended), 'relevant works' means: (1) where the supply is of the description set out in head (1) in the text, the works that constitute the services supplied; and (2) where the supply is of the description set out in head (2) in the text, the works by which the materials concerned are incorporated in the premises concerned or their immediate site: Sch 7A Pt II Group 7 notes para 3(4) (as added (see note 2 supra); and amended by the Value Added Tax (Reduced Rate) Order 2002, SI 2002/1100, arts 2, 5(e)(iv)).

The second 'empty home condition' is that: (a) the dwelling was not lived in during a period of at least 3 years; (b) the person, or one of the persons, whose beginning to live in the dwelling brought that period to an end was a person who (whether alone or jointly with another or others) acquired the dwelling at a time: (i) no later than the end of that period; and (ii) when the dwelling had been not lived in for at least 3 years; (c) no works by way of renovation or alteration were carried out to the dwelling during the period of 3 years ending with the acquisition; (d) the supply is made to a person who is: (A) the person, or one of the persons, whose beginning to live in the property brought to an end the period mentioned in head (a) supra; and (B) the person, or one of the persons, who acquired the dwelling as mentioned in head (b) supra; and (e) the relevant works are carried out during the period of one year beginning with the day of the acquisition: Value Added Tax Act 1994 Sch 7A Pt II Group 7 notes para 3(3) (as added: see note 2 supra). In heads (a)-(e) supra, references to a person acquiring a dwelling are to that person having a major interest in the dwelling granted, or assigned, to him for a consideration: Sch 7A Pt II Group 7 notes para 3(5) (as added: see note 2 supra). 'Major interest' in relation to land means the fee simple or a tenancy for a term certain exceeding 21 years: s 96(1). For the meaning of 'consideration' see PARA 95 post.

10 Ibid Sch 7A Pt II Group 7 notes para 4 (as added: see note 2 supra).

## **UPDATE**

### **12 Reduced rate charge: residential renovations and alterations**

NOTE 9--References to 3 years are now to 2 years: Value Added Tax Act 1994 Sch 7A Pt II Group 7 note 3 (amended by SI 2007/3448).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/13. Administration.

### **13. Administration.**

The Commissioners for Her Majesty's Revenue and Customs are responsible for the collection and management of value added tax<sup>1</sup>. Under their general powers of management the Commissioners from time to time issue notices for the information of traders upon whose activities VAT impinges and notices to the public generally<sup>2</sup>. The Commissioners have also made agreements with various trade bodies which permit members of those bodies to use procedures to meet their obligations under VAT law which take into account their individual circumstances<sup>3</sup>.

1 Value Added Tax Act 1994 s 58, Sch 11 para 1 (substituted by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 paras 54, 56). The Commissioners for Her Majesty's Revenue and Customs are appointed under the Commissioners for Revenue and Customs Act 2005 s 1 and integrate the former Inland Revenue and Her Majesty's Customs and Excise: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 901. The Commissioners for Her Majesty's Revenue and Customs also have all the other functions which were formerly vested in the Commissioners of Customs and Excise (see s 5(2)(b)) and may also appoint staff, known as officers of Revenue and Customs (see s 2), who have the functions formerly vested in Customs and Excise officers (see s 6). Accordingly, all statutory and other references to the Commissioners of Customs and Excise and their officers are, in so far as it is appropriate, now to be taken as references to the Commissioners for Her Majesty's Revenue and Customs and their officers: s 50(1), (2).

2 Copies of these notices may be obtained upon application to any local VAT office or by contacting the National Advice Service. These notices are subject to revision and cancellation without notice.

3 See eg Customs and Excise Business Brief 18/93 [1993] STI 987, announcing details of an agreement with representatives of racecourses and other trade bodies about recovery of input tax. For the meaning of 'input tax' see PARAS 4 ante, 215 post.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/14. Subordinate legislation.

#### **14. Subordinate legislation.**

Any order made by the Treasury<sup>1</sup> or Lord Chancellor<sup>2</sup> under the Value Added Tax Act 1994 and any regulations made by the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> or any rules made thereunder must be made by statutory instrument<sup>4</sup>. Regulations made by the Commissioners and certain Treasury orders<sup>5</sup> are subject to annulment in pursuance of a resolution of the House of Commons<sup>6</sup>. Under this negative resolution procedure the instrument must be laid<sup>7</sup> before the House of Commons as soon as may be after it has been made, and if that House within 40 days<sup>8</sup> from the date on which it was laid resolves that it be annulled it thereupon ceases to have effect<sup>9</sup>.

Other Treasury orders<sup>10</sup> are subject to a procedure which may be described as the affirmative resolution procedure<sup>11</sup>. Such an order must be laid before the House of Commons; and it ceases to have effect on the expiration of a period of 28 days<sup>12</sup> from the date on which it was made unless before the end of that period it has been approved by a resolution of the House of Commons; but this is without prejudice to anything previously done under it or to the making of a new order<sup>13</sup>. An order:

- 18 (1) which makes provision for securing that services which are specified in the order should be treated as supplied in the course or furtherance of a business<sup>14</sup>;
- 19 (2) which provides that payments should be made on account of VAT<sup>15</sup>;
- 20 (3) substituting a lesser sum for the sum for the time being specified as the value of a gift which does not constitute a supply<sup>16</sup>;
- 21 (4) making provision for increasing the rate of value added tax in force at the time of the making of the order<sup>17</sup>, or for excepting any input tax from credit in computing a taxable person's liability to account for VAT<sup>18</sup>, or for varying the schedules in relation to the reduced rate, zero-rating or exemptions so as to abolish the zero-rating of a supply or to abolish the exemption of a supply without zero-rating it<sup>19</sup>;
- 22 (5) making provision for a specified class of person to be eligible to be treated as a member of a group<sup>20</sup> if as a result of the order any bodies would cease to be eligible to be treated as members of a group<sup>21</sup>;
- 23 (6) which amends the rules relating to the application of VAT to land or buildings<sup>22</sup>;
- 24 (7) relating to the flat rate scheme for farmers<sup>23</sup>; or
- 25 (8) designating a scheme an avoidance scheme or designating a provision included in or associated with such schemes<sup>24</sup>,

requires an affirmative resolution<sup>25</sup>.

Directions and notices which are issued by the Commissioners under their general powers of management<sup>26</sup> are not required to be made by statutory instrument. Notwithstanding the absence of a system of Parliamentary scrutiny for such notices, some notices have the effect of delegated legislation<sup>27</sup>.

A statutory instrument containing an order prescribing classes of appeals in which there is a right of appeal to the Court of Appeal<sup>28</sup> or rules of procedure in relation to VAT and duties tribunals<sup>29</sup> is, however, subject to annulment in pursuance of a resolution of either House of Parliament<sup>30</sup>.

- 1 For an example of such powers see PARA 155 post.
- 2 For an example of such powers see PARA 349 post. Changes to the role of the Lord Chancellor have been proposed: see No 10 Downing Street press release *Modernising Government* (12 June 2003); and the Constitutional Reform Act 2005. As to the Lord Chancellor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.
- 3 See the Value Added Tax Act 1994 s 96(1). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.
- 4 Ibid s 97(1). See further the Statutory Instruments Act 1946 s 1(2); and STATUTES vol 44(1) (Reissue) PARAS 1502-1503.
- 5 Ie a statutory instrument made under any provision of the Value Added Tax Act 1994 except: (1) an order made under s 79 (see PARA 315 post); (2) an instrument as respects which any other parliamentary procedure is expressly provided; or (3) an instrument containing an order appointing a day for the purposes of any provision of the Value Added Tax Act 1994, being a day as from which the provision will have effect, with or without amendments, or will cease to have effect: s 97(5)(a)-(c).
- 6 Ibid s 97(5).
- 7 As to the laying of documents before Parliament see the Statutory Instruments Act 1946 s 4; and STATUTES vol 44(1) (Reissue) PARA 1515.
- 8 The reckoning of this period is governed by ibid ss 4(3), 5(1), 7(1): see STATUTES vol 44(1) (Reissue) PARAS 1515-1517.
- 9 Ibid ss 5, 7(2); Value Added Tax Act 1994 s 97(5).
- 10 Ie an order to which ibid s 97(3) applies: see heads (1)-(8) in the text.
- 11 As to affirmative resolutions see STATUTES vol 44(1) (Reissue) PARA 1518.
- 12 In reckoning this period no account is to be taken of any time during which Parliament is dissolved or prorogued or during which the House of Commons is adjourned for more than four days: Value Added Tax Act 1994 s 97(3).
- 13 Ibid s 97(3).
- 14 Ibid s 97(4)(a). An order referred to in head (1) in the text is an order under s 5(4) (see PARA 30 notes 31-34 post). As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 post.
- 15 Ibid s 97(4)(a). An order referred to in head (2) in the text is an order under s 28 (as amended) (see PARA 252 post).
- 16 Ibid s 97(4)(ab) (as added by the Finance Act 1996 s 33(3), (4)). An order referred to in head (3) in the text is an order under the Value Added Tax Act 1994 s 5(1), Sch 4 para 5(7) (as added) (see PARA 30 post).
- 17 Ie the rate in force under ibid s 2: see PARA 5 ante.
- 18 Ie under ibid s 25: see PARA 216 et seq post.
- 19 Ibid s 97(4)(c) (amended by the Finance Act 2001 s 99(6), Sch 31 Pt 2 para 6(1)-(3)). Orders referred to in head (4) in the text for varying the schedules in relation to the reduced rate, zero-rating or exemptions are orders made under the Value Added Tax Act 1994 s 29A, Sch 7A (as added and amended) (see PARAS 6-12 ante), s 30(2), Sch 8 (as amended) (see PARA 174 et seq post) or s 31(1), Sch 9 (as amended) (see PARA 155 et seq post). For the meaning of 'supply' see PARA 27 post.
- 20 Ie an order under ibid s 43AA(1) (as added) (see PARA 75 post).
- 21 Ibid s 97(4)(ca) (added by the Finance Act 2004 s 20(5)).
- 22 Value Added Tax Act 1994 s 97(4)(d). An order referred to in head (6) in the text is an order under s 51 (see PARAS 34, 157 post), and affecting Sch 10 (as amended), except one making only such amendments to Sch 10 (as amended) which are consequential on an order which itself varies Sch 7A (as added and amended), Sch 8 (as amended) or Sch 9 (as amended) otherwise than in a manner falling within s 97(4)(c) (as amended) (see

the text to note 19 supra): see s 97(4)(d). 'Land' includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land: Interpretation Act 1978 s 5, Sch 2 para 4(1)(a).

23 Value Added Tax Act 1994 s 97(4)(e). An order referred to in head (7) in the text is an order under s 54(4) or (8) (see PARA 88 post).

24 Ibid s 97(4)(g) (added by the Finance Act 2004 s 19(1), Sch 2 Pt 2 para 5(1), (3)). An order designating an avoidance scheme is an order made under the Value Added Tax Act 1994 Sch 11A para 3 (as added) (see PARA 289 post) and an order designating a provision included in or associated with such schemes is an order under Sch 11A para 4 (as added) (see PARA 289 post).

25 As from a day to be appointed, an order under ibid Sch 6 para 1A(7) (as added) (which enables the Treasury to make orders amending any of the definitions contained within Sch 6 para 1A (as added)) also requires an affirmative resolution: s 97(4)(f) (prospectively added by the Finance Act 2004 s 22(1), (4)). At the date on which this volume states the law, no such order had been made.

26 See PARA 13 ante.

27 For an example of this see Customs and Excise Public Notice 727 *Retail Schemes* (March 2002); and PARA 199 post. The legislative basis for delegated legislation in the case of retail schemes is the Value Added Tax Act 1994 s 58, Sch 11 para 2(6), which provides that regulations may make special provision for taxable supplies by retailers and in particular for permitting the value of supplies to be determined 'by such method or methods as may have been described in any notice published by the Commissioners . . .': see PARA 245 post.

28 Ie an order under ibid s 86: see PARA 371 post.

29 Ie rules under ibid s 82(1), Sch 12 para 9: see PARA 349 post.

30 Ibid s 97(2).

## UPDATE

### 14 Subordinate legislation

TEXT AND NOTES 2--Reference to Lord Chancellor omitted: Value Added Tax Act 1994 s 97(1) (amended by SI 2009/56).

TEXT AND NOTES 14-25--Also, heads (9) relating to self-supplies under the Value Added Tax Act 1994 s 55A(13) (see PARA 34A) (s 97(4)(ea) (added by Finance Act 2006 s 19(6)); (10) under the Value Added Tax Act 1994 Sch 10A para 3(4) (see PARA 99) (s 97(4)(fa) (added by Finance Act 2006 s 22(2)); (11) under the Value Added Tax Act 1994 s 77A(9), (9A) (see PARA 287) (s 97(4)(ea) (added by Finance Act 2007 s 98(2)).

TEXT AND NOTES 28-30--Repealed: SI 2009/56.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1. INTRODUCTION/15. Territorial extent; Northern Ireland and the Isle of Man.

## **15. Territorial extent; Northern Ireland and the Isle of Man.**

Value added tax is chargeable in Northern Ireland as part of the United Kingdom<sup>1</sup>. For the purposes of the constitution of Northern Ireland, VAT is an excepted matter, control of which cannot be transferred to Northern Ireland<sup>2</sup>.

The Isle of Man, which is not for these purposes a part of the United Kingdom, introduced VAT into the island by an Act of Tynwald<sup>3</sup>. For the purpose of giving effect to any agreement between the government of the United Kingdom and the government of the Isle of Man whereby both countries are to be treated as a single area for the purposes of VAT<sup>4</sup>, Her Majesty may by Order in Council<sup>5</sup> make provision for securing that tax is charged under the Value Added Tax Act 1994 as if all or any of the references in that Act to the United Kingdom included both the United Kingdom and the Isle of Man, but so that tax is not charged under both Acts in respect of the same transaction<sup>6</sup>. Such an order may make provision, inter alia:

- 26 (1) for determining, or enabling the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup> to determine, under which Act a person is to be registered and for transferring a person registered under one Act to the register kept under the other<sup>8</sup>; and
- 27 (2) for treating a person who is a taxable person for the purposes of the Act of Tynwald as a taxable person for all or any of the purposes of the Value Added Tax Act 1994<sup>9</sup>.

The order may also make such modifications of any provision contained in or having effect under any Act of Parliament relating to value added tax as appears necessary or expedient for the purposes of the order<sup>10</sup>.

1 Value Added Tax Act 1994 s 101(3). For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 Northern Ireland Act 1998 s 4(1), Sch 2 para 9(a). See also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 70.

3 See the Finance (Isle of Man) Act 1972 (an Act of Tynwald).

4 For the purposes of VAT charged under the Value Added Tax Act 1994 and VAT charged under the corresponding Act of Tynwald: Isle of Man Act 1979 s 6(1) (s 6 amended by the Value Added Tax Act 1983 s 50, Sch 9 para 3; and by the Value Added Tax Act 1994 s 100(1), Sch 14 para 7(2)).

5 The Order in Council currently in force is the Value Added Tax (Isle of Man) Order 1982, SI 1982/1067, which continues to have effect by virtue of the Interpretation Act 1978 s 17(2)(b); and the Value Added Tax Act 1994 ss 100(1), 101(4), Sch 13 para 23. See also the Value Added Tax (Isle of Man) (No 2) Order 1982, SI 1982/1068.

6 Isle of Man Act 1979 s 6(1) (as amended: see note 4 supra).

7 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 Isle of Man Act 1979 s 6(2)(a). A person otherwise liable to be registered under both Acts may be registered under either but not both Acts: see the Value Added Tax (Isle of Man) Order 1982, SI 1982/1067, art 11. As to registration under the Value Added Tax Act 1994 see PARA 64 et seq post.

9 Isle of Man Act 1979 s 6(2)(b) (as amended: see note 4 supra). For the other provision that may be made see s 6(2)(c)-(h) (as amended: see note 4 supra).

10 Ibid s 6(3).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1.

INTRODUCTION/16. Territories to be treated as excluded from or included in the territory of the Community and of the member states.

# **16. Territories to be treated as excluded from or included in the territory of the Community and of the member states.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by regulations make provision for the territory of the Community, or for the member states, to be treated for any purposes of the Value Added Tax Act 1994 as including or excluding such territories as may be prescribed<sup>2</sup>. The Channel Islands, Andorra, San Marino and the Aland Islands are treated as excluded from the territory of the European Community for those purposes<sup>3</sup>. The Canary Islands, the overseas departments of the French Republic<sup>4</sup> and Mount Athos are treated as excluded both from the territory of the Community and from the territory of Spain, the French Republic and the Hellenic Republic respectively<sup>5</sup>.

The territory of the Community is treated for those purposes as excluding Austria, Finland and Sweden ('the acceding states'), and the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia ('the enlargement states') in relation to goods:

- 28 (1) which are the subject of a supply<sup>6</sup> made in an acceding state before 1 January 1995, or in an enlargement state before 1 May 2004, and which in pursuance of that supply are removed to the United Kingdom<sup>7</sup> on or after 20 October 1995 in relation to an acceding state, or on or after 1 May 2004 in relation to an enlargement state, if they are goods in the case of which provisions of the law of the acceding state, or enlargement state, in question<sup>8</sup> have prevented VAT from being charged on that supply<sup>9</sup>; and
- 29 (2) which were subject to a suspension regime<sup>10</sup> before 1 January 1995 in relation to an acceding state, or before 1 May 2004 in relation to an enlargement state, and which by virtue of any Community legislation were to remain, for VAT purposes only, subject to that regime for a period beginning with that date and which cease to be subject to that regime on or after 20 October 1995 in relation to an acceding state, or on or after 1 May 2004 in relation to an enlargement state<sup>11</sup>.

However, this does not apply to:

- 30 (a) goods which are exported, in relation to an acceding state on or after 20 October 1995 or, in relation to an enlargement state on or after 1 May 2004, to a place outside the member states<sup>12</sup>;
- 31 (b) goods which are not means of transport and are removed on or after 20 October 1995 in relation to an acceding state, or on or after 1 May 2004 in relation to an enlargement state, from a temporary admission procedure<sup>13</sup> in order to be returned to the person in an acceding state or enlargement state who had exported them from that state<sup>14</sup>;
- 32 (c) means of transport which are removed on or after 20 October 1995 in relation to an acceding state, or on or after 1 May 2004 in relation to an enlargement state, from a temporary admission procedure<sup>15</sup> and which were first brought into service before 1 January 1987 in relation to an acceding state, or 1 May 1996 in relation to an enlargement state, or have a value not exceeding £4,000, or have been charged in an acceding state with VAT which has not been remitted or refunded by reason of their exportation and to such other tax, if any, to which means of transport of that class or description are normally chargeable<sup>16</sup>.

The Principality of Monaco is treated as included in the territory of the French Republic for the purposes of the Value Added Tax Act 1994, the Isle of Man is treated as included in the territory of the United Kingdom, the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia are treated as included in the territory of Cyprus, and all of them are treated as included in the territory of the Community<sup>17</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Value Added Tax Act 1994 s 93(1). Without prejudice to the generality of this power, and of the power conferred by s 16 (application of customs enactments: see PARA 115 post), the Commissioners may, for any purposes of the Value Added Tax Act 1994, by regulations provide for prescribed provisions of any customs and excise legislation to apply in relation to cases where any territory is treated under s 93(1) as excluded from the territory of the Community, with such exceptions and adaptations as may be prescribed: s 93(2). 'Prescribed' means prescribed by regulations made by the Commissioners under the Value Added Tax Act 1994: s 96(1). The reference to customs and excise legislation is a reference to any enactment or subordinate legislation or Community legislation, whenever passed, made or adopted, which has effect in relation to, or to any assigned matter connected with, the importation or exportation of goods; and 'assigned matter' means any matter in relation to which the Commissioners, or officers of Revenue and Customs, have a power or duty: Customs and Excise Management Act 1979 s 1(1) (as substituted); applied by the Value Added Tax Act 1994 s 93(3), (4). See further PARA 115 post; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900 et seq.

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 136.

4 le Guadeloupe, Martinique, Réunion, St Pierre and Miquelon and French Guiana: *ibid* reg 137(b).

5 *Ibid* reg 137.

6 For the meaning of 'supply' see PARA 27 post.

7 For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

8 le the provisions having effect for purposes corresponding to the Value Added Tax Act 1994 s 30(6)(a) or, so far as it applies to exportations, s 30(8): see PARA 192 post.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 138(1), (2)(a), (5) (reg 138(1) substituted, reg 138(2) amended, and reg 138(5) added, by SI 2004/1082).

10 For these purposes, goods are treated as having become subject to a suspension regime if:

26 (1) on their entry into the territory of the Community: (a) they were placed under a temporary admission procedure with full exemption from import duties, in temporary storage, in a free zone, or under customs warehousing arrangements or inward processing arrangements; or (b) they were admitted into the territorial waters of the United Kingdom for the purpose of being incorporated into drilling or production platforms, for the purposes of the construction, repair, maintenance, alteration or fitting-out of such platforms, for the purpose of linking such platforms to the mainland of the United Kingdom, or for the purpose of fuelling or provisioning such platforms (Value Added Tax Regulations 1995, SI 1995/2518, reg 138(3)(a)); or

27 (2) they were placed under any customs transit procedure in pursuance of a supply made in the course of a business (reg 138(3)(b)), and

in the case in question, the time that any Community customs debt in relation to the goods would be incurred in the United Kingdom if the accession to the European Union of the acceding states were disregarded would fall to be determined by reference to the matters mentioned in head (1)(a) or (b) *supra* (reg 138(3)). As to Community customs debts see further PARA 113 note 5 post.

11 See *ibid* reg 138(1), (2)(b), (5) (as substituted, amended and added: see note 9 *supra*).

12 See *ibid* reg 138(4)(a), (5) (as added: see note 9 *supra*).

13 le such as is referred to in *ibid* reg 138(3)(a)(i): see note 10 head (1)(a) *supra*.

14 See *ibid* reg 138(4)(b), (5) (as added: see note 9 *supra*).

15 See note 13 *supra*.

16 Value Added Tax Regulations 1995, SI 1995/2518, reg 138(4)(c), (5) (as added: see note 9 *supra*).

17 See *ibid* reg 139 (amended by SI 2004/1082). See further PARA 114 *post*.

## UPDATE

### **16 Territories to be treated as excluded from or included in the territory of the Community and of the member states**

TEXT AND NOTES 9-16--SI 1995/2518 reg 138(5) now reg 138(5)-(7) (substituted by SI 2006/3292). For the purposes of SI 1995/2518 reg 138(2) and (4) the specified date in relation to the 1995 acceding states is 1 January 1995; in relation to the 2004 acceding states is 1 May 2004; and in relation to the 2007 acceding states is 1 January 2007: reg 138(5). For the purposes of reg 138(2) and (4) the specified date in relation to the 1995 acceding states is 20 October 1995; in relation to the 2004 acceding states is 1 May 2004; and in relation to the 2007 acceding states is 1 January 2007: reg 138(6).

TEXT AND NOTES 9-11--'The enlargement states' now 'the 2004 acceding states'; and also excluded are Bulgaria and Romania ('the 2007 acceding states'): SI 1995/2518 reg 138(1) (substituted by SI 2006/3292).

In heads (1) and (2) reference to 20 October 1995 is now to the date specified in SI 1995/2518 reg 138(6): reg 138(2) (amended by SI 2006/3292).

TEXT AND NOTES 12-16--In heads (a)-(c) reference to 20 October 1995 is now to the date specified in SI 1995/2518 reg 138(6); and in head (c) reference to 1 January 1987 is now to the date specified in reg 138(7): reg 138(4) (amended by SI 2006/3292).

TEXT AND NOTE 12--For the purposes of head (a) the specified date in relation to the 1995 acceding states is 1 January 1987; in relation to the 2004 acceding states is 1 May 2006; and in relation to the 2007 acceding states is 1 January 1999: reg 138(7).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/1.  
INTRODUCTION/17. Power to make regulations relating to taxation under the laws of other member states.

# **17. Power to make regulations relating to taxation under the laws of other member states.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may make provision by regulations for the manner in which any of the following are to be or may be proved for any of the purposes of the Value Added Tax Act 1994:

- 33 (1) the effect of any provisions of the law of any other member state<sup>2</sup>;
- 34 (2) that provisions of any such law correspond or have a purpose corresponding, in relation to any member state, to or to the purpose of any provision of the Value Added Tax Act 1994<sup>3</sup>.

They may also provide by regulations:

- 35 (a) for a person to be treated for prescribed<sup>4</sup> purposes as taxable in another member state<sup>5</sup> only where he has given such notification, and furnished such other information, to the Commissioners as may be prescribed<sup>6</sup>;
- 36 (b) for the form and manner in which any notification or information is to be given or furnished under the regulations and the particulars which it is to contain<sup>7</sup>;
- 37 (c) for the proportion of any consideration<sup>8</sup> for any transaction which is to be taken for VAT purposes as representing a liability for VAT under the law of another member state to be conclusively determined by reference to such invoices<sup>9</sup> or in such other manner as may be prescribed<sup>10</sup>.

In any proceedings, whether civil or criminal, a certificate of the Commissioners that a person was or was not, at any date, taxable in another member state, or that any VAT payable under the law of another member state has or has not been paid, is sufficient evidence of that fact until the contrary is proved, and any document purporting to be such a certificate is deemed to be such a certificate until the contrary is proved<sup>11</sup>.

The powers of the Commissioners under the relevant information provisions<sup>12</sup> are exercisable, for the purpose of facilitating compliance with any Community obligations, with respect to matters that are relevant to a charge to VAT under the law of another member state as they are exercisable with respect to matters that are relevant for any of the purposes of the Value Added Tax Act 1994<sup>13</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Value Added Tax Act 1994 s 92(3)(a). References, in relation to another member state, to the law of that member state are to be construed for the purposes of the Value Added Tax Act 1994 as confined to so much of that law of that member state as for the time being has effect for the purposes of any Community instrument relating to VAT: s 92(1). For the meaning of 'another member state' see PARA 4 note 15 ante.

3 Ibid s 92(3)(b).

4 For the meaning of 'prescribed' see PARA 16 note 2 ante.

5 References for the purposes of VAT to a person being taxable in another member state are references to that person being taxable under so much of the law of that member state as makes provision for purposes corresponding, in relation to that member state, to the purposes of so much of the Value Added Tax Act 1994 as makes provision as to whether a person is a taxable person: s 92(2)(a). For the meaning of 'taxable person' see PARA 63 post.

6 Ibid s 92(4)(a).

7 Ibid s 92(4)(b).

8 For the meaning of 'consideration' generally see PARA 95 post.

9 'Invoice' includes any document similar to an invoice: Value Added Tax Act 1994 s 96(1). 'Document' means anything in which information of any description is recorded: s 96(1) (definition added by the Civil Evidence Act 1995 s 15(1), Sch 1 para 20).

10 Value Added Tax Act 1994 s 92(4)(c).

11 Ibid s 92(5).

12 This reference to the relevant information provisions is a reference to the provisions of ibid s 73(7) (see PARA 294 post) and s 58, Sch 11 (as amended) (see PARA 245 et seq post) relating to: (1) the keeping of accounts; (2) the making of returns and the submission of other documents to the Commissioners; (3) the production, use and contents of invoices; (4) the keeping and preservation of records; and (5) the furnishing of information and the production of documents: s 92(7).

13 Ibid s 92(6). This provision is without prejudice to the generality of any of the powers of the Commissioners under the relevant information provisions: s 92(6).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/18. Charge to tax.

## 2. THE CHARGE TO VALUE ADDED TAX

### (1) SUPPLY OF GOODS AND SERVICES

#### (i) In general

##### 18. Charge to tax.

Value added tax is charged on any supply<sup>1</sup> of goods and services made in the United Kingdom<sup>2</sup> in circumstances where the supply is a taxable supply<sup>3</sup> made by a taxable person<sup>4</sup> in the course or furtherance of any business<sup>5</sup> carried on by him<sup>6</sup>. The tax is a liability of the person making the supply<sup>7</sup>.

1 For the meaning of 'supply' see PARA 27 post.

2 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

3 A 'taxable supply' is a supply of goods and services made in the United Kingdom other than an exempt supply: Value Added Tax Act 1994 s 4(2). As to exempt supplies see PARA 155 et seq post. Taxable supplies may be made by persons other than taxable persons (see note 4 infra); and taxable supplies may also be made by taxable persons otherwise than in the course or furtherance of their business (see note 5 infra); but VAT may only be charged on taxable supplies made by taxable persons in the course or furtherance of a business: *Schemepanel Trading Ltd v Customs and Excise Comrs* (1995) VAT Decision 13647; affd [1996] STC 871.

4 For the meaning of 'taxable person' see PARA 63 post.

5 For the meaning of 'business' see PARA 23 post. If a limited company has been formed for the purpose of carrying on business and supplies goods or services for reward, it will be difficult to resist the conclusion that the supply is in the course or furtherance of the company's business, even if the supply is not of a kind ordinarily made by the company and even if it is the first or only supply of its kind: *Fusetron Ltd v Customs and Excise Comrs* [1993] 2 CMLR 613. The existence of a term in a lease prohibiting the use of premises for business purposes is not conclusive that they are not so used: *Rootes (t/a The Shutford Stud) v Customs and Excise Comrs* (1992) VAT Decision 6808, [1992] STI 215. Giving a long-service award to an employee involves a supply in the course of business: *RHM Bakeries (Northern) Ltd v Customs and Excise Comrs* [1979] STC 72 (but as to minor gifts see the Value Added Tax Act 1994 s 5(1), Sch 4 para 5(2) (as amended); and PARA 30 post).

There is an apparent inconsistency in the authorities as to whether sales which are made to finance a VAT-registered business are to be treated as 'in the furtherance of the business'. In *Ridley v Customs and Excise Comrs* [1983] VATTR 81, it was held that the sale of sporting rights over farmland on which the taxpayer carried on his trade was liable to VAT, notwithstanding that the rights themselves had never been used for the purposes of the business, on the ground that the sums raised were to be used to reduce the business overdraft; but in *Stirling v Customs and Excise Comrs* [1986] 2 CMLR 117, [1985] VATTR 232, the sale of personal assets to meet liabilities incurred by the taxpayer in the course of his business was considered to be outside the scope of VAT, having regard to EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 2(1) (see PARA 23 post); in disposing of such assets, the trader was not a taxable person 'acting as such'. Cf *Trustees of the Mellerstain Trust v Customs and Excise Comrs* [1989] VATTR 223, where the tribunal sought to reconcile *Ridley v Customs and Excise Comrs* supra with *Stirling v Customs and Excise Comrs* supra, explaining that the land in *Ridley v Customs and Excise Comrs* supra was already a business asset which the trader had simply exploited in an alternative way. As to whether VAT charged on supplies made to a trader can be recovered as input tax see PARA 215 et seq post. As to the meaning of 'in the course or furtherance of a business' see also PARA 23 post. As to the Sixth Directive see PARA 1 note 1 ante.

6 Value Added Tax Act 1994 s 4(1).



7 Ibid s 1(2). VAT becomes due at the time of supply (s 1(2)); but this rule is modified by the provisions relating to accounting for and paying VAT (see PARA 245 et seq post). As to determining the time of supply see PARA 35 et seq post.

## **UPDATE**

### **18 Charge to tax**

NOTE 3--Supplies made to a trustee of professional services for which he is entitled to charge are taxable supplies made by the trustee: *Capital Cranfield Trustees Ltd v HM Revenue and Customs* (2008) VAT Decision 20532, [2008] V & DR 123, [2008] SWTI 1073.

NOTE 5--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/19. Taxable acquisitions of goods from other member states.

## **19. Taxable acquisitions of goods from other member states.**

Value added tax and customs duties have been abolished on importations of goods and supplies of services between the member states of the European Community<sup>1</sup>. However, in order to prevent distortion of competition during an interim period prior to the harmonisation of VAT rates in different states, provision is made for a 'reverse charge' to be levied on the importer of certain goods or services from other member states<sup>2</sup>. In the case of goods this is achieved by the imposition of VAT on specified 'acquisitions of goods from other member states', that is to say acquisitions of goods in pursuance of a transaction which is (or is treated<sup>3</sup> as) a supply<sup>4</sup> of goods and which involves the removal<sup>5</sup> of the goods from another member state<sup>6</sup>. There are three classes of case in which a liability to VAT on acquisitions from member states arises:

- 38 (1) any acquisition by any person from another member state of a new means of transport<sup>7</sup> is liable to VAT if it takes place in the United Kingdom<sup>8</sup> otherwise than in pursuance of a taxable supply<sup>9</sup> and it is not an exempt acquisition<sup>10</sup>;
- 39 (2) any acquisition by any person of goods subject to a duty of excise from another member state is liable to VAT<sup>11</sup> if:

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- 1. (a) it takes place in the United Kingdom, otherwise than in pursuance of a taxable supply<sup>12</sup>;
- 2. (b) it is not an exempt acquisition<sup>13</sup>;
- 3. (c) the supplier is taxable in another member state<sup>14</sup> at the time of the transaction in pursuance of which the goods are acquired<sup>15</sup> and acts in the course or furtherance of a business<sup>16</sup> carried on by him in participating in that transaction<sup>17</sup>;
- 4. (d) the goods are acquired either in the course or furtherance of a business carried on by any person<sup>18</sup> or in the course or furtherance of any activities carried on otherwise than by way of business by any body corporate or by any club, association, organisation or other unincorporated body<sup>19</sup>; and
- 5. (e) it is the person who carries on that business or those activities who acquires the goods<sup>20</sup>;

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- 40 (3) any acquisition of goods from another member state by a taxable person<sup>21</sup> which takes place in the United Kingdom otherwise than in pursuance of a taxable supply is liable to VAT<sup>22</sup> if it is not an exempt acquisition<sup>23</sup> and it takes place in the circumstances set out in heads (2)(c) to (2)(e) above<sup>24</sup>.

Where a taxable acquisition is made by a taxable person who is fully taxable<sup>25</sup>, he will in general<sup>26</sup> bring into his VAT account the amount of the taxable acquisition both as a taxable output and as a corresponding deductible input<sup>27</sup>.

The removal of goods to the United Kingdom in pursuance of a supply to a taxable person, made by a person in another member state, where VAT on that supply is to be accounted for and paid in another member state by reference to the profit margin on the supply<sup>28</sup> is not, however, treated as the acquisition of goods from another member state<sup>29</sup>.

1 See EC Council Directive 91/680 (OJ L376, 31.12.91, p 1) supplementing the common system of value added tax, art 3; EC Council Directive 92/111 (OJ L384, 30.12.92, p 47) introducing simplification measures with regard to value added tax, art 4. The abolition took effect from 1 January 1993: see art 4.

2 As to the reverse charge on services see the Value Added Tax Act 1994 s 8 (as amended); and PARA 33 post; and as to the value of taxable acquisitions see s 20 (as amended); and PARA 108 et seq post.

3 le for the purposes of the Value Added Tax Act 1994: see PARAS 18 ante, 20 et seq post. As to deemed supplies see PARA 30 post.

4 For the meaning of 'supply' see PARA 27 post. Where the person with the property in any goods does not change in consequence of anything which is treated for VAT purposes as a supply of goods, that supply is treated for those purposes as a transaction in pursuance of which there is an acquisition of goods by the person making it: *ibid* s 11(3).

5 There is no statutory definition of 'removal' for these purposes, which must therefore be given its ordinary meaning of a physical taking from one place to another. It is immaterial for these purposes whether the removal of the goods from the other member state is by or under the directions of the supplier or by or under the directions of the person who acquires them or any other person: *ibid* s 11(2).

6 *Ibid* s 11(1). In relation to such an acquisition, references to the supplier are to be construed accordingly: s 11(1). References to goods being acquired by a person in another member state are references to goods being treated as so acquired in accordance with provisions of the law of that member state corresponding, in relation to that member state, to so much of the Value Added Tax Act 1994 as makes provision for treating goods as acquired in the United Kingdom from another member state: s 92(2)(b). For the meaning of 'another member state' see PARA 4 note 15 ante; and As to the meaning of 'United Kingdom' see PARA 4 note 3 ante. As to the meaning of 'the law of that member state' see PARA 17 note 2 ante.

The Treasury may by order provide with respect to any description of transaction that the acquisition of goods in pursuance of a transaction of that description is not to be treated for VAT purposes as the acquisition of goods from another member state: s 11(4). In exercise of the power so conferred, the Treasury has made the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 7: see the text and notes 28-29 *infra*. In addition, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax (Treatment of Transactions) (No 2) Order 1992, SI 1992/3132 (treatment of certain supplies of gold to central banks in member states: see PARA 185 post) has effect as if so made.

7 'Means of transport', in the expression 'new means of transport', means any of:

28 (1) any ship exceeding 7.5 m in length (Value Added Tax Act 1994 s 95(1)(a));

29 (2) any aircraft the take-off weight of which exceeds 1,550 kg (s 95(1)(b)); or

30 (3) any motorised land vehicle which either has an engine with a displacement or cylinder capacity exceeding 48 cubic cm (s 95(1)(c)(i)) or is constructed or adapted to be electrically propelled using more than 7.2 kW (s 95(1)(c)(ii)),

although a ship, aircraft or motorised land vehicle does not fall within any of these categories unless it is intended for the transport of persons or goods: s 95(2). The Treasury may by order vary these provisions by adding or deleting any ship, aircraft or vehicle of a description specified in the order to or from those which are for the time being specified above: s 95(4)(a). As to the making of orders generally see PARA 14 ante. 'Ship' includes hovercraft: s 96(1). A crane is not a means of transport: *BPH Equipment Ltd v Customs and Excise Comrs* (1996) VAT Decision 13914, [1996] STI 779.

A means of transport is to be treated as new, in relation to any supply or any acquisition from another member state, at any time unless at that time:

31 (a) the period that has elapsed since its first entry into service is more than three months, in the case of a ship or aircraft (Value Added Tax Act 1994 s 95(3)(a)(i) (s 95(3) amended by the Value Added Tax (Means of Transport) Order 1994, SI 1994/3128, art 2), and more than six months, in the case of a land vehicle (s 95(3)(a)(ii) (as so amended)); and

32 (b) it has, since its first entry into service, travelled under its own power for more than 100 hours (in the case of a ship) (s 95(3)(b)(i)), 40 hours (in the case of an aircraft) (s 95(3)(b)(ii)), or 6,000 km (in the case of a land vehicle) (s 95(3)(a)(iii) (as so amended)).

The Treasury may by order vary s 95 (as amended) by altering, omitting or adding to the provisions of s 95(3) (as so amended) for determining whether a means of transport is new: s 95(4)(b). In exercise of the power so conferred, the Treasury has made the Value Added Tax (Means of Transport) Order 1994, SI 1994/3128, cited *supra*.

The Commissioners for Her Majesty's Revenue and Customs may by regulations make provision specifying the circumstances in which a means of transport is to be treated for these purposes as having first entered into service: Value Added Tax Act 1994 s 95(5); Commissioners for Revenue and Customs Act 2005 s 50(1). Pursuant to this power it is provided that a new means of transport is to be treated as having first entered into service:

- 33 (i) in the case of a ship or aircraft, when it is delivered from its manufacturer to its first purchaser or owner, or on its first being made available to its first purchaser or owner, whichever is the earlier (Value Added Tax Regulations 1995, SI 1995/2518, reg 147(1)(a)(i)); or, if its manufacturer takes it into use for demonstration purposes, on its being first taken into such use (reg 147(1)(a)(ii));
- 34 (ii) in the case of a motorised land vehicle, either: (A) on its first registration for road use by the competent authority in the member state of its manufacture or when a liability to register for road use is first incurred in the member state of its manufacture, whichever is the earlier (reg 147(1)(b)(i)); (B) if it is not liable to be registered for road use in the member state of its manufacture, on its removal by its first purchaser or owner, or on its first delivery or on its being made available to its first purchaser, whichever is the earliest (reg 147(1)(b)(ii)); or (C) if its manufacturer takes it into use for demonstration purposes, on its first being taken into such use (reg 147(1)(b)(iii)).

Where the times specified in reg 147(1)(a), (b) cannot be established to the Commissioners' satisfaction, a means of transport is to be treated as having first entered into service on the issue of an invoice relating to the first supply of the means of transport: reg 147(2). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

Member states must, however, exempt certain supplies of new means of transport dispatched or transported to the purchaser by or on behalf of the vendor or the purchaser out of specified territories within the Community: see EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 28c(A)(b) (added by EC Council Directive 91/680 (OJ L376, 31.12.91, p 1)); and see further the Value Added Tax Regulations 1995, SI 1995/2518, regs 149-155; and PARAS 197, 310 post. As to the Sixth Directive see PARA 1 note 1 ante. See also Customs and Excise Public Notice 728 *New Means of Transport* (February 2003).

8 Value Added Tax Act 1994 s 10(1)(a), (2)(a). Goods are treated (subject to s 18 (as amended) (see PARAS 144-145 post) and s 18B (as added) (see PARA 146 et seq post)) as acquired in the United Kingdom if they are acquired pursuant to a transaction which involves their removal to the United Kingdom and does not involve their removal from the United Kingdom, and are otherwise treated as acquired outside the United Kingdom: s 13(1), (2) (s 13(1) amended by the Finance Act 1996 s 26(1), Sch 3 para 4). Goods are also treated as acquired in the United Kingdom if they are acquired by a person who, for the purpose of their acquisition, makes use of a number assigned to him for the purposes of VAT in the United Kingdom (ie his VAT registration number): Value Added Tax Act 1994 s 13(3). This does not, however, require any goods to be treated as acquired in the United Kingdom where it is established, in accordance with regulations made by the Commissioners for Her Majesty's Revenue and Customs for these purposes, that VAT both has been paid in another member state on the acquisition of those goods (s 13(4)(a)) and fell to be paid by virtue of the provisions of the law of that member state corresponding, in relation to that member state, to the provision made by s 13(2) (s 13(4)(b)). The Commissioners may by regulations make provision, for these purposes: (1) for the circumstances in which a person is to be treated as having been assigned a number for the purposes of VAT in the United Kingdom; (2) for the circumstances in which a person is to be treated as having made use of such a number for the purposes of the acquisition of any goods; and (3) for the refund, in prescribed circumstances, of VAT paid in the United Kingdom on acquisitions of goods in relation to which the conditions specified in s 13(4)(a), (b) are satisfied: s 13(5). At the date at which this volume states the law no such regulations had been made. A claim for a refund under any regulations so made is a matter on which an appeal lies to a VAT and duties tribunal: see s 83(d); and PARA 346 post.

As to the place of supply of goods see s 7 (as amended); and PARA 45 et seq post. A supply of goods dispatched or transported by a vendor of goods to another member state can be zero-rated if the supply is made to a person taxable in that other member state: see PARA 195 post. For this purpose, the trader is required to obtain the customer's overseas VAT registration number: see Customs and Excise Public Notice 725 *The Single Market* (October 2002) PARA 3.1.

9 Value Added Tax Act 1994 s 10(1)(b). For the meaning of 'taxable supply' see PARA 18 note 3 ante.

10 Ibid s 10(1)(c), (2)(b). An acquisition of goods from another member state is an exempt acquisition if the goods are acquired in pursuance of an exempt supply: s 31(1). As to exempt supplies see PARA 155 et seq post.

11 Ibid s 10(1)(c).

- 12 Ibid s 10(1)(a), (b).
- 13 Ibid s 10(2)(b).
- 14 For the meaning of 'taxable in another member state' see PARA 11 note 4 ante.
- 15 Ibid s 10(3)(c)(i).
- 16 As to the meaning of 'in the course or furtherance of a business' see PARA 18 note 5 ante.
- 17 Value Added Tax Act 1994 s 10(3)(c)(ii).
- 18 Ibid s 10(3)(a)(i).
- 19 Ibid s 10(3)(a)(ii).
- 20 Ibid s 10(3)(b).
- 21 Ibid s 10(1)(c). For the meaning of 'taxable person' see PARA 63 post. As to when a person is required to register for VAT see PARA 72 post.
- 22 Ibid s 10(1)(a), (b).
- 23 Ibid s 10(2)(b).
- 24 Ibid s 10(2)(a), (3).
- 25 As to partial exemption see PARA 224 et seq post.
- 26 The recovery of input tax on certain acquisitions of motor cars is wholly or partially blocked, even for fully-taxable traders: see PARA 223 post. For the meaning of 'input tax' see PARAS 4 ante, 215 post.
- 27 As to accounting for VAT see PARA 245 et seq post.
- 28 Ie by virtue of the law of that member state corresponding to the Value Added Tax Act 1994 s 50A (as added) (margin schemes: see PARA 202 et seq post) and any orders made thereunder: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 7.
- 29 Ibid art 7.

## **UPDATE**

### **19 Taxable acquisitions of goods from other member states**

NOTE 7--EC Council Directive 77/388: replaced by EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/20. Taxable supply on removal of goods to another member state.

## **20. Taxable supply on removal of goods to another member state.**

The counterpart to the charge on acquisition of goods from another member state<sup>1</sup> is the taxable supply<sup>2</sup> which (subject to certain exceptions) is imposed on the removal of goods to another member state<sup>3</sup>. Where goods forming part of the assets of any business<sup>4</sup> are removed from any member state by or under the directions of the person carrying on the business<sup>5</sup>, and are so removed in the course or furtherance of that business<sup>6</sup> for the purpose of being taken to a place in a member state other than that from which they are removed<sup>7</sup>, then, whether or not the removal is or is connected with a transaction for a consideration, that is a supply of goods by that person<sup>8</sup>. This rule will apply whether the trader removes the goods in order to sell them, or in order to use them in the course of his trade, or otherwise; however, if the removal takes place as part of a process whereby the trader is to transfer or dispose of the goods so that they no longer form part of the assets of his business, whether or not for a consideration, the removal is treated as falling within the general rule by which such transactions are treated as supplies of goods (with a consequential charge to value added tax<sup>9</sup>) and not under the specific rule for removals to another member state<sup>10</sup>.

If, therefore, the removal is made by a taxable person<sup>11</sup>, it will be treated as a supply liable to VAT. Where, however, the Commissioners for Her Majesty's Revenue and Customs<sup>12</sup> are satisfied that the supply in question involves both the removal of the goods from the United Kingdom<sup>13</sup> and their acquisition in another member state by a person who is liable for VAT on the acquisition<sup>14</sup> and that there has been compliance with such other conditions as are specified by regulations<sup>15</sup> or have been imposed by the Commissioners, the deemed supply will be zero-rated<sup>16</sup>.

The goods will, on removal to the other member state, be liable to VAT in that state in accordance with that country's rules on acquisitions of goods from other member states, and it may be necessary, for that reason, for the trader to register for VAT in that state.

1 See PARA 19 ante.

2 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

3 See the Value Added Tax Act 1994 s 5(1), Sch 4 para 6; and the text and notes 4-10 infra. For the exceptions to this charge to VAT see PARA 21 post.

4 As to the meaning of 'business' see PARA 23 post.

5 Value Added Tax Act 1994 Sch 4 para 6(1)(a).

6 As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5 ante, 23 note 2 post.

7 Value Added Tax Act 1994 Sch 4 para 6(1)(b).

8 Ibid Sch 4 para 6(1).

9 Ie under ibid Sch 4 para 5 (as amended): see PARA 30 post.

10 See ibid Sch 4 paras 5(1), 6(1); and PARA 30 post.

11 For the meaning of 'taxable person' see PARA 63 post.

12 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

13 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

14 In accordance with provisions of the law of that member state corresponding, in relation to that member state, to the provisions of the Value Added Tax Act 1994 s 10: see PARA 19 ante. As to the interpretation of references to the law of another member state see PARA 17 note 2 ante.

15 Where the Commissioners are satisfied that:

- 35 (1) a supply of goods by a taxable person involves their removal from the United Kingdom;
- 36 (2) the supply is to a person taxable in another member state;
- 37 (3) the goods have been removed to another member state; and
- 38 (4) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to *ibid* s 50A (as added) (see PARA 202 post), for VAT to be charged by reference to the profit margin on the supply,

the supply is to be zero-rated, subject to such conditions as the Commissioners may impose: Value Added Tax Regulations 1995, SI 1995/2518, reg 134.

By virtue of Customs and Excise Public Notice 725 *The Single Market* (October 2002) PARA 3.1, for supplies to customers in other member states the Commissioners require that:

- 39 (a) the supplier obtains and shows on his VAT sales invoice his customer's VAT registration number (with a two-digit country code prefix);
- 40 (b) the goods are sent or transported out of the United Kingdom to a destination in another member state; and
- 41 (c) the supplier holds commercial documentary evidence that the goods have been removed from the United Kingdom.

Guidance on proof of removal of goods is given in Customs and Excise Public Notice 703/1 *Export of Goods from the United Kingdom* (January 2004).

If these conditions are not satisfied, the Commissioners require the trader to charge and account for tax on the goods in the United Kingdom (unless the supply of the goods is normally zero-rated in the United Kingdom): Customs and Excise Public Notice 725 *The Single Market* (October 2002) PARA 3.2. The Commissioners impose similar requirements where a trader removes goods to another member state for the purposes of his trade. However, they additionally expect the trader to be registered for VAT in the other member state (since the trader will be liable for VAT there on the acquisition of the goods), and to use his overseas VAT registration number to support zero-rating of the deemed supply: Customs and Excise Public Notice 725 *The Single Market* (October 2002) PARAS 3.1, 6.1 et seq. For the record-keeping and accounting requirements relating to removals see PARAS 240, 284 post.

16 See the Value Added Tax Act 1994 s 30(8); and PARA 192 post.

## UPDATE

### 20 Taxable supply on removal of goods to another member state

NOTES 13, 14--The exemption from VAT on the intra-Community supply of goods is applicable only when the right to dispose of the goods as the owner has been transferred to the purchaser, and the goods have physically left the territory of the member state of supply: Case C-409/04 *R (on the application of Teleos plc) v Customs and Excise Comrs* [2008] STC 706, ECJ. See also Case C-184/05 *Twoh International BV v Staatssecretaris van Financiën* [2008] 1 CMLR 140, [2008] STC 740, ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/21. Where removal of goods to another member state is not a taxable supply.

## **21. Where removal of goods to another member state is not a taxable supply.**

The removal of goods to another member state<sup>1</sup> is not treated as effecting a supply<sup>2</sup> for the purposes of value added tax where:

- 41 (1) the goods are removed from any member state in the course of their removal from one part of that member state to another part of the same member state<sup>3</sup>;
- 42 (2) the goods have been removed from a place outside the member states for entry into the territory of the Community and are removed from a member state before the time when any Community customs debt<sup>4</sup> in respect of any Community customs duty on their entry into that territory would be incurred<sup>5</sup>; or
- 43 (3) the removal in question is either of gas through the natural gas distribution network, or electricity<sup>6</sup>.

It is also provided that the rule that the removal of goods involves a supply of those goods for VAT is not to apply to a removal of goods from a member state to another member state:

- 44 (a) where the supply of the goods would be treated as having been made in a member state other than the member state of dispatch by virtue of the distance selling rules<sup>7</sup>;
- 45 (b) where the supply of the goods would be treated<sup>8</sup> as having been made in the member state of dispatch<sup>9</sup>; or
- 46 (c) where the goods are removed<sup>10</sup> for the purpose of the owner either delivering them to a person to whom he is supplying those goods, or taking possession of them from a person who is supplying those goods to him, where (in either case) the supply is or will be<sup>11</sup> zero-rated<sup>12</sup>.

There is also no supply by removal for the purposes of VAT:

- 47 (i) either where goods are temporarily removed for treatment or processing<sup>13</sup>; or where the goods are returned to the member state of dispatch after the completion of the treatment or processing<sup>14</sup>;
- 48 (ii) either where the goods have been removed for the purpose of delivering them to another person in order that he can value or carry out any work on them<sup>15</sup> and the supply which is thus to be made will be a supply of services treated as having been made in the member state of arrival<sup>16</sup>; or where the goods are returned to the member state of dispatch on the completion of the valuation or work<sup>17</sup>;
- 49 (iii) either where goods are temporarily removed for the purposes of making a supply of services<sup>18</sup>; or where the goods are returned after the owner has ceased to use them in making the supply of services<sup>19</sup>;
- 50 (iv) either where temporary importation relief<sup>20</sup> would have been afforded had the goods been imported from a place outside the member states<sup>21</sup> and the owner intends, within two years from the date of removal, to export the goods to a place outside the member states or remove them to a member state other than the member state of arrival<sup>22</sup>; or where the goods are subsequently removed to a



member state other than that of arrival in accordance with the owner's previously expressed intention<sup>23</sup>.

1 For the meaning of 'another member state' see PARA 4 note 15 ante.

2 I.e. the Value Added Tax Act 1994 s 5(1), Sch 4 para 6(1) (see PARA 20 ante) does not apply: Sch 4 para 6(2). For the meaning of 'supply' see PARA 27 post.

3 Ibid Sch 4 para 6(2)(a). Thus VAT is not charged on the removal of goods where eg goods are shipped from one part of France to another via Dover, or from Liverpool to Grimsby via Calais.

4 As to the charge of VAT on the importation of goods see PARA 113 et seq post.

5 Value Added Tax Act 1994 Sch 4 para 6(2)(b). As to the places treated as excluded from, or included in, the territory of the Community for VAT purposes see PARA 16 ante.

6 Value Added Tax (Removal of Gas and Electricity) Order 2004, SI 2004/3150, art 2 (made under the Value Added Tax Act 1994 s 5(3) (see PARA 27 post)).

7 Value Added Tax (Removal of Goods) Order 1992, SI 1992/3111, art 4(a). As to the distance selling rules (ie the Value Added Tax Act 1994 s 7(4), (5)) see PARA 48 post.

8 I.e. by virtue of the Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148: see PARA 51 post.

9 Value Added Tax (Removal of Goods) Order 1992, SI 1992/3111, art 4(b).

10 The removal must be by or under the directions of the owner: ibid art 4(c).

11 I.e. by virtue of Value Added Tax Act 1994 s 30(6) or (8) (see PARA 192 post): Value Added Tax (Removal of Goods) Order 1992, SI 1992/3111, art 4(c).

12 Ibid art 4(c).

13 The following conditions must be satisfied: (1) the owner is registered in the member state of dispatch and is not registered in the member state of arrival (ibid art 4(d)(i)); (2) the goods have been removed for the purpose of delivering them to another person who is to produce goods by applying a treatment or process to the goods removed (art 4(d)(ii)); and (3) the owner intends that the goods produced will be returned to him by their removal to the member state of dispatch upon completion of the treatment or process (art 4(d)(iii)). The relevant intention of the owner must be fulfilled: art 5.

Where goods have been removed from a member state to a place in any other member state, that removal falls within art 4(d), (f) or (g) (see the text and notes 18-22 *infra*), and the owner's relevant intention is fulfilled (ie in accordance with art 5), the owner need not make any entry in the VAT payable portion of that part of his VAT account which relates to the prescribed accounting period in which he would be liable to account for any VAT chargeable in respect of the removal: Value Added Tax Regulations 1995, SI 1995/2518, reg 42(1), (2). Where, however, the owner's relevant intention has not been complied with and an amount of VAT has become payable, the owner must make a positive entry for the relevant amount of VAT in the VAT payable portion of that part of his VAT account which relates to the prescribed accounting period in which the condition was not complied with: reg 42(3). For the meaning of 'prescribed accounting period' see PARA 115 note 15 post. 'Positive entry' means an amount entered into the VAT account as a positive amount: reg 24. As to the VAT account and the VAT payable portion thereof see PARA 275 post.

14 Ibid art 4(h).

15 Ibid art 4(e)(i).

16 Ibid art 4(e)(ii).

17 Ibid art 4(i).

18 The following conditions must be satisfied: (1) the owner is established in the member state of dispatch and is not established in the member state of arrival (ibid art 4(f)(i)); (2) the goods are removed for the sole purpose of their being used by the owner in the course of a supply of services to be made by him (art 4(f)(ii)); (3) at the time of their removal there exists a legally binding obligation to make that supply of services (art 4(f)(iii)); and (4) the owner intends to remove them to the member state of dispatch upon his ceasing to use them in the course of making the supply (art 4(f)(iv)). The relevant intention of the owner must be fulfilled: art 5. See also note 13 *supra*.

19 Ibid art 4(h).

20 As to relief from VAT on importation see PARA 119 et seq post.

21 Value Added Tax (Removal of Goods) Order 1992, SI 1992/3111, art 4(g)(i). The relevant intention of the owner must be fulfilled: art 5. See also note 13 supra.

22 Ibid art 4(g)(ii). The relevant intention of the owner must be fulfilled: art 5. See also note 13 supra.

23 Ibid art 4(h).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/22. Triangulation.

## 22. Triangulation.

In order to simplify the treatment for value added tax purposes of supplies of goods passing from one member state to another by a chain of transactions involving an intermediate supplier (generally known as 'triangulation'), the option is given to the intermediate supplier to elect to treat the supply as made directly from the original owner of the goods to the ultimate purchaser ('the customer'): if the intermediate supplier elects to do this, the customer is obliged to account for VAT as on a taxable acquisition<sup>1</sup> of the goods from another member state<sup>2</sup>. This simplification is available in two cases, the first of which arises where the customer is registered for VAT in the United Kingdom and the second where the intermediate supplier is so registered. In the first such case, where:

- 51 (1) a person ('the original supplier') makes a supply<sup>3</sup> of goods to a person who belongs in another member state<sup>4</sup> ('the intermediate supplier')<sup>5</sup>;
- 52 (2) that supply involves the removal of the goods from another member state and their removal to the United Kingdom but does not involve the removal of the goods from the United Kingdom<sup>6</sup>;
- 53 (3) both the original supply and the removal of the goods to the United Kingdom are for the purposes of the making of a supply by the intermediate supplier to another person ('the customer') who is registered for the purposes of VAT<sup>7</sup>;
- 54 (4) neither of those supplies involves the removal of the goods from a member state in which the intermediate supplier is taxable<sup>8</sup> at the time of the removal without also involving the previous removal of the goods to that member state<sup>9</sup>; and
- 55 (5) there would be a taxable acquisition by the customer if the supply to him involved the removal of goods from another member state to the United Kingdom<sup>10</sup>,

the supply by the original supplier to the intermediate supplier is disregarded for the purposes of VAT and the supply by the intermediate supplier to the customer is then treated for those purposes<sup>11</sup> as if it did involve the removal of the goods from another member state to the United Kingdom<sup>12</sup>. An intermediate supplier who has made or intends to make a supply to which he wishes the above provisions to apply must notify the Commissioners for Her Majesty's Revenue and Customs<sup>13</sup> and the customer in writing of his intention to do so<sup>14</sup>. The notification must be made no later than the provision of the first invoice<sup>15</sup> in relation to the supply to which it relates, and sent both to the office designated by the Commissioners for the receipt of such notifications<sup>16</sup>, and to the customer<sup>17</sup>. Where an intermediate supplier has complied with these notification requirements in relation to the first supply to a customer, they are deemed to have been satisfied in relation to all subsequent supplies to that customer while the intermediate supplier continues to belong in another member state<sup>18</sup>.

In the second such case, where:

- 56 (a) any goods are acquired from another member state in a case which corresponds, in relation to another member state, to the first case described in heads (1) to (5) above in relation to the United Kingdom<sup>19</sup>; and
- 57 (b) the person who acquires the goods is registered for VAT in the United Kingdom and would be the intermediate supplier in relation to that corresponding case<sup>20</sup>,

the supply to him of those goods and the supply by him of those goods to the person who would be the customer in that corresponding case are both disregarded<sup>21</sup> for the purposes of VAT<sup>22</sup>.

Special rules apply for the tax treatment of installed or assembled goods<sup>23</sup>.

The simplified procedure<sup>24</sup> does not apply in relation to any supply unless the intermediate supplier complies with such requirements as to the furnishing, both to the Commissioners and to the customer, of invoices and other documents<sup>25</sup>, and of information, as the Commissioners may by regulations prescribe<sup>26</sup>.

1 As to the charge on taxable acquisitions from member states see PARA 19 ante.

2 See the Value Added Tax 1994 s 14; and the text and notes 4-26 infra.

3 For the meaning of 'supply' see PARA 27 post.

4 A person belongs in another member state for these purposes if:

42 (1) he does not have any business establishment or other fixed establishment in the United Kingdom and does not have his usual place of residence in the United Kingdom (see PARA 53 post) (Value Added Tax Act 1994 s 14(5)(a));

43 (2) he is neither registered for the purposes of VAT nor required to be so registered (see PARA 64 et seq post) (s 14(5)(b): in determining for these purposes whether a person is required to be registered for VAT, any supplies which would fall to be disregarded by virtue of s 14 if he did belong in another member state and complied with the requirements prescribed under s 14(3) (see the text and notes 24-26 infra; and PARAS 47, 283 post) must be disregarded (s 14(5)));

44 (3) he does not have a VAT representative and is not for the time being required to appoint one (see PARA 71 post) (s 14(5)(c)); and

45 (4) he is taxable in another member state (s 14(5)(d)).

For the meaning of 'another member state' see PARA 4 note 15 ante; As to the meaning of 'United Kingdom' see PARA 4 note 3 ante; and for the meaning of 'registered' see PARAS 18 note 4 ante, 64 note 2 post. For the meaning of 'taxable in another member state' see note 8 infra.

5 Ibid s 14(1)(a).

6 Ibid s 14(1)(b).

7 Ibid s 14(1)(c).

8 For these purposes, references to a person being taxable in another member state do not include references to a person who is so taxable by virtue only of provisions of the law of another member state corresponding to the provisions of the Value Added Tax Act 1994 by virtue of which a person who is not registered under that Act is a taxable person if he is required to be so registered: s 14(7). As to references to the law of another member state see PARA 17 note 2 ante; and for the meaning of 'taxable in another member state' generally see PARA 17 note 5 ante.

9 Ibid s 14(1)(d).

10 Ibid s 14(1)(e).

11 Ie other than for the purposes of registration under ibid s 3(2), Sch 3 (as amended) in respect of acquisitions from another member state: see PARA 72 post.

12 Ibid s 14(1). The result will be that the customer will be liable to account for VAT on his purchase of goods as if he had made a taxable acquisition of the goods. Where s 14 has the effect of deeming a taxable acquisition to have been made, the time of supply is taken to be the day of the issue of the prescribed invoice: see s 14(4) (applying s 12(1) (as amended) (see PARA 44 post) with modifications).

13 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 11(1). The notification must contain the following particulars:

- 46 (1) the name and address of the intermediate supplier (reg 11(2)(a));
- 47 (2) the number including the alphabetical code by which the intermediate supplier is identified for VAT purposes, which was used or is to be used for the purpose of the supply to him by the original supplier (reg 11(2)(b));
- 48 (3) the date upon which the goods were first delivered or are intended to be first delivered (reg 11(2)(c)); and
- 49 (4) the name, address and registration number of the customer to whom the goods have been supplied or are to be supplied (reg 11(2)(d)).

'Alphabetical code' means the prescribed alphabetical prefix which is used to identify the member state: see reg 2(1) (definition substituted by SI 2004/1082). 'Registration number' means the number allocated by the Commissioners to a taxable person in the certificate of registration issued to him: Value Added Tax Regulations 1995, SI 1995/2518, reg 2(1). For the meaning of 'taxable person' see PARA 63 post.

15 Ie in accordance with ibid reg 18: see PARA 283 post.

16 Ibid reg 11(3)(a). Notifications must be made separately in relation to each customer to whom it is intended to make supplies to which the intermediate supplier wishes the Value Added Tax Act 1994 s 14(1) to apply: Value Added Tax Regulations 1995, SI 1995/2518, reg 11(4).

17 Ibid reg 11(3)(b).

18 Ibid reg 11(5).

19 Value Added Tax Act 1994 s 14(6)(a).

20 Ibid s 14(6)(b).

21 Ie other than for the purposes of the information provisions referred to in ibid s 92(7) (see PARA 17 ante): s 14(6).

22 Ibid s 14(6). This provision is without prejudice to s 13(4) (place of acquisition: see PARA 19 note 8 ante): s 14(6). In this case, the intermediate supplier must comply with the requirements of the Value Added Tax Regulations 1995, SI 1995/2518, regs 17, 20: see PARAS 278, 283 post.

23 See the Value Added Tax Act 1994 s 14(2); and PARA 47 post.

24 Ie ibid s 14(1): see heads (1)-(5) in the text.

25 As to the meanings of 'invoice' and 'document' see PARA 17 note 9 ante.

26 Value Added Tax Act 1994 s 14(3). Such regulations may provide for the times at which, and the form and manner in which, any document or information is to be furnished and the particulars which it is to contain: s 14(3). In exercise of the power so conferred, the Commissioners have made the Value Added Tax Regulations 1995, SI 1995/2518, reg 11 (see the text and notes 13-18 supra) and regs 18, 20 (see PARA 283 post). The regulations are so framed that the intermediate supplier is given a choice whether or not to operate the simplified procedure: if he wishes the procedure to operate, he must correspondingly comply with the relevant regulations.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/23. Meaning of 'business'.

### 23. Meaning of 'business'.

Supplies which are not made in the course or furtherance of a business are outside the scope of value added tax. There is no exhaustive statutory definition of 'business'<sup>1</sup> for the purposes of the tax<sup>2</sup>, but it includes any trade, profession or vocation<sup>3</sup>. Leaving aside activities which are required by statute to be treated as constituting the carrying on of a business, the word 'business' is to be given its natural meaning and does not require that what is done must be done commercially, in the popular sense, or with the object of profit<sup>4</sup>. The activity must, however, involve the making of supplies over an appreciable tract of time and with such frequency as to amount to a recognisable and identifiable activity of the person on whom the liability to tax is to fall<sup>5</sup>.

There are special provisions governing the taxation of business carried on by the Crown, local authorities, groups of companies or partnerships, and of businesses carried on in divisions by companies or by unincorporated bodies, personal representatives and agents<sup>6</sup>.

1 The use of the word 'business' is peculiar to the United Kingdom and does not appear in EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of legislation concerning turnover taxes ('the Sixth Directive'), under which VAT is charged on supplies of goods or services effected for consideration by a taxable person acting as such: art 2(1). As to the Sixth Directive see PARA 1 note 1 ante. A 'taxable person' is defined for those purposes as any person who independently carries out any economic activity, whatever the purpose or results of that activity (art 4(1)); and 'economic activity' comprises all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions (art 4(2)). The exploitation of tangible or intangible property for the purpose of obtaining an income therefrom on a continuing basis is also to be considered an economic activity: art 4(2) (although the acquisition and holding of shares in a company, or the entry of a new partner into a partnership in consideration for a contribution in cash, are not by themselves economic activities conferring the status of a taxable person: see Case C-442/01 *Kaphag Renditefonds 35 Spreecenter Berlin-Hellersdorf 3. Tranche GbR v Finanzamt Charlottenburg* [2005] STC 1500, ECJ). The concept of 'business' in the United Kingdom legislation appears to be intended to correspond to this definition of 'economic activity'. Member states may also treat as a taxable person anyone who carries out on an occasional basis a transaction relating to any of the activities specified in EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4(2); and in particular, the supply before first occupation of buildings or parts of buildings, as well as the land on which they stand, and the supply of building land: see art 4(3). The United Kingdom has not specifically availed itself of the permission. Expenditure on services supplied in connection with an issue of shares is not to be regarded as expenditure preparatory to the carrying on of an economic activity for these purposes: see *Park Commercial Developments plc v Customs and Excise Comrs* [1990] 2 CMLR 746, [1990] VATTR 99 (distinguishing Case C-268/83 *Rompelman v Minister Van Financiën* [1985] 3 CMLR 202, ECJ).

2 For judicial consideration of the meaning of 'business' see *Customs and Excise Comrs v Apple and Pear Development Council* [1987] 2 CMLR 634, [1986] STC 192, HL; Case 102/86 *Apple and Pear Development Council v Customs and Excise Comrs* [1988] ECR 1443, [1988] 2 All ER 922, ECJ (council's activities did not amount to a supply effected for consideration where charges imposed on growers by statute without regard to the benefits provided to each grower); *Customs and Excise Comrs v Morrison's Academy Boarding Houses Association* [1978] STC 1, Ct of Sess (activities carried on without the intention of making a profit nevertheless to be considered a business); *National Water Council v Customs and Excise Comrs* [1979] STC 157 (services supplied in the performance of a statutory duty could nevertheless be treated as supplied in the course of a business); *Church of Scientology of California v Customs and Excise Comrs* [1980] CMLR 114, [1979] STC 297 (affd [1981] 1 All ER 1035, [1981] STC 65, CA) (a body which propagates a religion or religious philosophy may nonetheless as a matter of law be regarded as carrying on a business for VAT purposes); *Customs and Excise Comrs v Royal Exchange Theatre Trust* [1979] 3 All ER 797, [1979] STC 728 per Neill J (business-like activities carried on otherwise than for the purpose of making supplies for a consideration could not amount to a business for VAT); *Customs and Excise Comrs v Lord Fisher* [1981] 2 All ER 147, [1981] STC 238 per Gibson J ('business' for VAT purposes does not include any activity which is carried on only for pleasure and social enjoyment, even though the organiser may require contributions towards the cost of the activity from other participants); *Cumbræ Properties (1963) Ltd v Customs and Excise Comrs* [1981] STC 799 (secondment of staff to another

company within the same ownership made in the course of the company's business); *Three H Aircraft Hire (a firm) v Customs and Excise Comrs* [1982] STC 653 (a finding that a partnership existed was not conclusive that a business existed for VAT purposes); *Greater London Red Cross Blood Transfusion Service v Customs and Excise Comrs* [1983] VATTR 241 (provision of a voluntary service to the community does not amount to a business); *Whitechapel Art Gallery v Customs and Excise Comrs* [1986] STC 156 (the free admission of members of the public to art exhibitions was not a business activity, and could not be regarded as predominantly concerned with, or incidental to, the gallery's business activities); *Institute of Chartered Accountants in England and Wales v Customs and Excise Comrs* [1999] 2 All ER 449, [1999] STC 398, HL (regulatory function of institute in issuing licences (for a fee) to persons carrying on investment business did not constitute either a business or an economic activity); *Trinity Mirror plc (formerly Mirror Group Newspapers Ltd) v Customs and Excise Comrs* [2003] EWHC 480 (Ch), [2003] STC 518 (extent to which payments made by a landlord to a commercial tenant by way of inducement were consideration for a supply of services by the tenant); *West Devon Borough Council v Customs and Excise Comrs* [2001] STC 1282 (in the absence of an applicable special legal regime, a non-profit activity carried on by local authority pursuant to the ordinary rules of private law was a business activity); *Revenue and Customs Comrs v Jeancharm Ltd (t/a Beaver International)* [2005] EWHC 839 (Ch), [2005] STC 918 (charges in respect of legal services provided to an employee under a company contract of insurance cannot be a business cost of the company). Where a trader assigned her business to another in return for a weekly payment, the fact that she continued to be registered for VAT and to make the VAT returns was no evidence that it was she who carried on the business: *Nasim (t/a Yasmine Restaurant) v Customs and Excise Comrs* [1987] STC 387. For other judicial consideration by the European Court of Justice of 'economic activity', 'taxable person' and allied phrases see: Case 89/81 *Staatssecretaris van Financiën v Hong Kong Trade Development Council* [1982] ECR 1277, [1983] 1 CMLR 73, ECJ (a person who habitually provides services free of charge cannot be considered to be a taxable person entitled to recover VAT); Case 235/85 *EC Commission v Netherlands* [1987] ECR 1471, [1988] 2 CMLR 921, ECJ (private persons exercising the powers of a public authority in return for a fee are engaged in an economic activity for VAT purposes); similarly Case C-202/90 *Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas Primera y Segunda* [1991] ECR I-4247, [1993] STC 659, ECJ; Case 269/86 *Mol v Inspecteur der Invoerrechten en Accijnzen* [1988] ECR 3627, [1989] 3 CMLR 729, ECJ; Case 289/86 *Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting* [1988] ECR 3655, [1989] 3 CMLR 743, ECJ (illegal sale of drugs not an economic activity (but see also Case C-158/98 *Staatssecretaris van Financiën v Coffeeshop 'Siberië' Vof* [1999] All ER (EC) 560, ECJ (renting out a place intended for commercial activities was an economic activity and the economic character of the renting was not altered by the fact that the activities for which the place was used (in this case the sale of illegal drugs) constituted a criminal offence, even though such activities could render the renting itself unlawful)); Joined Cases 231/87, 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino and Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* [1989] ECR 3233, [1991] STC 205, ECJ (activities carried on by a local authority under the same legal conditions as private traders should be considered taxable economic activities despite EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4(5)); Case C-186/89 *WM van Tiem v Staatssecretaris van Financiën* [1990] ECR I-4363, [1993] STC 91, ECJ ('exploitation of property' extends to all forms of transactions by which it is sought to obtain income from goods on a continuing basis, whatever legal form they might take; accordingly, a grant of building rights for a consideration is to be considered an economic activity and thus taxable); Case C-60/90 *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen, Arnhem* [1991] ECR I-3111, [1993] STC 222, ECJ (a holding company whose functions are restricted to the mere holding of shares and the receipt of dividends therefrom does not carry on an economic activity); Case C-333/91 *Sofitam SA (formerly Satam SA) v Ministre chargé du Budget* [1993] ECR I-3513, [1997] STC 226, ECJ; cf Case C-306/94 *Régie Dauphinoise-Cabinet A Forest SARL v Ministre du Budget* [1996] 3 CMLR 193, [1996] STC 1176, ECJ (the investment of security deposits by an estate manager for its own benefit constituted a supply made by a taxable person acting as such and therefore falling within the scope of VAT); Case C-20/91 *De Jong v Staatssecretaris van Financiën* [1992] ECR I-2847, [1995] STC 727, ECJ; Case C-291/92 *Finanzamt Uelzen v Armbrrecht* [1995] ECR I-2775, [1995] STC 997, ECJ (a taxable person performing a transaction in a private capacity was not a 'taxable person acting as such' within EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 2(1) (eg where he sold property which he had chosen to reserve for his private use)); Case C-155/94 *Wellcome Trust Ltd v Customs and Excise Comrs* [1996] All ER (EC) 589, [1996] STC 945, ECJ (sale of shares held as part of an investment portfolio was nothing more than an exercise of the investor's rights of ownership and, even if regularly carried out on a large scale, did not amount to an economic activity within EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4). The concept of economic activity referred to in both the first and second sentences of art 4(2) (see note 1 supra) does not include activities carried out on an occasional basis only; but the hiring out of tangible property must be regarded as 'exploitation' of such property, within the second sentence thereof, if it is done for the purpose of obtaining income from it on a continuing basis. Whether or not this is so must be determined by the national court, evaluating all the circumstances of the particular case: Case C-230/94 *Enkler v Finanzamt Homburg* [1996] STC 1316, ECJ. See also PARA 18 note 5 ante.

3 Value Added Tax Act 1994 s 94(1).

4 *Customs and Excise Comrs v Morrison's Academy Boarding Houses Association* [1978] STC 1 at 5 per Lord Emslie. See also *Glasgow City Council v Customs and Excise Comrs* [1998] V & DR 407 (carrying out of building works by a local authority pursuant to statutory duties not a commercial transaction). The mitigation of VAT liability may itself be a legitimate business purpose, since a trader is entitled to structure his business in such a

way as to minimise his tax liability (see *RBS Property Development Ltd v Customs and Excise Comrs* (2002) VAT Decision 17789, [2003] STI 312), although the question remains open as to whether, if a transaction is carried out solely to obtain a tax advantage and has no independent purpose, an economic activity is being carried out (see *Halifax plc v Customs and Excise Comrs* [2002] STC 402). Transactions made with a view to obtaining an economic advantage by fraud rather than by legitimate distribution to a final consumer are not, however, economic transactions and are outside the scope of VAT: see *Bond House Systems Ltd v Customs and Excise Comrs* [2003] V & DR 210.

5 *Customs and Excise Comrs v Morrison's Academy Boarding Houses Association* [1978] STC 1 at 8 per Lord Cameron. However, contrast Case C-155/94 *Wellcome Trust Ltd v Customs and Excise Comrs* [1996] All ER (EC) 589 at 598-599, [1996] STC 945 at 954 per Advocate-General Lenz (if an activity is treated as an economic activity, within the meaning of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes (see art 4(2); and note 1 supra), it will remain so even if completed in a single day).

6 See the Value Added Tax Act 1994 ss 41-48 (as amended); and PARAS 74-75, 205 et seq post.

## UPDATE

### 23 Meaning of 'business'

NOTE 1--EC Council Directive 77/388 replaced by EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

In determining whether a transaction is an 'economic activity', the transaction has to be considered on its own merits as the character of a particular transaction cannot be altered by subsequent or earlier events: Cases C-354/03, C-355/03, C-484/03 *Optigen Ltd v Customs and Excise Comrs* [2006] Ch 218, ECJ (taxpayers unwittingly involved in a series of fraudulent transactions). See also *R (on the application of Mobile Export 365 Ltd) v Revenue and Customs Comrs* [2006] EWHC 311 (Admin), [2006] STC 1069.

The fact that a transaction is carried out with the sole aim of obtaining a tax advantage does not prevent it from being an economic activity; however, the right to deduct input tax may be lost if it constitutes an abusive practice: Case C-255/02 *Halifax plc v Customs and Excise Comrs*; Case C-223/03 *University of Huddersfield Higher Education Corpn v Customs and Excise Comrs* [2006] Ch 387, ECJ. See also *R v Hashash* [2006] EWCA Crim 2518, [2008] STC 1158 (lawful trade carried on for effecting fraud an economic activity); *WHA Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 728, [2007] STC 1695; *Revenue and Customs Comrs v Weald Leasing Ltd* [2008] EWHC 30 (Ch), [2008] STC 1601; and C-267/08 *SPO Landesorganisation Kärnten v Finanzamt Klagenfurt* [2010] STC 287, ECJ (external advertising activities carried out by section of political party not economic activities).

NOTE 2--*Institute of Chartered Accountants*, cited, applied in *Customs and Excise Comrs v St Paul's Community Project Ltd* [2004] EWHC 2490 (Ch), [2005] STC 95 (operation of day nursery not a business activity within Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (6) (see PARA 179)); considered in *Riverside Housing Association Ltd v Revenue and Customs Comrs* [2006] EWHC 2383 (Ch), [2006] STC 2072 (letting of property in return for payment an economic activity whether pursued for social or for philanthropic reasons: 'business' for purposes of 1994 Act s 4 (see PARA 18)).

NOTE 5--See Case C-284/04 *T-Mobile v Austria* [2008] STC 184, [2007] All ER (D) 308 (Jun), ECJ. (allocation by auction of rights to use radio-frequency spectrum for telecommunications services to public not an economic activity).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/24. The activities of clubs and associations.

## 24. The activities of clubs and associations.

The provision by a club, association or organisation<sup>1</sup> for a subscription or other consideration<sup>2</sup> of the facilities or advantages available to its members<sup>3</sup>, and the admission, for a consideration, of persons to any premises<sup>4</sup>, are deemed to be the carrying on of a business for the purposes of value added tax.

1 Exemption from VAT is granted in respect of supplies of certain goods and services made by trades unions and certain professional associations by the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 9 (as amended): see PARA 168 post. For the meaning of 'business' generally see PARA 23 ante.

2 Various attempts have been made by clubs to obtain sums from members without incurring a liability to account for VAT on the whole, or part, of the sums obtained. Thus, in *Trewby v Customs and Excise Comrs* [1976] 2 All ER 199, [1976] 1 WLR 932, DC, it was contended that since the members were beneficial owners of the land on which the club stood, the subscriptions were paid to obtain an interest in the land (which would have been the receipt of an exempt supply within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 (as amended), rather than for the facilities available on the land); held that members merely obtained a licence to enter the premises rather than a licence to occupy; and that this did not obtain exemption. See also *Exeter Golf and Country Club Ltd v Customs and Excise Comrs* [1981] STC 211, CA (where members were obliged to make an interest-free loan to the club in lieu of an entrance fee, the supply fell within what is now the Value Added Tax Act 1994 s 19(1) (see PARA 94 post) as a supply for a consideration not consisting wholly of money); *Lord Advocate v Largs Golf Club* [1985] STC 226, Ct of Sess (members were obliged to purchase a unit in a trust which had purchased the freehold of the golf course; held that the purchase of the unit was part of the consideration for membership, notwithstanding that it was paid to a third party). Cf *Arsenal Football Club plc v Customs and Excise Comrs* (1996) VAT Decision 14011, [1996] STI 965 (not of course a members' club case), where the link between the giving of a loan and the obtaining of a season ticket were held to be insufficiently direct to treat the making of the former as part of the consideration for the latter.

3 Value Added Tax Act 1994 s 94(2)(a). 'Facilities' is to be construed as the means or opportunity to do something more easily: *Club Cricket Conference v Customs and Excise Comrs* [1973] VATTR 53. See also in this regard *Universities Athletic Union v Customs and Excise Comrs* [1974] VATTR 118 (an unincorporated non-profit-making body established by universities to promote and co-ordinate inter-university sport with no commercial element in its activities was not an association providing facilities for its members, but such services as were supplied were more in the nature of advantages of membership); *Eastbourne Town Radio Cars Association v Customs and Excise Comrs* [2001] UKHL 19, [2001] STC 606 (non-profit organisation which acted as agent for its members in return for contributions towards its running costs was making a taxable supply to its members); *Compassion in World Farming v Customs and Excise Comrs* [1997] V & DR 281 (activities including lobbying and public relations for a subscription or other consideration did not constitute 'facilities or advantages' as its supporters were not 'members' within the meaning of the Value Added Tax Act 1994 s 94(2)(a)); and *Customs and Excise Comrs v British Field Sports Society* [1998] 2 All ER 1003, [1998] 1 WLR 962, CA (campaigning, lobbying and other public relations activities constituted a 'business activity' for these purposes, provided in return for consideration in the form of members' subscriptions). Where a non-profit-making club serves liquor to its members it carries on the business of providing drinking facilities for its members: *Carlton Lodge Club v Customs and Excise Comrs* [1974] 3 All ER 798, [1975] 1 WLR 66, DC.

4 Value Added Tax Act 1994 s 94(2)(b).

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## **25. Offices held by professionals etc.**

Where a person, in the course or furtherance of a trade, profession or vocation, accepts any office, services supplied by him as the holder of that office are treated for the purposes of value added tax as supplied in the course or furtherance of the trade, profession or vocation<sup>1</sup>. This may be contrasted with the usual position of employees and office-holders, who are outside the scope of VAT<sup>2</sup>.

<sup>1</sup> Value Added Tax Act 1994 s 94(4). Thus eg the services of an accountant appointed as auditor of a company are subject to VAT. In *Gardner v Customs and Excise Comrs* [1989] VATTR 132, the appellant accepted office as Chairman of the Prince of Wales Trust before he set up on his own account, and registered for VAT, as a business consultant; it was held that he had not accepted office 'in the course of' his profession and was not liable to account for VAT on the reimbursement of expenses made to him by the Trust. It has been held that a supply made 'in the course of business' must be a normal incident of the daily activities of the business, and that 'furtherance' refers to the business being helped forward (see *Heart of Variety v Customs and Excise Comrs* [1975] VATTR 103); as to whether a supply is made 'in the course or furtherance of a business' (in the context of individual partners in a firm of solicitors also being office-holders with outside bodies as a means of boosting the firm's profile), and the relevance of the distinction between appointments to such offices on the basis of personal merit and appointments on the basis of professional expertise, see *Oglethorpe Sturton & Gillibrand v Customs and Excise Comrs* (2002) VAT Decision 17491, [2002] STI 834 (following *Heart of Variety v Customs and Excise Comrs* supra); and *Birketts (a firm) v Customs and Excise Comrs* (2002) VAT Decision 17515, [2002] STI 371.

<sup>2</sup> Such persons are assumed not to be carrying on a business: see eg *Rickarby v Customs and Excise Comrs* [1973] VATTR 186. The matter is clearer in EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), which defines a 'taxable person' as 'any person who independently carries out in any place any economic activity': see art 4(1); and PARA 23 note 1 ante. As to the Sixth Directive see PARA 1 note 1 ante.

## **UPDATE**

## **25 Offices held by professionals etc**

NOTE 2--EC Council Directive 77/388: replaced by EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/26. Termination and transfer of businesses.

## 26. Termination and transfer of businesses.

Anything which is done in connection with the termination or intended termination of a business<sup>1</sup> is treated for the purposes of value added tax as being done in the course or furtherance of that business<sup>2</sup>. Likewise, the disposition of a business as a going concern<sup>3</sup>, or of its assets or liabilities (whether or not in connection with its reorganisation or winding up), is treated as a supply<sup>4</sup> made in the course or furtherance of the business<sup>5</sup>. The following supplies by a person of assets of his business are, however, treated as neither a supply of goods nor a supply of services for the purposes of VAT:

- 58 (1) their supply to a person to whom he transfers his business as a going concern where the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, that is carried on by the transferor<sup>6</sup>, and, in a case where the transferor is a taxable person<sup>7</sup>, the transferee is already a taxable person or a person defined as such in Manx law<sup>8</sup>, or becomes a taxable person immediately as a result of the transfer<sup>9</sup>; and
- 59 (2) their supply to a person to whom he transfers part of his business as a going concern where that part is capable of separate operation<sup>10</sup>, the assets are to be used by the transferee in carrying on the same kind of business<sup>11</sup> as that carried on by the transferor in relation to that part<sup>12</sup>, and, in a case where the transferor is a taxable person, the transferee is already a taxable person or a person defined as such in Manx law, or becomes a taxable person immediately as a result of the transfer<sup>13</sup>.

A supply of assets consisting of a grant which would fall within certain exemptions relating to land<sup>14</sup> but for an election<sup>15</sup> made by the transferor<sup>16</sup>, or a grant of a fee simple<sup>17</sup>, is not treated as neither a supply of goods nor a supply of services by virtue of heads (1) and (2) above unless the transferee makes a further election in relation to the land<sup>18</sup>. There is also treated as neither a supply of goods nor a supply of services the assignment by an owner of goods comprised in a hire-purchase or conditional sale agreement of his rights and interest thereunder, and the goods comprised therein, to a bank or other financial institution<sup>19</sup>.

1 For the meaning of 'business' see PARA 23 ante.

2 Value Added Tax Act 1994 s 94(5). As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

3 Special rules, however, apply to prevent VAT liabilities arising on the transfer of a business, or a part of a business, as a going concern: see the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended); and the text and notes 6-19 infra. As to transfers of going concerns see further PARA 210 post.

4 For the meaning of 'supply' see PARA 27 post.

5 Value Added Tax Act 1994 s 94(6).

6 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(1)(a)(i). The sale of industrial units to unregistered pension fund trustees is outside the scope of art 5 (as amended) by reason of art 5(1)(a): *Gould and Cullen v Customs and Excise Comrs* [1994] 1 CMLR 347, [1993] VATTR 209. By concession, Customs permit a transfer of a property letting business to be treated as a going concern (and so as outside the scope of VAT) even where the legal title to the land is transferred, not to the person who will carry on the business but to a

nominee, provided that the name of the beneficial owner is disclosed to the transferor: see Customs and Excise Public Notice 700/9 *Transfer of a Business as a Going Concern* (March 2002) PARA 9.

7 For the meaning of 'taxable person' see PARA 63 post.

8 Ie defined in the Value Added Tax Act 1996 (an Act of Tynwald) s 3(1): Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, arts 2(1), 5(1)(a)(ii) (art 2(1) renumbered by SI 2001/3649; definition 'the Manx Act' and the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(1)(a)(ii) amended by SI 1998/760).

9 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(1)(a)(ii) (amended by SI 1998/760). See note 6 supra.

10 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(1)(b)(i).

11 Ie whether or not as part of any existing business: *ibid* art 5(1)(b)(ii).

12 *Ibid* art 5(1)(b)(ii).

13 *Ibid* art 5(1)(b)(iii). Although the effect of art 5 (as amended) is to treat the transfer as not involving a supply for VAT purposes, this does not also mean that the goods supplied are not treated as acquired as trading stock for the purpose of the operation of retail scheme B: *Customs and Excise Comrs v Co-operative Wholesale Society Ltd* [1995] STC 983. As to retail schemes see PARA 199 et seq post.

14 Ie which would fall within the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 1 (as amended): see PARA 156 post.

15 'Election' for these purposes means an election having effect under *ibid* s 51(1), Sch 10 para 2 (as amended) (election to waive exemption: see PARA 157 post): Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(3).

16 For these purposes, 'transferor' and 'transferee' include a relevant associate of either respectively as defined in the Value Added Tax Act 1994 Sch 10 para 3(7) (see PARA 157 post): Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(3).

17 Ie a grant which falls within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(a): see PARA 156 post.

18 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(2) (amended by SI 2004/779). The transferee is required, no later than the relevant date, to have made an election in relation to the land which has effect on the relevant date and to have given any written notification of the election required by the Value Added Tax Act 1994 Sch 10 para 3(6) (as substituted) (see PARA 158 post) (Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(2A)(a) (art 5(2A), (2B) added by SI 2004/779) and to have notified the transferor that the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(2B) (as added), does not apply in relation to him (art 5(2A)(b) (as so added)). Article 5(2B) (as added) applies to a transferee where: (1) the supply of the asset that is to be transferred to him would become, in relation to him, a capital item as described in the Value Added Tax Regulations 1995, SI 1995/2518, reg 113 (as amended) (see PARA 235 post) if the supply of that asset to him were either to be treated as neither a supply of goods nor a supply of services, or were not so treated (Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(2B)(a) (as so added)); and (2) his supplies of that asset will, or would fall, to be exempt supplies by virtue of the Value Added Tax Act 1994 Sch 10 para 2(3AA) (as added) (see PARA 158 post) (Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(2B)(b) (as so added)). For these purposes, 'the relevant date' means the date upon which the grant would have been treated as having been made or, if there is more than one such date, the earliest of them: art 5(3). See further *Higher Education Statistics Agency Ltd v Customs and Excise Comrs* [2000] STC 332.

This provision is intended to counteract the cash-flow advantage formerly obtained by exempt transferees having buildings erected for their occupation by a taxable person (who makes an election to tax so that input tax relief may be obtained) and then taking a lease at a standard-rated rent.

19 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5(4). As to hire purchase and conditional sale agreements generally see CONSUMER CREDIT.

## UPDATE

## 26 Termination and transfer of businesses

TEXT AND NOTES 3-5--'Business' now includes part of a business: Value Added Tax Act 1994 s 94(6) (amended by Finance Act 2007 s 100(7)).

TEXT AND NOTES 6-19--The assets transferred need not be used in the same way by the transferee (so that where hotels were purchased by a hotel company which at once sold on the buildings and leased them back for use as hotels, there was a transfer of a going concern: *Morton Hotels Ltd v HMRC Comrs* (2007) VAT Decision 20039, [2007] STI 1377.

TEXT AND NOTE 15--The references are now to an option under the Value Added Tax Act 1994 Sch 10 Pt 1 (paras 1-34) which the transferor has exercised and to the exercise of that option: SI 1995/1268 art 5(2)(a) (amended by SI 2008/1146).

NOTE 16--Reference to Value Added Tax Act 1994 Sch 10 para 3(7) now to Sch 10 para 3: SI 1995/1268 art 5(3) (amended by SI 2008/1146).

NOTE 18--Reference to the election required by Value Added Tax Act 1994 Sch 10 para 3(6) is now to the option required by Sch 10 para 20, and reference to Sch 10 paras 2(3AA) is now to Sch 10 para 12: SI 1995/1268 art 5(2B), (3) (amended by SI 2008/1146).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/27. Meaning of 'supply'.

## 27. Meaning of 'supply'.

'Supply' includes all forms of supply but does not include anything done otherwise than for a consideration<sup>1</sup>. The legislation relating to value added tax distinguishes supplies of goods from supplies of services<sup>2</sup>; in particular, there are different rules relating to the place and time of supply<sup>3</sup>. Anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is treated as a supply of services<sup>4</sup>.

The Treasury may by order provide with respect to any description of transaction that it is to be treated as:

- 60 (1) a supply of goods and not as a supply of services<sup>5</sup>;
- 61 (2) a supply of services and not as a supply of goods<sup>6</sup>; or
- 62 (3) neither a supply of goods nor a supply of services<sup>7</sup>.

1 Value Added Tax Act 1994 s 5(2)(a). This is subject to any provision made by s 5(1), Sch 4 (as amended) (see PARAS 21 ante, 30 post) and to Treasury orders under s 5(3)-(6) (see the text and notes 5-7 infra; and PARAS 30, 32 post): s 5(2).

'Supply' is the passing of possession in goods pursuant to an arrangement under which the supplier agrees to part with possession and the recipient agrees to take possession; and by 'possession' is meant in this context control over the goods, in the sense of having the immediate facility for their use: *Customs and Excise Comrs v Oliver* [1980] 1 All ER 353, [1980] STC 73, followed in *Tas-Stage Ltd v Customs and Excise Comrs* [1988] STC 436. A supply of goods may, however, take place notwithstanding that the supplier never takes possession of the goods himself (*Customs and Excise Comrs v John Willmott Housing Ltd* [1987] STC 692) and it is not a relevant consideration for these purposes whether the recipient had any use for the goods acquired or that the acquisition was made in the context of a compensation scheme, the acquisition of title being the core element of the transaction (see *Parker Hale Ltd v Customs and Excise Comrs* [2000] STC 388 (transfer of handguns under the large calibre handgun compensation scheme established pursuant to the Firearms (Amendment) Act 1997); approved in *Stewart (t/a GT Shooting v Customs and Excise Comrs* [2001] EWCA Civ 1988, [2002] STC 255). Where an employer provided premises and equipment for a canteen, together with the services of an employee to cook the meals, there was a supply of the food in the canteen, even though the meals were provided at cost out of money collected by the canteen manager from the employees and never passed through the firm's accounts: *Barker (Mr and Mrs) v Customs and Excise Comrs* (1990) VAT Decision 4589, [1990] STI 394. Where a business allocates goods to itself for private use, VAT is deductible for money spent by it on maintaining the value of the goods: see Cases C-322/99 and C-323/99 *Finanzamt Burgdorf v Fischer*; *Finanzamt Dusseldorf-Mettmann v Brandenstein* [2002] QB 704, [2001] STC 1356, ECJ. The question as to when foreign currency dealings amount to a supply has been referred to the European Court of Justice in Case C-172/96 *Customs and Excise Comrs v First National Bank of Chicago* [1996] STI 1231. A non-profit organisation which acts as agent for its members in return for contributions towards its running costs makes a taxable supply to its members: *Eastbourne Town Radio Cars Association v Customs and Excise Comrs* [2001] UKHL 19, [2001] STC 606.

If a purchaser obtains property from a trader by fraud and the trader subsequently avoids the contract, there is no supply for VAT: *Harry B Litherland & Co Ltd v Customs and Excise Comrs* [1978] VATTR 226. VAT may not be levied on either the illegal importation of drugs into the European Community (Case 294/82 *Senta Einberger v Hauptzollamt Freiburg (No 2)* [1984] ECR 1177, [1985] 1 CMLR 765, ECJ) or the illegal sale of narcotics within a member state (Case 269/86 *Mol v Inspecteur der Invoerrechten en Accijnzen* [1988] ECR 3627, [1989] 3 CMLR 729, ECJ; Case 289/86 *Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting* [1988] ECR 3655, [1989] 3 CMLR 743, ECJ). This restriction does not, however, apply to goods which may lawfully be traded on the market, but which are illegally exported: Case C-111/92 *Lange v Finanzamt Fürstentfeldbruck* [1994] 1 CMLR 573, ECJ. A sale by a receiver of stolen goods also constitutes a sale for VAT purposes, obliging the receiver to account for VAT (*Customs and Excise Comrs v Oliver* supra); and the supply of counterfeit goods (Case C-3/97 *Criminal Proceedings against Goodwin* [1998] All ER (EC) 500, [1998] STC 699), the unlicensed supply of anabolic steroids (*R v Citrone* [1999] STC 29, [1999] Crim LR 327, CA), the renting out of a place intended for the sale of illegal drugs (Case C-158/98 *Staatssecretaris van Financiën v Coffeeshop 'Siberië' Vof* [1999] All ER (EC) 560, ECJ) and the procurement of prostitutes by an escort agency (*Customs and Excise*

*Comrs v Polok* [2002] EWHC 156 (Ch), [2002] STC 361) have all been held to be taxable supplies for VAT purposes.

The supply of goods and services by a charity in connection with a fund-raising event is treated as made in the course or furtherance of its business if made against payment; but such supplies are exempt supplies, in accordance with the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 12 (as substituted and amended): see PARA 171 post. Where, though, the supply is not in connection with a fund-raising event (as defined), it is taxable in the ordinary way: *Customs and Excise Comrs v Tron Theatre Ltd* [1994] STC 177. As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

For the meaning of 'consideration' generally see PARA 95 post; and see also note 4 infra. Repairs made to residential property by a local authority (in default of compliance with a statutory repair notice), the cost of which was recoverable from the property owner, was held not to constitute a supply for a consideration, as there was insufficient consensuality (*Glasgow City Council v Customs and Excise Comrs* [1998] V & DR 407); further, where two charitable companies, each controlling the other and having a common membership, were established for the purposes of operating schools, the first company owning and managing the school buildings which it leased to the other, which actually operated the schools, the repair or acquisition of buildings by the owning company funded, inter alia, by the operating surplus of the operating company did not constitute a supply of services for 'consideration' for VAT purposes (*Customs and Excise Comrs v Church Schools Foundation Ltd* [2001] EWCA Civ 1745, [2001] STC 1661).

2 The rules are contained in the Value Added Tax Act 1994 Sch 4 (as amended): see PARA 30 post. Occasionally it can be difficult to determine whether a transaction involves a supply of goods or a supply of services; it has been said that regard must be had to all the circumstances in which the transaction takes place in order to identify its characteristic features: Case C-231/94 *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] All ER (EC) 656, [1996] STC 774, ECJ. Thus, the supply of prepared food and drink for immediate consumption in a restaurant on board a ferry was 'characterised by a cluster of features and acts, of which the provision of food was only one component, and in which services largely predominate'. It was, therefore, held to be a supply of services, in contrast to the position which would have obtained had the transaction related to 'take-away food'. Another substantially more difficult case is that where a customer provides his own materials to a supplier to make up into an item of goods, eg where a customer takes an old gold bracelet to a jeweller to be melted down and used (perhaps with other gold) to make a new item of jewellery: in some instances it will be found that there are two sales, one by the customer to the jeweller, and the other vice versa; and in other instances, that the jeweller is simply providing a service of 'refashioning' the customer's bracelet (see *Customs and Excise Comrs v Sai Jewellers, Sai Jewellers v Customs and Excise Comrs* [1996] STC 269). The provision by a lessor of rental cars of a credit card with which the lessee could buy fuel (and then discharge the balance owing on the card) was not a contract for the supply of fuel, but a contract to finance its purchase, and was therefore a supply of services: Case C-185/01 *Auto Lease Holland BV v Bundesamt für Finanzen* [2005] STC 598, ECJ.

3 See PARA 35 et seq post.

4 Value Added Tax Act 1994 s 5(2)(b). If a credit card company buys at a discount from a retailer a debt owed to the retailer by one of its cardholders, the company is to be treated as making a supply of services (ie the service of clearing the debt) for a consideration (ie the discount): *Customs and Excise Comrs v Diners Club Ltd* [1989] 2 All ER 385, [1989] STC 407, CA; *Customs and Excise Comrs v High Street Vouchers Ltd* [1990] STC 575; Case C-18/92 *Chaussures Bally SA v Belgian State* [1993] ECR I-2871, [1997] STC 209, ECJ. A partnership which admitted a partner in consideration of payment of a contribution in cash did not effect towards that person a supply of services for consideration: see Case C-442/01 *Kaphag Renditefonds 35 Spreecenter Berlin-Hellersdorf 3. Tranche GbR v Finanzamt Charlottenburg* [2005] STC 1500, ECJ.

A distinction is drawn between compensation (which is not within the scope of VAT) and consideration, though it may be difficult to distinguish the one from the other. See further Customs and Excise Public Notice 701/36 *Insurance* (May 2002) PARA 7; and see also Customs and Excise Press Notice 82/87 (payments under out of court settlements which are essentially compensatory and do not directly relate to supplies of goods and services are outside the scope of VAT); and [1992] 32 LS Gaz p 32 (9 September 1992) (report of meeting between the Law Society and the Commissioners of Customs and Excise in relation to that notice). See also *Cooper Chasney Ltd v Customs and Excise Comrs* [1990] 3 CMLR 509, (1990) VAT Decision 4898 (taxpayer, C, was held to have made a taxable supply when, having sued another company for an alleged infringement of its name, it received £30,000 in settlement under an agreement whereby C gave up its right to use the name); *Customs and Excise Comrs v Bass plc* [1993] STC 42 (charge made by a hotelier when a customer fails to arrive, having made a guaranteed reservation, is a supply of services, ie making available a room); *Reich v Customs and Excise Comrs* (1993) VAT Decision 9548, [1993] STI 356, (a payment of £35,000 under a Tomlin order in settlement of a claim for alleged commission was held to be partly compensatory and outside the scope of VAT, in the absence of proof of any supplies; cf *JE Greves & Son v Customs and Excise Comrs* [1993] VATTR 127, where the tribunal held that a payment of £450,000 under a Tomlin order was consideration for an exempt supply of the taxpayer's possessory interest in land); *Croydon Hotel and Leisure Co Ltd v Customs and Excise Comrs* (1997) VAT Decision 14920, [1997] STI 1176 (a compensation payment made pursuant to the termination of an hotel management agreement was consideration for a supply of services, the service being the (former) manager's

waiving his right to continue to manage the hotel); cf *Lloyds Bank plc v Customs and Excise Comrs* (1996) VAT Decision 14181, [1996] STI 1358, where the parties amended a lease (where the landlord had opted to tax) to make provision for termination and for compensation on termination in order that the lessee might immediately exercise the right to terminate; it was held that the entire transaction was, in substance and reality, one by which consideration was paid by the lessee in return for the grant by the landlord of an option to surrender the lease. A farmer's undertaking to cease milk production is not a supply of services and the compensation paid to him is not subject to VAT: Case C-215/94 *Mohr v Finanzamt Bad Segeberg* [1996] ECR I-959, [1996] STC 328, ECJ.

An excess charge incurred pursuant to an infringement of local authority parking regulations was a fine for infringing those regulations and not consideration for the supply of parking services: *Bristol City Council v Customs and Excise Comrs* (2001) VAT Decision 17665, [2002] STI 1671.

5 Value Added Tax Act 1994 s 5(3)(a). In the exercise of this power, the Treasury has made the Value Added Tax (Fiscal Warehousing) (Treatment of Transactions) Order 1996, SI 1996/1255. A transaction fulfilling the prescribed description is to be treated as a supply of goods and not as a supply of services: art 3(1). The prescribed description is that there is a supply which is not a retail transaction involving the transfer of any undivided share of property in eligible goods and either: (1) that supply takes place while the goods in question are subject to a fiscal warehousing regime; or (2) the transferee causes the goods in question to be placed in a fiscal warehousing regime after receiving that supply but before the supply, if any, which next occurs involving the transfer of any property in those goods: art 3(2). In construing art 3(2), any supply referred to therein must be treated as taking place at the material time for that supply: art 2(2). For these purposes, 'supply' means a supply for the purposes of the Value Added Tax Act 1994 s 5(2)(a) (see the text and note 1 *supra*); 'eligible goods' has the meaning given by s 18B(6) (as added) (see *PARA 146 post*); and 'material time' has the meaning given by s 18F(1) (as added) (see *PARA 149 note 3 post*): Value Added Tax (Fiscal Warehousing) (Treatment of Transactions) Order 1996, SI 1996/1255, art 2(1). As to goods subject to a fiscal warehousing regime see *PARA 146 et seq post*.

By virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax Act (Water) Order 1989, SI 1989/1114 (which treats the supply of water as a supply of goods and not of services, in so far as it would not otherwise be a supply of goods: see art 2), also has effect as if made under the Value Added Tax Act 1994 s 5(3)(a).

6 *Ibid* s 5(3)(b). At the date at which this volume states the law, no such order had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax Act (Tour Operators) Order 1987, SI 1987/1806 (amended by SI 1992/3125; SI 1995/1495) (which treats combinations of supplies of goods or services made by a tour operator for the benefit of travellers as a single supply of services: see art 3(2)) has effect as if so made.

7 Value Added Tax Act 1994 s 5(3)(c). In exercise of the power so conferred, the Treasury has made the Value Added Tax (Treatment of Transactions) Order 1995, SI 1995/958 (amended by SI 1999/3119) (which excludes from the scope of VAT the transfer of ownership in certain second-hand goods and works of art imported from outside the EC with a view to possible sale (see *PARA 28 post*) and the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268 (amended by SI 1995/1385; SI 1997/1616; SI 1998/760; SI 1999/2831; SI 1999/3120; SI 2001/3649; SI 2001/3753; SI 2002/1280; SI 2002/1503; SI 2004/779; SI 2004/3085) (see *PARAS 26 ante, 28 post*).

By virtue of the Interpretation Act 1978 s 17(2)(b), the following orders also have effect as if so made: the Value Added Tax (Treatment of Transactions) Order 1992, SI 1992/630 (which excludes from the scope of VAT the provision of the private use of a motor car by an employer to his employee in circumstances where the employee has a choice between a higher salary and a lower salary together with the use of the car (save to the extent that the employer charges the employee an amount in excess of the differential for the provision of the benefit); the Value Added Tax (Removal of Goods) Order 1992, SI 1992/3111 (amended by the Finance Act 2003 s 153(3)) (which precludes certain removals of goods from one member state to another being treated as supplies of goods by the Value Added Tax Act 1994 Sch 4 para 6 (see *PARAS 20-21 ante*)); the Value Added Tax (Cars) Order 1992, SI 1992/3122 (amended by SI 1995/1269; SI 1995/1667; SI 1997/1615; SI 1998/759; SI 1999/2832; SI 2001/3649; SI 2002/1502; SI 2004/3084) (which excludes from the scope of the tax the disposal of used cars which have been repossessed under a finance agreement or in settlement of a claim under an insurance policy, certain disposals of cars for no consideration and certain hirings and non-business use of motor cars free of charge or for less than full consideration) (see further *PARA 29 post*); and the Value Added Tax (Supply of Temporarily Imported Goods) Order 1992, SI 1992/3130 (which excludes from the scope of VAT supplies of goods held under temporary importation arrangements with total relief from customs duty provided that the goods remain eligible for those importation arrangements and the supply is to a person established outside the member states).

## UPDATE

### 27 Meaning of 'supply'



NOTE 1--See *Revenue and Customs Comrs v Loyalty Management UK Ltd* [2007] EWCA Civ 965, [2008] STC 59; *Spearmint Rhino Ventures (UK) Ltd v Revenue and Customs Comrs* [2007] EWHC 613 (Ch), [2007] STC 1252; *Community Housing Association Ltd v Revenue and Customs Comrs* [2009] EWHC 455 (Ch), [2009] STC 1324.

NOTE 7--SI 1995/958 further amended: SI 2006/2187.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/28. Transactions for which special provision is made.

## **28. Transactions for which special provision is made.**

The transfer of ownership in second-hand goods imported from a place outside the member states<sup>1</sup> with a view to their sale by auction, or in works of art<sup>2</sup> imported from such a place for the purposes of exhibition, with a view to possible sale, at a time when those goods or works of art are still subject to arrangements for temporary importation with total exemption from export duty<sup>3</sup>, is treated as neither a supply<sup>4</sup> of goods nor a supply of services<sup>5</sup>. The provision of any services relating to such a transfer of ownership is similarly so treated<sup>6</sup>.

Each of the following descriptions of transaction is treated as neither a supply of goods nor a supply of services:

- 63 (1) the disposal of any works of art<sup>7</sup>, antiques<sup>8</sup> and collectors' items or second-hand goods<sup>9</sup> which have been repossessed under the terms of a finance agreement<sup>10</sup>;
- 64 (2) the disposal of any such items or goods by an insurer who has taken possession of them in settlement of a claim under a policy of insurance<sup>11</sup>;
- 65 (3) the disposal of a boat or an aircraft by a mortgagee after he has taken possession of it under the terms of a marine mortgage<sup>12</sup> or an aircraft mortgage<sup>13</sup>;
- 66 (4) the assignment by the owner of goods comprised in a hire purchase or conditional sale agreement of his rights and interests under that agreement, and the goods comprised in it, to a bank or other financial institution<sup>14</sup>;
- 67 (5) services provided in connection with a supply of goods by an agent acting in his own name to the purchaser of the goods the consideration<sup>15</sup> for which is taken into account under the margin scheme<sup>16</sup> in calculating the price at which the agent obtained the goods<sup>17</sup>;
- 68 (6) services in connection with the sale of goods provided by an auctioneer<sup>18</sup> acting in his own name to the vendor or the purchaser of the goods the consideration for which is taken into account under the margin scheme<sup>19</sup> in calculating the price at which the auctioneer obtained or sold the goods<sup>20</sup>;
- 69 (7) the removal of goods to the United Kingdom<sup>21</sup> in pursuance of a supply to a person made by a person in another member state<sup>22</sup> where value added tax on that supply is to be accounted for and paid in another member state by reference to the profit margin<sup>23</sup> on that supply<sup>24</sup>.

Such treatment is afforded to transactions falling within one of heads (1) to (3) above only if the goods disposed of are in the same condition at the time of disposal as they were when they were repossessed or taken into possession and a supply of the goods in the United Kingdom made by the person from whom, in each case, they were obtained would not be chargeable with VAT, or would have been chargeable with VAT on less than the full value of the supply<sup>25</sup>. Those heads do not apply to reimported goods which were previously exported from the United Kingdom or the Isle of Man free of VAT<sup>26</sup> or to imported goods which have not borne VAT chargeable<sup>27</sup> in the United Kingdom or the Isle of Man<sup>28</sup>.

The exchange of a reconditioned article for an unserviceable article of a similar kind by a person who regularly offers in the course of his business<sup>29</sup> to provide a reconditioning facility by that means is treated as a supply of services and not as a supply of goods<sup>30</sup>.

1 As to goods imported from a place outside the member states see PARA 113 note 2 post; and as to the territories treated as included in, or excluded from, the territories of the member states for VAT purposes see PARA 16 ante.

2 For the meaning of 'work of art' see PARA 117 note 1 post (definition applied by the Value Added Tax (Treatment of Transactions) Order 1995, SI 1995/958, art 2 (substituted by SI 1999/3119) and the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 2(1) (renumbered by SI 2001/3649; definition 'work of art' substituted by SI 1999/3120)).

3 In accordance with EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) establishing the Community Customs Code, arts 137-141, 144(1).

4 For the meaning of 'supply' see PARA 27 ante.

5 Value Added Tax (Treatment of Transactions) Order 1995, SI 1995/958, art 3(1). Article 3(1), (2) does not apply in relation to any transfer of ownership in second-hand goods which is effected otherwise than by sale by auction: art 3(3).

6 Ibid art 3(2).

7 See note 2 supra.

8 'Antiques' means objects, other than works of art or collectors' items, which are more than 100 years old; and 'collectors' items' means any collection or collector's piece falling within the Value Added Tax Act 1994 s 21(5) (as added and substituted) (see PARA 117 note 3 post) but excluding investment gold coins within the meaning of Sch 9 Pt II Group 15 Note 1(b), (c) (see PARA 164 note 1 post): Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 2(1) (as renumbered: see note 2 supra; definition 'collectors' items' substituted by SI 1999/3120).

9 'Second-hand goods' means tangible movable property that is suitable for further use as it is or after repair, other than motor cars, works of art, collectors' items or antiques and other than precious metals and precious stones: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 2(1) (as renumbered: see note 2 supra). Second-hand goods in this context include second-hand horses and ponies: see Customs and Excise Public Notice 718 *Margin Schemes for Second-hand Goods, Works of Art, Antiques and Collectors' Items* (May 2003) PARA 22. 'Motor car' means any motor vehicle of a kind normally used on public roads which has three or more wheels and either: (1) is constructed or adapted solely or mainly for the carriage of passengers; or (2) has to the rear of the driver's seat roofed accommodation which is fitted with side windows or which is constructed or adapted for the fitting of side windows; but does not include: (a) vehicles capable of accommodating only one person; (b) vehicles which meet the requirements of the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078, Sch 6 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 318 et seq) and are capable of carrying 12 or more seated persons; (c) vehicles of not less than three tonnes unladen weight (as defined in reg 3(2) (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 271); (d) vehicles constructed to carry a payload (the difference between a vehicle's kerb weight (as defined in reg 3(2)) and its maximum gross weight (as so defined)) of one tonne or more; (e) caravans, ambulances and prison vans; and (f) vehicles constructed for a special purpose other than the carriage of persons and having no other accommodation for carrying persons than such as is incidental to that purpose: Value Added Tax Act 1994 Sch 6 para 1A(4), (5) (added by the Finance Act 2004 s 22(1), (2)); Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (definition substituted by SI 1999/2930); Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 2(1) (as so renumbered; definition substituted by SI 1999/2831); Value Added Tax (Cars) Order 1992, SI 1992/3122, art 2(1) (renumbered by SI 2001/3649; definition 'motor car' substituted by SI 1999/2832). See *Withers of Winsford Ltd v Customs and Excise Comrs* [1988] STC 431, following *Customs and Excise Comrs v Mechanical Services (Trailer Engineers) Ltd* [1979] 1 All ER 501, [1979] STC 79, CA (the expression 'any motor vehicle of a kind normally used on public roads', construed as a whole and in its ordinary sense, points to the broad classes of motor vehicles normally used on public roads such as saloon cars, estate cars and sport cars but even if the expression were to be more narrowly construed, continental versions of saloon cars were vehicles which were 'normally used on public roads'); and *Customs and Excise Comrs v Jeynes (t/a Midland International (Hire) Caterers)* [1984] STC 30 (in deciding whether a vehicle is a 'motor car' for these purposes only the physical characteristics of the vehicle need be considered, elements such as the type of vehicle it is registered as being irrelevant). See also Customs and Excise Business Brief 16/04 [2004] STI 1429.

10 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 4(1)(a), (3). 'Finance agreement' means an agreement for the sale of goods whereby the property in those goods is not to be transferred until the whole of the price has been paid and the seller retains the right to repossess the goods: art 2(1) (as renumbered: see note 2 supra); Value Added Tax (Cars) Order 1992, SI 1992/3122, art 2(1) (as renumbered: see note 9 supra).

11 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 4(1)(b), (3).

12 'Marine mortgage' means a mortgage which is registered in accordance with the Merchant Shipping Act 1995 (see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 245 et seq) and by virtue of which a boat, but not any share of it, is made a security for a loan: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 2(1) (as renumbered: see note 2 supra). As to mortgages of ships see MORTGAGE vol 32 (2005 Reissue) PARA 446; SHIPPING AND MARITIME LAW vol 93 (2008) PARA 318 et seq.

13 Ibid art 4(1)(c), (d). 'Aircraft mortgage' means a mortgage which is registered in accordance with the Mortgaging of Aircraft Order 1972, SI 1972/1268 (as amended): Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 2(1) (as renumbered: see note 2 supra). As to mortgages of aircraft see AIR LAW vol 2 (2008) PARAS 431-432; MORTGAGE vol 32 (2005 Reissue) PARA 448.

14 Ibid art 5(4). As to hire purchase and conditional sale agreements generally see CONSUMER CREDIT.

15 For the meaning of 'consideration' generally see PARA 95 post.

16 Ie by virtue of the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(6) (see PARA 203 post).

17 Ibid art 9.

18 'Auctioneer' means a person who sells or offers for sale goods at any public sale where persons become purchasers by competition, being the highest bidders: ibid art 2(1) (as renumbered: see note 2 supra); Value Added Tax (Cars) Order 1992, SI 1992/3122, art 2(1) (as renumbered: see note 9 supra; definition 'auctioneer' added by SI 1995/1269).

19 Ie by virtue of the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(7): see PARA 203 post.

20 Ibid art 10.

21 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

22 For the meaning of 'another member state' see PARA 4 note 15 ante.

23 Ie by virtue of the law of that member state corresponding to the Value Added Tax Act 1994 s 50A (as added) (see PARA 202 post) and any orders made thereunder (see PARAS 203-204 post): Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 7. As to the construction of references to the corresponding law of another member state see PARA 17 ante.

24 Ibid art 8. That a sale of trading stock in the course of a transfer of a business as a going concern is to be treated as neither a supply of goods nor a supply of services (by reason of the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268: see art 5(1)-(3); and PARA 26 ante) is no justification for treating the goods as if they had not been received by the purchaser, and therefore requiring them to be omitted from the computation of 'goods received' under Retail Scheme B: *Customs and Excise Comrs v Co-operative Wholesale Society Ltd* [1995] STC 983, disapproving *Kelly and Kelly v Customs and Excise Comrs* (1989) VAT Decision 4139 (unreported). As to retail schemes see PARAS 199-201 post.

25 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 4(1). Article 4(1) thus envisages that the person from whom the goods were repossessed would either not be a taxable person or would have operated the margin scheme in relation to those goods.

26 Ie free of VAT chargeable under the Value Added Tax Act 1994 or the Value Added Tax Act 1996 (an Act of Tynwald) by reason of the zero-rating provisions of either Act, or regulations made under either Act: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, arts 2(1), 4(2) (art 2(1) as renumbered: see note 2 supra; definition 'the Manx Act' amended by SI 1998/760; Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 4(2) amended by SI 1995/1385).

27 Ie chargeable under either of the Acts mentioned in note 26 supra: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 4(2).

28 Ibid art 4(2) (as amended: see note 26 supra).

29 For the meaning of 'business' see PARA 23 ante.

30 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 6.

## UPDATE

## **28 Transactions for which special provision is made**

NOTE 3--Community Customs Code replaced: Community Customs Code (Modernised Customs Code) found in European Parliament and EC Council Regulation 450/2008 (OJ L145, 4.6.2008, p 1), see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 20-345.

NOTES 5, 6--SI 1995/958 art 3(1), (2) amended: SI 2006/2187.

TEXT AND NOTES 7-10--Head (1) does not apply where adjustment, whether or not made under SI 1995/2518 reg 38 (see PARA 277) has taken account, or may later take account, of VAT on the initial supply under the finance agreement as a result of repossession and the goods delivered under that agreement were delivered on or after 1 September 2006: SI 1995/1268 reg 4(1A) (added by SI 2006/869).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/29. Special provisions relating to motor cars.

## 29. Special provisions relating to motor cars.

Each of the following descriptions of transaction is treated as neither a supply<sup>1</sup> of goods nor a supply of services:

- 70 (1) the disposal of a used motor car<sup>2</sup> by a person who repossessed it under the terms of a finance agreement<sup>3</sup>, where the motor car is in the same condition as it was in when it was repossessed<sup>4</sup>;
- 71 (2) the disposal of a used motor car by an insurer who has taken it in the settlement of a claim under a policy of insurance, where the motor car is disposed of in the same condition as it was in when it was so taken<sup>5</sup>;
- 72 (3) the disposal of a motor car for no consideration<sup>6</sup>;
- 73 (4) services in connection with a supply of a used motor car provided by an agent acting in his own name to the purchaser of the motor car the consideration for which is taken into account under the margin scheme<sup>7</sup> in calculating the price at which the agent sold the motor car<sup>8</sup>;
- 74 (5) services in connection with the sale of a used motor car provided by an auctioneer<sup>9</sup> acting in his own name to the vendor or the purchaser of the motor car the consideration for which is taken into account under the margin scheme in calculating the price at which the auctioneer obtained or sold the motor car<sup>10</sup>;
- 75 (6) a relevant supply of services<sup>11</sup> by a taxable person to whom a motor car has been let on hire or supplied or by whom a motor car has been acquired from another member state<sup>12</sup> or imported<sup>13</sup>.

These provisions do not, however, apply, in relation to a case falling within heads (1) to (3) above, unless the tax on any previous supply, acquisition or importation was wholly excluded from credit<sup>14</sup> as input tax<sup>15</sup>, and do not apply, in relation to a case falling within head (6) above, unless the tax on any previous letting on hire, supply, acquisition or importation was wholly or partly so excluded<sup>16</sup>. Additionally, nothing in heads (1) and (2) above is to be construed as meaning that a transaction is not a supply for the purposes of the statutory provisions<sup>17</sup> relating to the acquisition of goods from another member state<sup>18</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 For the meaning of 'motor car' see PARA 28 note 9 ante.

3 For the meaning of 'finance agreement' see PARA 28 note 10 ante.

4 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 4(1)(a). This provision applies where the person disposing of the used car has gained possession of it in accordance with the terms of the finance agreement, and it makes no difference whether or not the car has been repossessed following a breach by a hirer under the agreement or whether or not the finance company has actively had to exercise a contractual right to take the car back: *Customs and Excise Comrs v General Motors Acceptance Corp'n (UK) plc* [2004] EWHC 192 (Ch), [2004] STC 577. See also Customs and Excise Information Sheet 5/04 [2004] STI 1159.

5 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 4(1)(b).

6 Ibid art 4(1)(c) (amended by SI 1995/1667). For the meaning of 'consideration' generally see PARA 95 post.

7 le by virtue of the Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(6) (see PARA 204 post). Article 4(1)(d) (as added) in fact refers to art 8(8) but it is thought that this must be a drafting error, as art 8 (as originally made) consisted of art 8(1)-(5), and art 8(8) (as now constituted) comprises definitions.

8 Ibid art 4(1)(d) (art 4(1)(d), (e) added by SI 1995/1269).

9 For the meaning of 'auctioneer' see PARA 28 note 18 ante.

10 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 4(1)(e) (as added: see note 8 supra). Article 4(1)(e) (as added) refers to the consideration being taken into account by virtue of art 8(9), but it is thought that this is a drafting error: see note 7 supra. The correct reference would appear to be to art 8(7) (as substituted and amended): see PARA 204 post.

11 For these purposes, a relevant supply of services is: (1) the letting on hire of a motor car to any person for no consideration or for a consideration which is less than that which would be payable in money if it were a commercial transaction conducted at arm's length; or (2) the making available of a motor car, otherwise than by letting it on hire, to any person (including, where the taxable person is an individual, himself, and where the taxable person is a partnership, a partner) for private use, whether or not for a consideration: ibid art 4(1C) (art 4(1) amended, art 4(1)(f), (1A)-(1C) added, by SI 1995/1667). For the meaning of 'taxable person' see PARA 63 post.

12 For the meaning of 'another member state' see PARA 4 note 15 ante.

13 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 4(1)(f) (as added: see note 11 supra).

14 le excluded from credit under the Value Added Tax Act 1994 s 25 (see PARA 216 post).

15 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 4(1), (1A) (art 4(1) as amended, art 4(1A) as added: see note 11 supra). For the meaning of 'input tax' see PARAS 4 ante, 215 post.

16 Ibid art 4(1), (1B) (art 4(1) as amended, art 4(1B) as added: see note 11 supra).

17 le for the purposes of the Value Added Tax Act 1994 s 11(1)(a): see PARA 19 ante.

18 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 4(2) (amended by SI 1995/1269).

## UPDATE

### 29 Special provisions relating to motor cars

TEXT AND NOTES 2-4--Head (1) does not apply where adjustment, whether or not made under SI 1995/2518 reg 38 (see PARA 277) has taken account, or may later take account, of VAT on the initial supply under the finance agreement as a result of repossession and the motor car delivered under that agreement were delivered on or after 1 September 2006: SI 1992/3122 reg 4(1AA) (added by SI 2006/874).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/30. Deemed supplies.

### **30. Deemed supplies.**

Certain supplies of services are required by statute to be treated as supplies of goods<sup>1</sup> and vice versa. In addition, some activities which would not otherwise involve any supply for VAT purposes (for example because not made for a consideration) are treated as a supply of goods or, in some instances, as a supply of services<sup>2</sup>.

Any transfer of the whole property in goods<sup>3</sup> is a supply of goods<sup>4</sup>, but the transfer of an undivided share of the property in goods or of the possession of goods (for example the letting of goods on hire, or the lending of goods) is treated as a supply of services<sup>5</sup>. If, however, the possession of goods is transferred under an agreement for their sale or under an agreement which expressly contemplates that property in the goods will also pass at some time in the future (determined by, or ascertainable from, the agreement but in any case no later than the time when the goods are fully paid for) then this is a supply of goods<sup>6</sup>. The grant, assignment or surrender of a major interest in land is treated as a supply of goods<sup>7</sup>.

Where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, and whether or not for a consideration, that is a supply of goods by that person<sup>8</sup> in the course or furtherance of his business<sup>9</sup>. Exceptions are made for small business gifts<sup>10</sup> and gifts of samples<sup>11</sup>. Where goods held or used for the purposes of a business are, by or under the direction of the person carrying on the business, put to any private use or used, or made available to any person for use, for any purpose other than a purpose of the business, that is a supply of services in the course or furtherance of the business<sup>12</sup>. These rules do not require anything which a person carrying on a business does otherwise than for a consideration in relation to any goods to be treated as a supply except in a case where that person or any of his predecessors<sup>13</sup> is a person who, disregarding these provisions, has or will become entitled<sup>14</sup> either to credit for the whole or any part of the VAT charged on the supply, acquisition or importation of those goods or of anything comprised in them<sup>15</sup> or to a repayment<sup>16</sup> of VAT on the supply or importation of those goods or of anything comprised in them<sup>17</sup>.

The removal of goods forming part of the assets of a business from one member state to another member state, by or under the directions of the trader, is treated as a supply of goods if it would not otherwise have so been treated<sup>18</sup>.

Where goods forming part of the assets of a business carried on by a taxable person<sup>19</sup> are sold by another under a power exercisable by him, in or towards satisfaction of a debt owed by the taxable person, they are deemed to be supplied by the taxable person in the course or furtherance of that business<sup>20</sup>.

Where a person ceases to be a taxable person, any goods then forming part of the assets of a business carried on by him are deemed to be supplied by him in the course of that business immediately before he ceases to be a taxable person<sup>21</sup> unless:

- 76 (1) the business is transferred as a going concern to another taxable person<sup>22</sup>;
- 77 (2) the business is carried on by another person who is treated under regulations made by the Commissioners for Her Majesty's Revenue and Customs as a taxable person<sup>23</sup>; or
- 78 (3) the VAT on the deemed supply would be no more than £1,000<sup>24</sup>.



The charge is not, however, so imposed on any goods in the case of which the taxable person can show to the Commissioners' satisfaction that no credit for input tax<sup>25</sup> has been allowed<sup>26</sup> to him<sup>27</sup>, that the goods did not become his as part of the assets of a business which was transferred to him as a going concern by another taxable person<sup>28</sup> and that he has not obtained transitional relief<sup>29</sup> in respect of the goods<sup>30</sup>.

The Treasury may by order<sup>31</sup> make provision for securing, with respect to services of any description specified in the order, that where a person carrying on a business does anything which is not a supply of services but would, if done for a consideration, be a supply of services of a description specified in the order<sup>32</sup>, and such other conditions as may be specified in the order are satisfied<sup>33</sup>, those services are treated as being supplied by him in the course or furtherance of the business<sup>34</sup>. Where a person carrying on a business puts services which have been supplied to him<sup>35</sup> to any private use, or uses or makes them available to any person for use, for a purpose other than a purpose of his business, he is treated (except for the purposes of determining whether tax on the supply of the services to him is input tax of his<sup>36</sup>) as supplying the services in the course or furtherance of his business<sup>37</sup>. No supply is, however, deemed to be so made in respect of any services:

- 79 (a) which are used or made available for a consideration<sup>38</sup>;
- 80 (b) other than those in respect of which the person carrying on the business has or will become entitled to credit<sup>39</sup> for the whole or any part of the input tax on their supply to him<sup>40</sup>;
- 81 (c) in respect of which any part of the tax on their supply to the person carrying on the business was not counted, by virtue of an apportionment<sup>41</sup>, as being input tax<sup>42</sup>;
- 82 (d) which are catering or accommodation services supplied by an employer<sup>43</sup> to his employees<sup>44</sup>; or
- 83 (e) consisting of the letting on hire of a motor car<sup>45</sup> where one half of the input tax on that letting on hire was excluded<sup>46</sup> from credit<sup>47</sup>.

1 Thus the supply of any form of power, heat, refrigeration or ventilation is treated as a supply of goods: Value Added Tax Act 1994 s 5(1), Sch 4 para 3. See also Case C-393/92 *Municipality of Almelo v NV Energiebedrijf IJsselmij* [1994] ECR I-1477 at 1516, ECJ (electricity goods, not a service). As to the taxation of domestic fuel supplies see PARA 7 ante. For the meaning of 'supply' see PARA 27 ante.

2 See eg the Value Added Tax Act 1994 Sch 4 para 5(1); and the text and note 8 infra.

3 There is no statutory definition of 'goods' for these purposes; but they are assumed to be restricted to tangible movable property. Supplies of intangible property and of choses in action, such as shares, copyright, patents and trademarks, will be supplies of services: see *ibid* s 8(2), Sch 5 para 1, which assumes that transfers and assignments of such rights are supplies of services. Supplies of land are separately dealt with by Sch 4 para 4: see the text to note 7 infra. The issue of, or dealing in, commercial paper is treated as a supply of services: Customs and Excise Business Brief 11/91 [1991] STI 757. The provision of a telephone card enabling the purchaser to make telephone calls is a supply of services; even if the purchaser is only interested in collecting the card and not in using the units contained in the card, there is still a supply of services, not goods; what is important is the nature of the transaction and not the state of mind of the parties to the transaction: *Farrow v Customs and Excise Comrs* (1993) VAT Decision 10612, [1993] STI 1188. If A is paid by B to supply goods to C, there is no supply of goods by A to B unless B (at least briefly) obtains a proprietary right in the goods supplied: *Customs and Excise Comrs v Sooner Foods Ltd* [1983] STC 376 at 380-381, ECJ; *British Airways plc v Customs and Excise Comrs* [1996] STC 1127. As to whether the supply of restaurant meals (in contrast to the supply of take-away food) is a supply of goods or services see Case C-231/94 *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] All ER (EC) 656, [1996] STC 774, ECJ. Accordingly, B cannot claim an input tax deduction for the VAT charged on the supply. Cf the position with supplies of services: *P & O European Ferries (Dover) Ltd v Customs and Excise Comrs* [1992] VATTR 221; *lbstock Building Products Ltd v Customs and Excise Comrs* [1987] VATTR 1. Consider also *Philips Exports Ltd v Customs and Excise Comrs* [1990] STC 508n (there can be a supply of goods by A to B where property is transferred from A to B and instantaneously is sold on to C by A as B's agent). There is no need for the legal title to property to pass for there to be a supply of goods, it is sufficient if the purchaser obtains the power to dispose of the goods as if he were owner: Case C-320/88 *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV* [1990] ECR I-285, [1991] STC 627, ECJ. See also the cases noted to para 27 ante.

4 Value Added Tax Act 1994 Sch 4 para 1(1).

5 Ibid Sch 4 para 1(1)(a), (b).

6 Ibid Sch 4 para 1(2). See *Tas-Stage Ltd v Customs and Excise Comrs* [1988] STC 436.

7 Value Added Tax Act 1994 Sch 4 para 4. For the meaning of 'major interest' in relation to land see PARA 12 note 9 ante. This does not mean that land is treated as goods for the purposes of VAT but only that supplies of land are treated as supplies of goods: it is for this reason necessary to make specific provision for the application of Sch 4 paras 5-8 (as amended) (see the text and notes 8-31 infra) to land. Schedule 4 paras 5-8 (as amended) have effect in relation to land forming part of the assets of, or held or used for the purposes of, a business as if it were goods forming part of those assets, or held or used for those purposes (Sch 4 para 9(1)); and in their application by virtue of this provision, references to transfer, disposition or sale have effect as references to the grant or assignment of any interest in, right over or licence to occupy the land concerned (Sch 4 para 9(2)). See also Sch 4 para 9(3) (cited in note 8 infra). A 'time-share' grant of the right to occupy a holiday cottage for one specific week each year for 80 years did not amount to the grant of a major interest in land: *Cottage Holiday Associates Ltd v Customs and Excise Comrs* [1983] QB 735, [1983] STC 278.

8 Value Added Tax Act 1994 Sch 4 para 5(1). For an interesting case where the taxpayer was arguing for the application of Sch 4 para 5(1) (because the goods were magazines, whose supply would be zero-rated, enabling the partially exempt trader a greater input tax recovery rate) see *Post Office v Customs and Excise Comrs* (1996) VAT Decision 14075, [1996] STI 1215. See also *Church of England Children's Society v Customs and Excise Comrs* [2005] EWHC 1692 (Ch), [2005] STC 1644 (no reason not to treat as a supply, to its fullest extent, a disposal of goods made otherwise than for a consideration where the original input tax had been restricted because it had not been possible to attribute the input costs to an output transaction: once an output transaction has been identified, as the Value Added Tax Act 1994 Sch 4 para 5(1) requires, it is merely a question of identifying the input costs relating to the deemed supply).

In the case of a business carried on by an individual, Sch 4 para 5(1) applies to any transfer or disposition of goods in favour of himself personally: Sch 4 para 5(6)(a). Since a disposal which falls within Sch 4 para 5(1) must be at the direction of the trader, goods which are stolen are not the subject of a supply for VAT purposes. The value of the supply is determined by s 19(1), Sch 6 para 6 (see PARA 100 post); but if the parties are 'connected' and the recipient would be unable to recover all the VAT on the supply, the Commissioners for Her Majesty's Revenue and Customs are entitled to direct that the supply be treated as having taken place at the open market value of the goods (see Sch 6 para 1; and PARA 96 post). Special rules apply to interests in land: in cases where Sch 4 para 5(1) applies to land forming part of the assets of a business, the supply is treated as one of services and not of goods unless the transaction involves either the grant or assignment of a major interest in land or a grant or assignment otherwise than for a consideration: Sch 4 para 9(3). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

9 Ibid Sch 4 para 5(6). As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante. The distribution of prospectuses by a college was deemed to be a disposal of assets forming part of the assets of the business: see *Customs and Excise Comrs v West Herts College* [2001] STC 1245.

10 Is a business gift the cost of which, together with the cost of any other business gifts made to the same person in the same year, was not more than £50: Value Added Tax Act 1994 Sch 4 para 5(2)(a) (substituted by the Finance Act 2003 s 21(1)-(3)). The Treasury may by order substitute for the sum for the time being so specified such sum, not being less than £10, as it thinks fit: Value Added Tax Act 1994 Sch 4 para 5(7) (added by the Finance Act 1996 s 33(2)). For these purposes, 'business gift' means a gift of goods that is made in the course or furtherance of the business in question; 'cost', in relation to a gift of goods, means the cost to the donor of acquiring or, as the case may be, producing the goods; and 'the same year', in relation to a gift, means any period of 12 months that includes the day on which the gift is made: Value Added Tax Act 1994 Sch 4 para 5(2ZA) (added by the Finance Act 2003 s 21(1)-(3)). As to the meaning of 'gift' in these circumstances see *GUS Merchandise Corp Ltd v Customs and Excise Comrs* [1981] 1 WLR 1309, [1981] STC 569, CA (articles of low value, supplied by a mail order company as inducements to persons to become 'agents', otherwise than in circumstances demonstrating an absence of intention to create legal relations, were not gifts within what is now the Value Added Tax Act 1994 Sch 4 para 5(2)(a) (as substituted)); Case C-33/93 *Empire Stores Ltd v Customs and Excise Comrs* [1994] 3 All ER 90, [1994] STC 623, ECJ (where inducements of low value were provided by a mail order company in return for persons introducing themselves or their friends to the company, the supplies were taxable transactions within EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 5(6), the taxable amount of which was the price paid by the company for the articles given). As to the meaning of, and the determination of the value of, consideration for VAT purposes see PARA 95 et seq post. An exception is made for certain supplies of goods (and services: see the text to note 12 infra) made by an employer in favour of his employees, where the supplies consist in the provision either of accommodation in an hotel, inn, boarding house or similar establishment or, in the course of catering, of food or beverages: see the Value Added Tax Act 1994 Sch 6 para 10; Case C-412/03 *Hotel Scandic Gåsabäck AB v Riksskatteverket* [2005] STC 1311, ECJ; and PARA 102 post. See

also *Goodfellow v Customs and Excise Comrs* [1986] VATTR 119 (hotel employees were engaged at the minimum rates of pay then permissible in the hotel sector, as determined by reference to a former Wages Council Order which specified a rate varied according to whether the employee was provided with board and lodgings; there was no agreement to provide the board and lodgings for a monetary consideration, so that the value of the supply was nil, in accordance with the Value Added Tax Act 1994 Sch 6 para 10). As to the Sixth Directive see PARA 1 note 1 ante.

For the purposes of determining the cost to the donor of acquiring or producing goods of which he has made a gift, where the acquisition by the donor of the goods, or anything comprised in the goods, was by means of a transfer of a business, or a part of a business, as a going concern, the assets transferred by that transfer included those goods or that thing, and the transfer of those assets is one falling by virtue of an order under the Value Added Tax Act 1994 s 5(3) (or under an enactment re-enacted in s 5(3)) (see PARA 27 ante) to be treated as neither a supply of goods nor a supply of services, the donor and his predecessor or, as the case may be, all of his predecessors are to be treated as if they were the same person: Sch 4 para 5(2A) (added by the Finance Act 1998 s 21(3)).

11 Value Added Tax Act 1994 Sch 4 para 5(2)(b). Where, however, a person is given a number of samples by the same person, whether all on one occasion or on different occasions, and those samples are identical or do not differ in any material respect from each other, the exception is available for one only or, as the case may be, the first to be given only: see Sch 4 para 5(3).

12 Ibid Sch 4 para 5(4), (6). This applies whether or not consideration is given: Sch 4 para 5(4). Schedule 4 para 5(4) applies to goods used, or made available for use, by the individual carrying on the business personally (Sch 4 para 5(6)(b) (amended by the Finance Act 1995 s 33(1), (3))), but does not apply, notwithstanding Sch 4 para 9(1) (see the text and note 7 supra) to any interest in land, any building or part of a building, any civil engineering work or part of such a work, or any goods incorporated or to be incorporated in a building or civil engineering work (whether by being installed as fixtures or fittings or otherwise) (Sch 4 para 5(4A) (added by the Finance Act 2003 s 22(1))). If the supply takes place otherwise than for consideration, it is treated as having a value equal to the full cost to the taxable person of providing the services: Value Added Tax Act 1994 Sch 6 para 7(b) (amended by the Finance Act 1995 s 33(3)(b)). Where consideration is given, that consideration is used as the value of the supply unless the supply is between connected persons, when the Value Added Tax Act 1994 Sch 6 para 1 may apply: see note 8 supra. There is an exception for the provision of certain supplies of services by an employer to his employee: see note 10 supra. See also the Value Added Tax (Treatment of Transactions) Order 1992, SI 1992/630; and PARA 27 note 7 ante. There is substantial difficulty as to the interaction of the Value Added Tax Act 1994 s 24(5) (see PARA 215 note 13 post) with Sch 4 para 5(4).

13 In relation to any goods or anything comprised in any goods, a person is the predecessor of another for these purposes if that other person is a person to whom he has transferred assets of his business by a transfer of that business, or a part of it, as a going concern, those assets consisted of or included those goods or that thing, and the transfer of the assets is one falling by virtue of an order under *ibid* s 5(3) (or under an enactment re-enacted in s 5(3)) (see PARA 27 ante) to be treated as neither a supply of goods nor a supply of services, and references in Sch 4 para 5 (as amended) to a person's predecessors include references to the predecessors of his predecessors through any number of transfers: Sch 4 para 5(5A) (added by the Finance Act 1998 s 21(5)).

14 *Ie* under the Value Added Tax Act 1994 s 25 or s 26: see PARAS 216-217 post.

15 Ibid Sch 4 para 5(5)(a) (Sch 4 para 5(5) amended by the Finance Act 1995 s 33(1), (3) and by the Finance Act 1998 s 21(4); the Value Added Tax Act 1994 Sch 4 para 5(5)(a), (b) substituted by the Finance Act 2003 s 136(9)). This accords with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 5(7) (supplies of goods), art 6(2)(a) (supplies of services), which require non-business transactions in, and use of, goods to be treated as supplies for the purposes of VAT in cases where the VAT on the goods was wholly or partly recoverable by the taxable person. Accordingly, where a trader bought a second-hand car from a private individual (which was considered to carry with it residual VAT from its initial purchase in the second-hand sale price) and was, in accordance with the German turnover tax law, unable to recover the residual VAT, art 6(2)(a) precluded an output tax charge on the private use made by him of the car: Case 50/88 *Kühne v Finanzamt München III* [1989] ECR 1925, [1990] STC 749, ECJ (applied in Case C-155/01 *Cookies World Vertriebsgesellschaft mbH iL v Finanzlandesdirektion für Tirol* [2004] 2 CMLR 215, ECJ (Austrian law which taxed charge for car leased from abroad where foreign input tax refundable was contrary to Directive 77/388 (OJ L145, 13.6.77, p 1) art 6(2))).

16 *Ie* under a scheme embodied in regulations made under the Value Added Tax Act 1994 s 39 (see PARA 308 post).

17 Ibid Sch 4 para 5(5)(b) (as substituted: see note 15 supra).

18 See *ibid* Sch 4 para 6; and PARA 21 ante. This provision has to be read in conjunction with the provisions relating to the place of supply of goods (*ie* s 7 (as amended): see PARAS 45-50 post) and those dealing with the acquisition of goods from another member state (*ie* ss 10, 11: see PARA 19 ante) and is concerned with the case where a trader, having claimed credit for input tax on the purchase of goods, subsequently takes them outside the scope of United Kingdom VAT law, by exporting the goods from the United Kingdom before their sale. A

trader is liable for United Kingdom VAT only on supplies of goods or services made in the United Kingdom (see s 4; and PARA 18 ante); and would pay tax on goods sold elsewhere in the EC only if he were liable to VAT in the member state to which the goods were taken. This principle offers a potential method of avoiding VAT which is obviated by the provisions of Sch 4 para 6, which ensures that a taxable supply is made on removal. The value of the supply is determined by Sch 6 para 6: see PARA 100 post. Certain exceptions to the notional supply are made by the Value Added Tax (Removal of Goods) Order 1992, SI 1992/3111: see PARA 21 ante. By virtue of the Value Added Tax Act 1994 s 30(8) (see PARA 192 post), a removal of goods to another member state will be zero-rated provided that the Commissioners are satisfied both that the goods have been removed from the United Kingdom and that they will have been the subject of a taxable acquisition in another member state by the exporter or another; the consequence is that no charge to VAT will be imposed on the trader removing goods to another part of the EU provided that corresponding VAT provisions will operate on him in the member state which is the destination of the goods. It should also be noted that the Value Added Tax Act 1994 does not provide for a notional supply where goods are removed to a place outside the EU because sales of goods which are to be exported from the EU are zero-rated: see further PARA 192 et seq post.

19 For the meaning of 'taxable person' see PARA 63 post.

20 Value Added Tax Act 1994 Sch 4 para 7. The sale under a forced sale by a sheriff's officer or county court bailiff is thus deemed to be a supply made by the taxable person in the course or furtherance of his business. The provisions made by regulations under s 58, Sch 11 para 2 (as amended) (see PARA 245 post) for cases where goods are treated as supplied by a taxable person by virtue of Sch 4 para 7 may require VAT chargeable on the supply to be accounted for and paid, and particulars of it to be provided, by such other person and in such manner as may be specified in the regulations: Sch 11 para 2(12). As to the information required by the Commissioners from the person effecting the sale see the Value Added Tax Regulations 1995, SI 1995/2518, reg 27; and PARA 278 post.

21 The provisions of the Value Added Tax Act 1994 Sch 4 para 8(1) (as amended) (see the text and notes 22-24 infra) do not have the effect of creating a self-supply: see *Haugh v Customs and Excise Comrs* (1997) VAT Decision 15055, [1997] STI 1278.

22 Value Added Tax Act 1994 Sch 4 para 8(1)(a). The notional supply is treated as made not only when a person ceases trading but also when he deregisters. As to registration see PARA 64 et seq post. However, there is no notional supply of goods on a person deregistering on obtaining certification within the flat-rate scheme for farmers (see PARA 88 et seq post): see Sch 4 para 8(3). Sch 6 para 6 applies to determine the value of the notional supply under Sch 4 para 8 (as amended): see note 8 supra. As to transfers of businesses as going concerns see PARA 210 post; and as to the termination and transfer of businesses see PARA 26 ante.

23 Ibid Sch 4 para 8(1)(b). The regulations in question are made under s 46(4), which relates to persons who carry on a business of a taxable person who has died or become bankrupt or incapacitated: see PARA 79 post.

24 Ibid Sch 4 para 8(1)(c) (amended by the Value Added Tax (Deemed Supply of Goods) Order 2000, SI 2000/266, art 2, pursuant to the power of the Treasury by order to increase or further increase the specified sum (Value Added Tax Act 1994 Sch 4 para 8(4))). As to the making of orders generally see PARA 14 ante.

25 For the meaning of 'input tax' see PARAS 4 ante, 215 post.

26 Ie in respect of the supply of the goods, their acquisition from another member state or their importation from a place outside a member state: Value Added Tax Act 1994 Sch 4 para 8(2)(a). As to credits for input tax see PARA 274 post.

27 Ibid Sch 4 para 8(2)(a).

28 Ibid Sch 4 para 8(2)(b).

29 Ie under the Finance Act 1973 s 4 (repealed) (relief for tax- or duty-paid stock at the commencement of VAT).

30 Value Added Tax Act 1994 Sch 4 para 8(2)(c).

31 Such an order may provide for the method by which the value of any supply of services which is treated as taking place by virtue of the order is to be calculated: ibid s 5(8). At the date at which this volume states the law, no such order had been made; but by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507 (as amended) (see the text and notes 35-47 infra) has effect as if so made.

32 Value Added Tax Act 1994 s 5(4)(a).

33 Ibid s 5(4)(b).

34 Ibid s 5(4).

35 For the purposes of the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507 (as amended), references to services supplied to a person include references to supplies of a major interest in land, any building or part of a building, any civil engineering work or part of such a work, or any goods incorporated or to be incorporated in a building or civil engineering work (whether by being installed as fixtures or fittings or otherwise): art 3A (arts 3A, 3B added by SI 2003/1055). Where the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 3 (as amended) applies in relation to supplies of goods falling within art 3A (as added), the person is treated as supplying a service of making the goods available, and the other articles of the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507 (as amended) apply with appropriate modifications: art 3B (as so added).

36 Ie under the Value Added Tax Act 1994 s 24 (as amended) (see PARA 215 post).

37 Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 3 (amended by SI 1995/1668; SI 2003/1055). In the case of a business carried on by an individual, these provisions apply to services used, or made available for use, by himself personally: Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 4. The value of the supply which a person is so treated as making is taken to be such part of the value of the supply of the services to him as fairly and reasonably represents the cost to him of providing the services: art 5. Where there is only minor or occasional non-business use of the services, the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507 (as amended) can be ignored; and in other cases the value of the supply can be calculated, if the taxpayer so wishes, by using his normal accounting convention for depreciating assets: see Customs and Excise Business Brief 17/94 [1994] STI 1156 at 1157. Nothing in the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507 (as amended) is to be construed as making any person liable for any tax which, taken together with any tax for which he was liable as a result of a previous supply of the same services which he was treated as making by virtue thereof, would exceed the amount of input tax for which he has or will become entitled to credit under the Value Added Tax Act 1994 ss 25, 26 (see PARAS 216-218 post) in respect of the services used, or made available for use, by him; and, where the tax chargeable would otherwise exceed the amount of that credit, he is not to be treated as making a supply of the services where the amount of that credit has already been equalled or exceeded and in any other case, the value of the supply is to be reduced accordingly: Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 7 (amended by SI 1998/762). Where there is a supply of any of the assets of a business of a person ('the transferor') to a person to whom the whole or any part of that business is transferred as a going concern ('the transferee'), and that supply is treated in accordance with an Order made under the Value Added Tax Act 1994 s 5(3) (or under an enactment re-enacted in s 5(3)) (see PARA 27 ante) as being neither a supply of goods nor a supply of services, the liability of the transferee to tax in accordance with the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, arts 5, 6(b) (as amended) (see the text and notes 39-40 infra), art 7 (as amended), is to be determined as if the transferor and the transferee were the same person: art 8(a), (b) (added by SI 1998/672). Where a transferor has himself acquired any assets by way of a supply falling within the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 8 (as added), that article has the effect of requiring the person from whom those assets were acquired to be treated for the purposes of determining the liability of the transferee to tax in accordance with arts 5, 6(b), 7 (as amended) as the same person as the transferor and the transferee, and so on in the case of any number of successive supplies falling within art 8 (as added): art 9 (added by SI 1998/672).

38 Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 6(a).

39 Ie under the Value Added Tax Act 1994 ss 25, 26: see PARAS 216-218 post.

40 Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 6(b) (amended by SI 1995/1668; SI 1998/762).

41 Ie under the Value Added Tax Act 1994 s 24(5): see PARA 215 post.

42 Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 6(c) (amended by SI 1995/1668).

43 Ie the services fall within the Value Added Tax Act 1994 s 19(1), Sch 6 para 10: see note 10 supra; and PARA 102 post.

44 Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 6(d) (amended by SI 1995/1668).

45 For these purposes, 'motor car' has the same meaning as in the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (as amended) (see PARA 28 note 9 ante): Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 6A(2) (art 6A added by SI 1995/1668).

46 Ie under the Value Added Tax Act 1994 s 5 by virtue of the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7 (as amended): see PARA 223 post.

47 Value Added Tax (Supply of Services) Order 1993, SI 1993/1507, art 6A(1) (as added: see note 45 supra).

## **UPDATE**

### **30 Deemed supplies**

NOTE 8--In the Value Added Tax Act 1994 Sch 4 para 9 'grant' includes surrender: Sch 4 para 9(4) (added by Finance Act 2007 s 99(3)).

NOTES 10, 15--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

NOTE 12--The Value Added Tax Act 1994 Sch 4 para 5(4) does not apply to goods (including land treated as goods for these purposes by Sch 4 para 9) which have no economic life for the purposes of SI 1995/2518 Pt 15A (paras 116A-116N) (see PARA 237A) at the time when they are used or made available for use: SI 1995/1268 art 10A (added by SI 2007/2923). Value Added Tax Act 1994 Sch 4 para 5(4A) repealed: Finance Act 2007 s 99(2), Sch 27 Pt 6(1).

NOTE 28--'Business' now includes part of a business: Value Added Tax Act 1994 Sch 4 para 8(2)(b) (amended by Finance Act 2007 s 100(9)).

NOTE 35--SI 1993/1507 arts 3A, 3B revoked: SI 2007/2173.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/31. Composite and separate supplies.

### 31. Composite and separate supplies.

When the goods or services provided under a contract consist of a number of different elements, it is a question of law<sup>1</sup>, to be determined objectively<sup>2</sup>, whether the supplier has made a single supply or a number of separate supplies. The distinction is of significance only where the different elements would, if separately supplied, be subject to value added tax at different rates<sup>3</sup>; where the transaction is treated as involving a composite supply the court is obliged to determine the liability of that supply to VAT<sup>4</sup>. The question to be asked in determining whether there has been a single supply or several supplies has been identified as being whether the supply of one item in the transaction is incidental to, or an integral part of, the supply of the other<sup>5</sup>.

1 *British Railways Board v Customs and Excise Comrs* [1977] 2 All ER 873 at 875-876, [1977] 1 WLR 588 at 591, CA, per Lord Denning MR and at 879 and 595 per Browne LJ (provision, against payment, of rail card, entitling holder to reduced price travel, was part of a single zero-rated supply of transport services); on a similar issue in relation to the purchase of discount cards to buy children's clothing at a reduced price see *Mothercare (UK) Ltd v Customs and Excise Comrs* [1993] VATTR 391. The role of the court is to ensure that what, from an economic point of view, is in reality a single service should not be artificially split (see *Card Protection Plan Ltd v Customs and Excise Comrs* [2001] UKHL 4, [2001] 2 All ER 143), pursuant to which the essential features of the transaction have to be ascertained and regard has to be had to all the circumstances in which the transaction took place (Case C-349/96 *Card Protection Plan Ltd v Customs and Excise Comrs* [1999] All ER (EC) 339, ECJ). See also *College of Estate Management v Customs and Excise Comrs* [2005] UKHL 62, [2005] STC 1597 (supply of the printed material for distance learning by an educational institution was not a separate supply of goods dissociable from the exempt supply of the educational services provided by that institution); and *Gambro Hospital Ltd v Customs and Excise Comrs* [2004] BVC 2191, Vat and Duties Tribunal (where courses of dialysis services were supplied on a fixed-fee basis to an NHS trust, each patient's treatment constituted a single composite supply).

2 See *British Airways plc v Customs and Excise Comrs* [1990] STC 643, CA (decision as to whether in-flight catering an integral part of zero-rated supply of transport to be made objectively); *College of Estate Management v Customs and Excise Comrs* [2005] UKHL 62, [2005] STC 1597 (importance of first-hand evidence in making determinations).

3 Inevitably, one or other party will be seeking to establish that the whole, or part, of the supply is within the scope of zero-rating or an exemption. The general principle for VAT is that supplies of goods or services effected for consideration are to be subject to VAT and that any exemption given by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 13 (see PARA 155 post) is to be interpreted strictly: Case 348/87 *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* [1989] ECR 1737, [1991] 2 CMLR 429, ECJ. It would seem to follow, therefore, that general principles favour separation of supplies, at least in cases where the composite supply would otherwise be exempt or zero-rated (since that which would be standard-rated if supplied alone is thereby subsumed in a larger exempt transaction). For this reason, in Case 416/85 *EC Commission v United Kingdom* [1990] 2 QB 130, [1988] ECR 3127, ECJ, it was held that EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(c) covered only the provision of medical care in the exercise of the medical and paramedical professions and that it excluded the supply of goods, as defined in art 5, without prejudice to minor provisions of goods which were indissociable from the service provided (so that the dispensing of spectacles in the course of the provision of the services of an ophthalmic optician could not be treated as exempt: see also *Customs and Excise Comrs v Leightons Ltd*, *Customs and Excise Comrs v Eye-Tech Opticians (No 1)* and *Eye-Tech Opticians (No 2)* [1995] STC 458 (the supply of the dispensing services of an optician was not integral to the standard-rated supply of spectacles)). While the European Court of Justice has maintained this line (see eg Case C-141/00 *Ambulanter Pflegedienst Kugler GmbH v Finanzamt Für Körperschaften I In Berlin* [2004] 3 CMLR 1175), recent domestic decisions would appear to cast doubt on these general principles: see eg *Customs and Excise Comrs v Wellington Private Hospital Ltd* [1997] STC 445, CA (the supply of drugs and prostheses in connection with the treatment in hospital of a patient were essential (rather than ancillary) to the patient's treatment and accordingly constituted separate supplies of goods for VAT purposes) and *Beynon & Partners v Customs and Excise Comrs* [2004] UKHL 53, [2004] 4 All ER 1091 (the correct approach in deciding whether the provision of

medical services and the supply of eg drugs pursuant to those services is to regard the transaction as the patient's visit to the doctor for treatment, on which view the correct classification of the personal administration of a drug to a patient is that it is a single supply of medical services). See also *Telewest Communications plc v Customs and Excise Comrs* [2005] EWCA Civ 102, [2005] STC 481 (supply of television services and an accompanying magazine as part of single subscription package was separate supplies for VAT purposes). The (otherwise taxable) letting of premises and sites for parking is not to be excepted from the exemption for the letting of immovable property in EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b) where such lettings are 'closely linked to the letting of immovable property to be used for another purposes, such as residential or commercial property, which are themselves exempt from VAT': Case 173/88 *Skatteministeriet v Henriksen* [1989] ECR 2763, [1990] STC 768, ECJ. See also Customs and Excise Business Brief 13/96 [1996] STI 1200 on composite supplies by hairdressing salons to individual stylists. As to the Sixth Directive see PARA 1 note 1 ante.

4 The issue of single or multiple supplies has been further considered in: *Customs and Excise Comrs v Automobile Association* [1974] 1 All ER 1257, [1974] 1 WLR 1447, DC (subscriptions to clubs entitling members to separate supplies of: (1) benefit of membership (standard-rated); and (2) books and magazines (zero-rated)); *Trewby v Customs and Excise Comrs* [1976] 2 All ER 199, [1976] 1 WLR 932, DC (standard-rated membership of Hurlingham Club did not involve any separate exempt supply of an undivided share in land); *Customs and Excise Comrs v Guy Butler (International) Ltd* [1977] QB 377, [1976] 2 All ER 700, CA (supply of services by money broker of making arrangements for a loan against the issue of a certificate of deposit was a single supply notwithstanding that the broker received payment for its services from both parties); *British Airports Authority v Customs and Excise Comrs* [1977] 1 All ER 497, [1977] 1 WLR 302, CA (agreement to permit a retailer to occupy a site at an airport did not also involve a separate supply of the right to sell from the site); *Customs and Excise Comrs v Scott* [1978] STC 191 (no separate zero-rated supply of feed (grass) when transaction was 'the entire transaction of keeping a horse'); *Customs and Excise Comrs v Bushby* [1979] STC 8 (no separate zero-rated supply of feed where taxpayers supplied stud services to clients, notwithstanding an itemised bill); *Spigot Lodge Ltd v Customs and Excise Comrs* [1985] STC 255 (where S supplied service of training racehorses to R, who provided S with the feed for his own horse and others trained by S, and only charged for the feed supplied by S to others, there was no composite supply by S in respect of the training and feeding of R's horses). Where a transaction involves a principal, dominant or core element taxable at one rate and one or more ancillary elements which are taxable at another, the rate applicable to the principal element normally prevails and is ascribed also to the ancillaries: however, this rule is not general and was not applied where a company supplied static, ready-equipped caravans and sought to apply the zero-rate (undisputedly appropriate to the supply of the caravan as such) to the supply of removable equipment (invoiced separately to the company and correctly standard-rated on that invoice); the supply of the caravan was treated as separate from that of the removable equipment, which remained standard-rated: *Talacre Beach Caravan Sales Ltd v Customs and Excise Comrs* [2004] EWHC 165 (Ch), [2004] STC 817 (see also PARA 184 post).

5 See *Customs and Excise Comrs v United Biscuits (UK) Ltd (t/a Simmers)* [1992] STC 325 (a decorative tin costing more than the biscuits it contained was an integral part of a zero-rated supply of biscuits); approved in *Card Protection Plan Ltd v Customs and Excise Comrs* [1994] 1 CMLR 756, [1994] STC 199, CA (a supply of insurance was an incidental part of a standard-rated supply of card registration services) (revsd on other grounds [2001] UKHL 4, [2001] 2 All ER 143); and considered in *Kimberly-Clark v Customs and Excise Comrs* [2003] EWHC 1623 (Ch), [2004] STC 473 (babies' nappies supplied in a plastic box described as a 'toy-box' held to be a composite zero-rated supply of the former), in which it was held: (1) that the matter had to be considered specifically by reference to the supply by the appellant to his direct customer (ie, the wholesaler or retailer) and not to the ultimate sale by the retailer to the shopper; (2) that there was therefore scope for inconsistent tax treatment between a sale to a retailer and a sale by that retailer to an individual. See also *Customs and Excise Comrs v Plantiflor Ltd* [2002] UKHL 33, [2002] 1 WLR 2287 (supply of goods by post; delivery service and supply of goods themselves were separate supplies); *College of Estate Management v Customs and Excise Comrs* [2005] UKHL 62, [2005] STC 1597 (provision of printed distance-learning materials was not separate from supply of education and examination services); *Century Life plc v Customs and Excise Comrs* [2001] STC 38, CA (pension regulations compliance review carried out by insurance agent was intimately related to the pension policy); *Appleby Bowers (a firm) v Customs and Excise Comrs* [2001] STC 185 (supply of brochures and provision of overall promotional service were separate supplies); *Debenhams Retail plc v Customs and Excise Comrs* [2005] EWCA Civ 892, [2005] STC 1155 (single price for retail goods attributed partly to those goods and partly to the supply of card-handling services).

By way of guidance it has been explained that a distinction will generally be drawn between a simple, single, transaction consisting of two or more elements (which will be treated as single composite transaction) and a large commercial contract involving the provision of goods and services of various kinds, where the contract is more likely to be treated as involving distinct supplies: *Bophuthatswana National Commercial Corp Ltd v Customs and Excise Comrs* [1993] STC 702, CA; *Rayner & Keeler Ltd v Customs and Excise Comrs* [1994] STC 724. In addition, where it is impracticable to apportion the consideration between the various alleged separate supplies, this points against a finding of separate supplies: *British Airways plc v Customs and Excise Comrs* [1990] STC 643 at 648, CA, per Parker LJ; *Card Protection Plan Ltd v Customs and Excise Comrs* supra; *Virgin Atlantic Airways Ltd v Customs and Excise Comrs* [1995] STC 341 (the provision of a limousine service between the passenger's home in the United Kingdom and the airport was an integral part of a single zero-rated supply



of international transport); *Customs and Excise Comrs v Leightons Ltd*, *Customs and Excise Comrs v Eye-Tech Opticians (No 1)* and *Eye-Tech Opticians (No 2)* [1995] STC 458 at 463.

## UPDATE

### 31 Composite and separate supplies

NOTE 1--See *American Express Services Europe Ltd v Revenue and Customs Comrs* [2010] EWHC 120 (Ch), [2010] STC 1023 (single indivisible economic supply that would be artificial to split).

NOTE 3--EC Council Directive 77/388: replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

In certain circumstances, the different components of a single composite supply may be subject to different rates of value added tax: see Case C-251/05 *Talacre Beach Caravan Sales Ltd v Customs and Excise Comrs* [2006] STC 1671, EC; and PARA 184.

NOTE 4--See also *Tumble Tots (UK) v Revenue and Customs Comrs* [2007] EWHC 103 (Ch), [2007] STC 1171 (children's club; consideration was for club membership; other elements, such as magazines and T-shirts, were ancillary).

NOTE 5--See also *International Masters Publishers Ltd v Revenue and Customs Comrs* [2006] EWCA Civ 1455, [2007] STC 153 (supply of CD books by mail order distinct from supply of cards); *Revenue and Customs Comrs v Weight Watchers (UK) Ltd* [2008] EWCA Civ 715, [2008] STC 2313 (weight-loss classes and materials given at weekly meetings constituted single supply of weight-loss services); *Ford Motor Co Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 1370, [2008] STC 1016 (sale of car with free insurance constituted single supply); *Revenue and Customs Comrs v David Baxendale Ltd* [2009] EWCA Civ 831, [2009] STC 2578 (weight-loss food packs and counselling services constituted single supply of services). See also HMRC Brief 13/2009 (issued following the decision in *Weight Watchers* above).

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### **32. Self-supply.**

The Treasury may by order<sup>1</sup> make provision for securing<sup>2</sup> that where in such circumstances as may be specified in the order goods of a description so specified are taken possession of or produced by a person in the course or furtherance of a business<sup>3</sup> carried on by him and are neither supplied to another person nor incorporated<sup>4</sup> in other goods produced in the course or furtherance of that business<sup>5</sup> but are used by him for the purpose of a business carried on by him<sup>6</sup>, the goods are treated for the value added tax purposes as being both supplied to him for the purpose of that business and supplied by him in the course or furtherance of it<sup>7</sup>.

The Treasury may also make provision, by order, for securing, with respect to services of any description specified in the order, that where a person in the course or furtherance of a business carried on by him does anything for the purpose of that business which is not a supply of services but would, if done for a consideration<sup>8</sup>, be a supply of services of a description specified in the order<sup>9</sup>, and such other conditions as may be specified in the order are satisfied<sup>10</sup>, the services are treated for the purposes of VAT as being both supplied to him for the purpose of that business and supplied by him in the course or furtherance of it<sup>11</sup>.

Provisions having the effect of applying self-supply rules in relation to supplies of gold and other precious metals have also been made<sup>12</sup>.

The self-supply rules are designed to restrict the loss of VAT which would occur if a trader who would have been unable to recover (in whole or in part) the input tax on supplies made to him were able to produce the goods or supply the services from his own resources<sup>13</sup>. The effect of goods or services being treated as self-supplied is that the trader has to account to the Commissioners for Her Majesty's Revenue and Customs<sup>14</sup> for the output tax<sup>15</sup> which is deemed to be incorporated in the notional consideration on the supply which he is treated as making. He is then treated as having incurred input tax on the same supply, which is also notionally received by him; and he may recover that input tax to the extent permitted by the rules generally applicable to him<sup>16</sup>.

1 As to the making of orders generally see PARA 14 ante.

2 Ie subject to any exceptions provided for by or under the order: Value Added Tax Act 1994 s 5(5).

3 As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

4 Where goods are manufactured or produced from any other goods, those other goods are treated as incorporated in the first-mentioned goods for these purposes: Value Added Tax Act 1994 s 5(7).

5 Ibid s 5(5)(a).

6 Ibid s 5(5)(b).

7 Ibid s 5(5). Pursuant to the power so conferred, and by virtue of the Interpretation Act 1978 s 17(2)(b), the Treasury has made the Value Added Tax (Cars) Order 1992, SI 1992/3122, art 5 (as substituted and amended), which provides that any motor car which either: (1) has been produced by a taxable person otherwise than by the conversion of a vehicle obtained by him (art 5(1)(a) (art 5 substituted by SI 1995/1667)); (2) has been produced by the taxable person by the conversion of another vehicle, whether a motor car or not (Value Added Tax (Cars) Order 1992, SI 1992/3122, art 5(1)(b) (as so substituted; art 5(1)(b), (d) amended, art 5(2A) added, art 5(3) further substituted, by SI 1999/2832)), or was supplied to, or acquired from another member state or imported by, a taxable person (Value Added Tax (Cars) Order 1992, SI 1992/3122, art 5(1)(c) (as so substituted)) and in relation to that vehicle the tax on the supply to, or acquisition or importation by, the

taxable person of the motor car or the vehicle from which it was converted was not wholly excluded from credit under the Value Added Tax Act 1994 s 25 (see PARA 216 post) (Value Added Tax (Cars) Order 1992, SI 1992/3122, art 5(2) (as so substituted)); or (3) which was transferred to a taxable person as an asset of a business or part of a business in the course of the transfer of that business or part of a business as a going concern: (a) in circumstances where the transfer was treated as neither a supply of goods nor a supply of services by virtue of an order made or having effect as if made under the Value Added Tax Act 1994 s 5(3) (see PARA 27 ante); (b) in the hands of the transferor or any predecessor of his the motor car was one to which these provisions applied by virtue of the Value Added Tax (Cars) Order 1992, SI 1992/3122, art 5(1)(a), (b) or (c) (as substituted and amended); and (c) the motor car has not been treated as supplied by virtue of art 5 (as substituted and amended) to and by the transferor or any of his predecessors (art 5(1)(d) (as so substituted and amended)), is treated as both supplied to the taxable person for the purposes of a business carried on by him and supplied by him for the purposes of that business, provided it has not been supplied by him in the course or furtherance of a business carried on by him (Value Added Tax (Cars) Order 1992, SI 1992/3122, art 5(3)(a) (as so substituted)) and is used by him such that had it been supplied to, or imported or acquired from another member state by, him at that time his entitlement to credit under the Value Added Tax Act 1994 s 25 in respect of the VAT chargeable on such a supply, importation or acquisition from another member state would have been wholly excluded by virtue of the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7 (as amended) (see PARA 223 post) (Value Added Tax (Cars) Order 1992, SI 1992/3122, art 5(3)(b) (as so substituted)). For the meaning of 'motor car' see PARA 28 note 9 ante. For the meaning of 'another member state' see PARA 4 note 15 ante. For these purposes a person is a predecessor of a transferor if he transferred the motor car as an asset of a business or part of a business which he transferred as a going concern either to the transferor or, where the motor car has been the subject of more than one such transfer, to a person who made one of those transfers (art 5(2A)(a) (as so added)); and the transfer of the motor car was treated as neither a supply of goods nor a supply of services by virtue of any order made or having effect as if made under the Value Added Tax Act 1994 s 5(3) (art 5(2A)(b) (as so added)). These provisions apply in relation to any bodies corporate which are treated for the purposes of the Value Added Tax Act 1994 s 43 (as amended) (see PARA 205 post) as members of a group as if those bodies were one person, but any motor car which would fall to be treated as supplied to and by that person is treated as supplied to and by the representative member: Value Added Tax (Cars) Order 1992, SI 1992/3122, art 7 (amended by SI 1995/1269; SI 1999/2832). The Value Added Tax Act 1994 s 5(1), Sch 4 para 5(4) (see PARA 30 ante) does not apply in relation to a motor car to which these provisions apply which is used or made available in circumstances where it would otherwise be treated as supplied to and by a taxable person: Value Added Tax (Cars) Order 1992, SI 1992/3122, art 4A (added by SI 1995/1667; and amended by SI 1999/2832).

8 For the meaning of 'consideration' generally see PARA 95 post. The value of the self-supply of goods is determined by the Value Added Tax Act 1994 s 19(1), Sch 6 para 6: see PARAS 30 note 8 ante, 100 post.

9 Ibid s 5(6)(a).

10 Ibid s 5(6)(b).

11 Ibid s 5(6). An order made under s 5(6) may provide for the method by which the value of any supply of services which is treated as taking place by virtue of the order is to be calculated: s 5(8). At the date at which this volume states the law, no such order had been made, but, by virtue of the Interpretation Act 1978 s 17(2) (b), the Value Added Tax (Self-supply of Construction Services) Order 1989, SI 1989/472 (which brings within the tax certain self-supplies of construction services by builders, made in the course or furtherance of the business and for the purposes of that business, where the value of the services is not less than £100,000), has effect as if so made. The value of the self-supply is to be taken as the open market value of the services: art 4(1).

12 For these purposes, references to a supply of gold are references to: (1) any supply of goods consisting in fine gold, in gold grain of any purity or in gold coins of any purity (Value Added Tax Act 1994 s 55(5)(a) (s 55(5) (a) substituted, and s 55(5)(c) added, by the Finance Act 1996 ss 29(3), 32(1), (2), 205(1), Sch 41 Pt IV)); (2) any supply of goods containing gold where the consideration for the supply (apart from any VAT) is, or is equivalent to, an amount which does not exceed, or exceeds by no more than a negligible amount, the open market value of the gold contained in the goods (Value Added Tax Act 1994 s 55(5)(b)); or (3) any supply of services consisting in the application to another person's goods of a treatment or process which produces goods a supply of which would fall within head (1) supra (s 55(5)(c) (as so added)). Where a taxable person makes a supply of gold to a person who is himself a taxable person at the time when the supply is made (s 55(2)(a)) and who is supplied in connection with the carrying on by him of any business (s 55(2)(b)), it is for the person supplied, on the supplier's behalf, to account for and pay tax on the supply, and not for the supplier (s 55(2)). So much of the Value Added Tax Act 1994 and of any other enactment or any subordinate legislation as has effect for the purposes of, or in connection with, the enforcement of any obligation to account for and pay VAT applies for these purposes in relation to any person who is required under s 55(2) to account for and pay any VAT as if that VAT were VAT on a supply made by him: s 55(3).

The Treasury may by order provide for s 55 (as amended) to apply, as it applies to the supplies so specified, to such other supplies of goods consisting in or containing any precious or semi-precious metal or stones (s 55(6) (a)), or services relating to, or to anything containing, any precious or semi-precious metal or stones (s 55(6)

(b)), as may be specified in the order. For such an extension see the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173 (as amended); the Value Added Tax (Investment Gold) Order 1999, SI 1999/3116, art 4; and PARA 164 post.

13 As to the rules determining the right to claim credit for input tax see PARA 217 et seq post. In essence, a trader who makes exempt supplies is unable to recover the input tax on supplies made to him for the purpose of those supplies. In addition, special rules exist which disentitle, in whole or in part, the majority of traders from recovering input tax on the purchase or leasing of cars: see PARA 223 post.

14 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

15 For the meaning of 'output tax' see PARAS 4 ante, 215 post.

16 See PARA 217 et seq post.

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### 33. The reverse charge.

Where certain services are supplied by a person who belongs in a country other than the United Kingdom<sup>1</sup> and are received by a person ('the recipient') who belongs in the United Kingdom<sup>2</sup> for the purposes of any business<sup>3</sup> carried on by him<sup>4</sup>, then all the same consequences for value added tax<sup>5</sup> are to follow as if the recipient had himself supplied the services in the United Kingdom in the course or furtherance of his business<sup>6</sup> and that supply were a taxable supply<sup>7</sup>. The services to which these provisions, not being exempt services<sup>8</sup>, are applicable are<sup>9</sup>:

- 84 (1) transfers and assignments of copyright, patents, licences, trademarks and similar rights<sup>10</sup>;
- 85 (2) advertising services<sup>11</sup>;
- 86 (3) services of consultants<sup>12</sup>, engineers, consultancy bureaux, lawyers, accountants and other similar services; data processing and provision of information<sup>13</sup>;
- 87 (4) acceptance of any obligation to refrain from pursuing or exercising, in whole or part, any business activity or any copyright, patents, licences, trademarks and similar rights<sup>14</sup>;
- 88 (5) banking, financial and insurance services<sup>15</sup>;
- 89 (6) the provision of access to, and of transport or transmission through, natural gas and electricity distribution systems and the provision of other directly linked services<sup>16</sup>;
- 90 (7) the supply of staff<sup>17</sup>;
- 91 (8) the letting on hire of goods other than means of transport<sup>18</sup>;
- 92 (9) telecommunications services<sup>19</sup>;
- 93 (10) radio and television broadcasting services<sup>20</sup>;
- 94 (11) electronically supplied services<sup>21</sup>;
- 95 (12) the services rendered by one person to another in procuring for the other any of the services referred to above<sup>22</sup>; and
- 96 (13) any services not of a description specified in heads (1)-(8), (12) above when supplied to a registered<sup>23</sup> recipient<sup>24</sup>.

The reverse charge provisions are similarly applicable to the supply of electricity, and the supply of gas through the natural gas distribution network, by a person who is outside the United Kingdom<sup>25</sup> to a registered person for the purposes of any business carried on by the recipient<sup>26</sup>.

Supplies which are so treated as made by the recipient are not, however, to be taken into account as supplies made by him when determining any allowance of input tax<sup>27</sup> in his case<sup>28</sup>.

1 Value Added Tax Act 1994 s 8(1)(a). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 The rules determining where the supplier or recipient of services belongs are to be found in *ibid* s 9: see PARAS 53-62 post. Section 8(1) has effect in relation to any services which are of a description specified in Sch 5 para 9 (see head (13) in the text) and whose place of supply is determined by an order under s 7(11) (see PARA 45 post) to be in the United Kingdom, as if the recipient belonged in the United Kingdom for the purposes of s 8(1)(b): s 8(2), Sch 5 para 10.

3 For the meaning of 'business' see PARA 23 ante.

4 Value Added Tax Act 1994 s 8(1)(b).

5 le and in particular, so much as charges VAT on a supply and entitles a taxable person to credit for input tax: *ibid* s 8(1). For the meaning of 'supply' see PARA 27 ante; and For the meaning of 'input tax' see PARAS 4 ante, 215 post.

6 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

7 Value Added Tax Act 1994 s 8(1). Section 8 is designed to prevent partially-exempt traders (see PARA 217 et seq post) circumventing the limitation on their recovery of input tax by buying in VAT-free services from abroad. The particular concern is that the services to which these provisions apply are treated as supplied where they are received (see EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 9(2)(e) (as amended)) and will therefore not be charged to tax in the member state where the supplier of the service belongs. Article 21(1)(b) (amended by EC Council Directive 99/59 (OJ L162, 26.6.99, p 63)) enables member states to recover the VAT on a reverse charge not only from the recipient of the supply but also from the supplier. The United Kingdom has not availed itself of this right. As to the Sixth Directive see PARA 1 note 1 ante.

In applying the Value Added Tax Act 1994 s 8(1), the supply of services treated as made by the recipient is assumed to have been made at a time to be determined in accordance with regulations prescribing rules for attributing a time of supply in cases within that provision: s 8(4). Services which are treated as made by a taxable person under s 8(1) are treated as being supplied when the supplies are paid for or, if the consideration is not in money, on the last day of the prescribed accounting period in which the services are performed: Value Added Tax Regulations 1995, SI 1995/2518, reg 82. They must therefore be included in the trader's VAT return for that period. For the meaning of 'prescribed accounting period' see PARA 115 note 15 post.

Where the services are supplied for a consideration in money, the value of the supply is taken to be such amount as is equal to that consideration; where the consideration does not consist wholly in money, the value of the supply is treated as such amount in money as is equal to that consideration: Value Added Tax Act 1994 Sch 6 para 8. The consequence is that the price actually paid by the trader for the performance of the services is deemed to be exclusive of VAT. Thus, if the trader pays £1,000 for foreign legal advice, he must bring £175 into his next VAT return as output tax (though he may, correspondingly, be entitled to credit for a like amount in the same return as input tax). This may be contrasted with the general rule, in s 19(2), that the value of a supply is to be taken be such amount as, with the addition of the VAT chargeable, is equal to the consideration: see PARA 94 post. 'Money' includes currencies other than sterling: s 96(1).

8 Exempt services are services within any of the descriptions specified in *ibid* s 31(1), Sch 9 (as amended) (see PARA 155 et seq post): s 8(2).

9 The Treasury may by order add to, or vary, the list of services to which the reverse charge is applicable (ie *ibid* Sch 5 (as amended): see the text and notes 10-24 *infra*); and this power includes power, where any services whose place of supply is determined by an order under s 7(11) (see PARA 45 post) are added thereto, to provide that s 8(1) is to have effect in relation to those services as if a person belongs in the United Kingdom for the purposes of s 8(1)(b) if, and only if, he is a taxable person (s 8(5), (6)), and power to make such incidental, supplemental, consequential and transitional provision in connection with any addition to or variation of Sch 5 (as amended) as they think fit (s 8(7) (s 8(7), (8) added by the Finance Act 1997 s 42)). Without prejudice to the generality of the Value Added Tax Act 1994 s 8(7) (as added), the provision that may be made thereunder includes: (1) provision making such modifications of s 43(2A)-(2E) (as added and amended) (see PARA 205 note 5 post) as the Treasury may think fit in connection with any addition to or variation of Sch 5 (as amended) (s 8(8)(a) (as so added)); and (2) provision modifying the effect of any regulations under s 8(4) (see note 7 *supra*) in relation to any services added to Sch 5 (as amended) (s 8(8)(b) (as so added)). For the meaning of 'taxable person' see PARA 63 post.

10 *Ibid* Sch 5 para 1.

11 *Ibid* Sch 5 para 2. A professional motor racing team which derived most of its income from sponsorship fees, paid in return for advertising on its cars, was held to be supplying advertising services for these purposes: see *John Village Automotive Ltd v Customs and Excise Comrs* [1998] V & DR 340 (decided under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9(2)(e) (as amended), to which provisions the Value Added Tax Act 1994 Sch 5 (as amended) corresponds).

12 To be a consultant for these purposes a person must be recognised within his peer group as an individual with professional knowledge and skill who knows more about the matter in hand than his peers: *Nasim Mohammed (t/a The Indian Palmist) v Customs and Excise Comrs* (2003) VAT Decision 18397, [2004] STI 452 (work of palmist required neither marked intellectual character nor any high level of qualification, and the taxpayer was esteemed by his clients but had no peers (as far as he was aware); nor was there professional regulation).

13 Value Added Tax Act 1994 Sch 5 para 3. Excluded from this head are any services relating to land: Sch 5 para 3.

14 Ibid Sch 5 para 4.

15 Ibid Sch 5 para 5. For these purposes, banking, financial and insurance services include reinsurance, but do not include the provision of safe deposit facilities: Sch 5 para 5.

16 Ibid Sch 5 para 5A (added by the Value Added Tax (Reverse Charge) (Gas and Electricity) Order 2004, SI 2004/3149, arts 2, 3).

17 Value Added Tax Act 1994 Sch 5 para 6.

18 Ibid Sch 5 para 7.

19 Ibid Sch 5 para 7A (added by the Value Added Tax (Reverse Charge) (Anti-avoidance) Order 1997, SI 1997/1523, arts 1, 3(2); and substituted by the Value Added Tax (Reverse Charge) (Amendment) Order 2003, SI 2003/863, art 2(1), (2)). 'Telecommunications services' for these purposes are services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including: (1) the related transfer or assignment of the right to use capacity for such transmission, emission or reception; and (2) the provision of access to global information networks: Value Added Tax Act 1994 Sch 5 para 7A (as so added and substituted).

20 Ibid Sch 5 para 7B (Sch 5 paras 7B, 7C added, Sch 5 para 8 amended, by the Value Added Tax (Reverse Charge) (Amendment) Order 2003, SI 2003/863, art 2(1), (3), (4)).

21 Value Added Tax Act 1994 Sch 5 para 7C (as added: see note 20 supra). Examples of electronically supplied services are: (1) website supply, web-hosting and distance maintenance of programmes and equipment; (2) the supply and updating of software; (3) the supply of images, text and information, and the making available of databases; (4) the supply of music, films and games (including games of chance and gambling games); (5) the supply of political, cultural, artistic, sporting, scientific and entertainment broadcasts (including broadcasts of events); and (6) the supply of distance teaching: Sch 5 para 7C(a)-(f) (as so added). Where the supplier of a service and his customer communicate via electronic mail, this does not of itself mean that the service performed is an electronically supplied service: Sch 5 para 7C (as so added).

22 Ibid Sch 5 para 8 (as amended: see note 20 supra).

23 Ie registered under the Value Added Tax Act 1994: see PARAS 18 note 4 ante, 64 et seq post.

24 Ibid Sch 5 para 9 (amended by the Value Added Tax (Reverse Charge) (Anti-avoidance) Order 1997, SI 1997/1523, arts 1, 3(4)).

25 For these purposes a person is outside the United Kingdom if he has established his business or has a fixed establishment outside the United Kingdom or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides is outside the United Kingdom: Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148, art 14 (made pursuant to the Value Added Tax Act 1994 s 9A(6) (s 9A added by the Finance Act 2004 s 21(1)), which provides that whether a person is outside the United Kingdom for these purposes is determined in accordance with an order made by the Treasury).

26 Value Added Tax Act 1994 s 9A(1), (2), (5) (as added: see note 25 supra). Goods which are treated as supplied by a person under s 9A (as added) are treated as being supplied when the goods are paid for or, if the consideration is not in money, on the last day of the prescribed accounting period in which the goods are removed or made available: Value Added Tax Regulations 1995, SI 1995/2518, reg 82A (added by SI 2004/3140) (made under the Value Added Tax Act 1994 s 9A(4) (as so added), which provides that the supply of relevant goods for these purposes is treated as made by the recipient is assumed to have been made at a time to be determined in accordance with regulations prescribing rules for attributing a time of supply in cases to which s 9A (as added) applies).

27 Ie under ibid s 26(1): see PARA 217 post.

28 Ibid ss 8(3), 9A(3) (as added: see note 25 supra).

## UPDATE

### 33 The reverse charge

NOTES 7, 11--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/34. The developer's self-supply charge.

### **34. The developer's self-supply charge.**

Until 1 March 1995, complex rules existed to ensure that persons who constructed or enlarged certain buildings or civil engineering works, which were to be used otherwise than for the purposes of a fully-taxable business, were able to recover the input tax incurred in the course of construction but were obliged to account for value added tax on using or going into occupation of the building or work or on making an exempt grant of an interest in the building or work<sup>1</sup>. These rules were abolished with effect from that date<sup>2</sup>; but transitional provisions exist in relation to buildings and works where construction commenced prior to that date. Those transitional provisions are set out below; in each case, it is predicated that a person (a 'developer'<sup>3</sup>) has procured the construction<sup>4</sup> of a building or civil engineering work of a description to which the provisions apply<sup>5</sup>.

On the first occasion during the period beginning with the day when the construction of such a building or work is first planned and ending ten years after its completion on which the developer grants an interest in, right over or licence to occupy the building or work (or any part of it) which is an exempt supply<sup>6</sup>, or is in occupation of the building or uses the work (or any part of it) when not a fully-taxable person<sup>7</sup>, that interest, right or licence held by the developer is treated<sup>8</sup> as supplied to the developer for the purpose of a business carried on by him and supplied by him in the course or furtherance of the business<sup>9</sup> on the last day of the prescribed accounting period during which it applies or, if later, of the prescribed accounting period during which the building or work becomes substantially ready for occupation or use<sup>10</sup>. The supply so treated as made is taken to be a taxable supply<sup>11</sup>; but no charge occurs if the relevant grant is made before construction is planned<sup>12</sup>. In order to secure the final abolition of the developer's self-supply charge, it is provided that where a building or civil engineering work is within the scope of the provisions but there has been no relevant grant by 1 March 1997 and the ten-year period has not then expired, the occurrence of that date will itself be a triggering event for the purposes of that charge<sup>13</sup>.

Where a developer is a tenant, lessee or licensee and becomes liable to a charge to VAT under these provisions<sup>14</sup> in respect of his tenancy, lease or licence he must forthwith notify his landlord, lessor or licensor of the date from which the tenancy, lease or licence becomes a developmental tenancy, developmental lease or developmental licence<sup>15</sup> for the purposes of the provisions relating to exempt supplies of land<sup>16</sup>.

1 See the Value Added Tax Act 1994 s 51, Sch 10 paras 5, 6 (as originally enacted).

2 See the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 6, 7.

3 For these purposes 'developer', in relation to a building or work, means a person who: (1) constructs it; (2) orders it to be constructed; or (3) finances its construction, with a view to granting an interest in, right over or licence to occupy it, or any part of it, or to occupying or using it, or any part of it, for his own purposes: Value Added Tax Act 1994 Sch 10 para 5(5). On a strict construction of Sch 10 (as amended), therefore, a person does not cease to be a developer simply because he grants a lease which is a taxable supply. However, the validity of these provisions has been called into question by the decision in *Robert Gordon's College v Customs and Excise Comrs* [1996] 1 WLR 201, [1995] STC 1093, HL, in which it was held that the domestic legislation relating to the developer's self-supply charge failed properly to implement the relevant provisions of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes (ie arts 5(7)(a), 6(3)), in making provision for a self-supply charge in circumstances where the developer had granted a lease to another and then occupied the property under the terms of a licence from that person. Where a body corporate treated under the Value Added Tax Act 1994 s 43 (as amended) (see PARA 205 post) as a member of a group is a developer in relation to a building or work, and it grants an interest in, right over or

licence to occupy the building or work, or any part of it, to another body corporate which is so treated as a member of the group, then for these purposes, the following are treated, as from the time of the grant, as also being a developer in relation to the building or work, ie any body corporate which: (a) was treated as a member of the same group as the body corporate making the grant at the time of the grant; or (b) has been so treated at any later time when the body corporate by which the grant was made had an interest in, right over or licence to occupy the building or work, or any part of it; or (c) has been treated as a member of the same group as a body corporate within head (a) or (b) supra, or this head, at a time when that body corporate has an interest in, right over or licence to occupy the building or work, or any part of it: Sch 10 para 5(6), (7). This provision prevents the avoidance of the rules by the simple device of granting an interest by means not involving a supply for VAT purposes: see PARA 205 post. As to the Sixth Directive see PARA 1 note 1 ante.

For the meaning of 'grant' see PARA 156 note 2 post (definition applied by the Value Added Tax Act 1994 Sch 10 para 9 (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 9). As from a day to be appointed, where the benefit of the consideration for the grant of an interest in, right over or licence to occupy land accrues to a person but that person is not the person making the grant, the person to whom the benefit accrues is treated for the purposes of the Value Added Tax Act 1994 as the person making the grant, and to the extent that any input tax of the person actually making the grant is attributable to the grant it is treated as input tax of the person to whom the benefit accrues: Sch 10 para 8(1) (Sch 10 para 8(1) prospectively renumbered, Sch 10 para 8(2), (3) prospectively added, by the Finance Act 1995 s 26(2) as from a day to be appointed under s 26(3)). Where the consideration for the grant of an interest in, right over or licence to occupy land is such that its provision is enforceable primarily by the person who, as owner of an interest in or right in or over that land, actually made the grant, or by another person in his capacity as the owner for the time being of that interest or right or of any other interest or right in or over that land, that person, and not any person (other than that person) to whom a benefit accrues by virtue of his being a beneficiary under a trust relating to the land, or the proceeds of sale of any land, is taken for these purposes to be the person to whom the benefit of the consideration accrues: Value Added Tax Act 1994 Sch 10 para 8(2) (as so prospectively added). This provision does not, however, apply to the extent that the Commissioners for Her Majesty's Revenue and Customs, on an application made in the prescribed manner jointly by: (i) the person who would otherwise be taken thereunder to be the person to whom the benefit of the consideration accrues; and (ii) all the persons for the time being in existence who, as beneficiaries under such a trust as is mentioned therein, are persons who have or may become entitled to, or to a share of, the consideration, or for whose benefit any of it is to be or may be applied, may direct that the benefit of the consideration is to be treated for these purposes as a benefit accruing to the persons falling within head (ii) supra and not, unless he also falls within that head, to the person falling within head (i) supra: Sch 10 para 8(3) (as so prospectively added). At the date at which this volume states the law no such day had been appointed. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 The developer's self-supply charge (ie *ibid* Sch 10 para 5(1), (2), (3A)-(7) (as amended)) also applies in relation to any of the following reconstructions, enlargements or extensions:

- 50 (1) a reconstruction, enlargement or extension of an existing building which is commenced on or after 1 January 1992 and before 1 March 1995 and: (a) which is carried out wholly or partly on land ('new land') adjoining the curtilage of the existing building (Sch 10 para 5(8)(a)(i) (Sch 10 para 5(1) substituted, Sch 10 para 5(2)-(4), (8), (10) amended, Sch 10 para 5(3A) added, by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 6)); or (b) as a result of which the gross external floor area of the reconstructed, enlarged or extended building, excluding any floor area on new building land, exceeds the gross external floor area of the existing building by not less than 20% of the gross external floor area of the existing building (Value Added Tax Act 1994 Sch 10 para 5(8)(a)(ii) (as so amended));
- 51 (2) a reconstruction of an existing building which is commenced within that period and in the course of which at least 80% of the area of the floor structures of the existing building is removed (Sch 10 para 5(8)(b) (as so amended)); and
- 52 (3) a reconstruction, enlargement or extension of a civil engineering work which is commenced within that period and which is carried out wholly or partly on land ('new land') adjoining the land on or in which the existing work is situated (Sch 10 para 5(8)(c) (as so amended)),

as if references to the building or work were references to the reconstructed, enlarged or extended building or work and as if references to construction were references to reconstruction, enlargement or extension: Sch 10 para 5(8) (as so amended). For the purposes of head (1) supra, extensions to an existing building include the provision of any annex having internal access to the existing building: Sch 10 para 5(9). The developer's self-supply charge does not, however, apply to a reconstruction, enlargement or extension falling within heads (1) or (3) supra where the developer has held an interest in at least 75% of all the land on which the reconstructed, enlarged or extended building or work stands, or is constructed, throughout the period of ten years ending with the last day of the prescribed accounting period during which that building or work becomes substantially ready for occupation or use: Sch 10 para 5(10)(a) (as so amended). Nor does it apply to a reconstruction, enlargement

or extension: (i) to the extent that it results in such an enlargement of the gross external floor area as is mentioned in head (1) supra; or (ii) falling within head (2) supra, where (in either case) the interest in, right over or licence to occupy the building concerned, or any part of it, has already been treated as supplied to and by the developer under Sch 10 para 6(1) (see the text and notes 8-10 infra): Sch 10 para 5(10)(b) (as so amended).

5 The provisions apply to: (1) any building neither designed as a dwelling or number of dwellings nor intended for use solely for a relevant residential or a relevant charitable purpose; (2) any civil engineering work other than a work necessary for the development of a permanent park for residential caravans, provided in each case that construction of it was commenced after 1 August 1989 and before 1 March 1995 and that no grant of the fee simple in it falling within *ibid* s 31(1), Sch 9 Pt II Group 1 item 1(a)(ii) or (iv) (see PARA 156 post) has been made before the occasion concerned: see Sch 10 para 5(2), (3) (as amended: see note 4 supra). A building or work to which these provisions would otherwise apply does not, however, fall within them if: (a) construction of it was commenced before 1 March 1995 but had not been completed by that date; and (b) the developer makes no claim after that date to credit due for input tax, entitlement to which is dependent upon his being treated in due course as having made a supply by virtue of Sch 10 para 6 (as amended), and either he has made no such claim prior to that date or he accounts to the Commissioners for a sum equal to any such credit that has previously been claimed: Sch 10 para 5(3A) (as added: see note 4 supra). For the meanings of 'designed as a dwelling', 'use for a relevant residential purpose' and 'use for a relevant charitable purpose' see PARA 179 notes 8-10 post (definitions applied by Sch 10 para 9 (as amended: see note 3 supra)); for the meaning of 'construction' see PARA 179 note 6 post (definition as so applied); and for the meaning of 'input tax' see PARAS 4 ante, 215 post. As to when a building or work is completed see PARA 156 note 6 post (definition as so applied).

6 For the meaning of 'exempt supply' see PARA 155 post.

7 Value Added Tax Act 1994 Sch 10 para 5(1)(a) (as substituted: see note 4 supra). For these purposes, a taxable person is treated as a fully-taxable person in any prescribed accounting period if either: (1) at the end of that period he is entitled to credit for input tax on all supplies to, and acquisitions and importations by, him in the period (apart from any on which input tax is excluded from credit by virtue of s 25(7) (see PARA 218 post) (Sch 10 para 5(4)(a) (as amended: see note 4 supra)); or (2) he does not use the building or work at any time during the period in, or in connection with, making any exempt supplies of goods or services (Sch 10 para 5(4) (b) (as so amended)). For the meaning of 'taxable person' see PARA 63 post; and for the meaning of 'prescribed accounting period' see PARA 216 note 6 post.

8 *Ibid* for the purposes of the Value Added Tax Act 1994: Sch 10 para 6(1).

9 As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

10 Value Added Tax Act 1994 Sch 10 para 6(1).

11 *Ibid* Sch 10 para 6(2). However, if the value of the self-supply proves to be less than £100,000, there is deemed to have been no such supply: Sch 10 para 6(5). The value of the supply is the aggregate of: (1) the value of grants relating to the land on which the building or work is constructed made, or to be made, to the developer, but excluding, in a case where construction commenced before 1 January 1992, the value of any grants to be made for consideration in the form of rent the amount of which cannot be ascertained by the developer when the supply is treated as made, and in any other case excluding the value of any grants made before the relevant day: (a) to the extent that consideration for such grants was in the form of rent, and to the extent that such rent was properly attributable to a building which has been demolished (Sch 10 para 6(2)(a) (i)); (b) in respect of a building which has been reconstructed, enlarged or extended so that the reconstruction, enlargement or extension falls within Sch 10 para 5(8)(a)(ii) (see note 4 supra), and does not fall also within Sch 10 para 5(8)(b) (as amended) (see note 4 supra), to the extent that consideration for such grants was in the form of rent, and to the extent that such rent was properly attributable to the building as it existed before the commencement of the reconstruction, enlargement or extension (Sch 10 para 6(2)(a)(ii)); (c) in respect of a building which has been so reconstructed that the reconstruction falls within Sch 10 para 5(8)(b) (as amended), to the extent that consideration for such grants was in the form of rent, and to the extent that such rent was properly attributable to the building before the reconstruction commenced (Sch 10 para 6(2)(a)(iii)); and also excluding the value of any grants falling within Sch 9 Pt II Group 1 item 1(b) (see PARA 156 post) (Sch 10 para 6(2)(a)(iv)); and (2) the value of all the taxable supplies of goods and services, other than any that are zero-rated, made or to be made for or in connection with the construction of the building or work (Sch 10 para 6(2) (b)). For the purposes of head (1)(a) supra, 'the relevant day' is the day on which the demolition of the building in question commenced; and for the purposes of heads (1)(b), (c) supra, 'the relevant day' is the day on which the reconstruction, enlargement or extension in question commenced: Sch 10 para 6(6). For the Commissioners' explanation of the valuation rules see Customs and Excise Public Notice 708 *Buildings and Construction* (July 2002) PARA 25.2. As to self-supplies of construction services see PARA 32 note 11 ante. For the meaning of 'taxable supply' see PARA 18 note 3 ante.

Where the rate of VAT ('the lower rate') chargeable on a supply ('the construction supply') falling within head (2) supra, the value of which is included in the value of a supply ('the self-supply') treated as made by the Value

Added Tax Act 1994 Sch 10 para 6(1) is lower than the rate of VAT ('the current rate') chargeable on that self-supply, then VAT on the self-supply is charged at the lower rate on so much of its value as is comprised of the relevant part of the value of the construction supply and at the current rate on the remainder of its value: Sch 10 para 6(3). 'The relevant part of the value of the construction supply' means: (i) where the construction supply is a supply of goods, the value of such of those goods as have actually been delivered by the supplier (Sch 10 para 6(4)(a)); (ii) where the construction supply is a supply of services, the value of such of those services as have actually been performed by the supplier (Sch 10 para 6(4)(b)), on or before the last day upon which the lower rate is in force (Sch 10 para 6(4)).

In the application of Sch 10 para 6(1)-(6) to a reconstruction, enlargement or extension to which Sch 10 para 5(1), (2), (3A)-(7) (as amended) applies by virtue of Sch 10 para 5(8) (as amended) (see note 4 supra), references to the building or work are to be construed as references to the reconstructed, enlarged or extended building or work and references to construction are to be construed as references to reconstruction, enlargement or extension: Sch 10 para 6(7)(a) (Sch 10 para 6(7) amended, Sch 10 para 6(9) added, by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 7(a)). Furthermore, the reference in head (1)(a) supra to the value of grants relating to the land on which the building or work is constructed is to be construed as a reference, in relation to a reconstruction, enlargement or extension: (A) of an existing building to the extent that it falls within the Value Added Tax Act 1994 Sch 10 para 5(8)(a)(i) (see note 4 supra) and does not fall also within Sch 10 para 5(8)(b) (as amended) (see note 4 supra), to the value of grants relating to the new building land (Sch 6 para 6(7)(b)(i)); (B) of an existing building to the extent that it falls within Sch 10 para 5(8)(a)(ii) (see note 4 supra) and does not fall also within Sch 10 para 5(8)(b) (as amended), to the value of grants relating to the land on which the existing building stands multiplied by the appropriate fraction (Sch 6 para 6(7)(b)(ii)); and (C) to a work falling within Sch 10 para 5(8)(c) (as amended) (see note 4 supra), to the value of grants relating to new land (Sch 6 para 6(7)(b)(iii)). The 'appropriate fraction' is calculated by dividing the additional gross external floor area resulting from the reconstruction, enlargement or extension, excluding any floor area on new building land, by the gross external floor area of the reconstructed, enlarged or extended building, excluding any floor area on new building land: Sch 10 para 6(8). As to what is an existing building see PARA 179 note 6 post (applied by virtue of Sch 10 para 9 (as amended: see note 3 supra)).

12 See *ibid* Sch 10 para 5(1) (as substituted); and the text and notes 6-7 supra.

13 See *ibid* Sch 10 para 5(1)(b) (as substituted: see note 4 supra). Where Sch 10 para 6 (as amended) applies by virtue of Sch 10 para 5(1)(b) (as so substituted), it has effect as if: (1) in Sch 10 para 6(1) the words '(or any part of it)' were omitted and for the words 'the last day' to 'ready for occupation or use' there were substituted '1 March 1997' (Sch 10 para 6(9)(a) (as added: see note 11 supra)); (2) in Sch 10 para 6(2)(a) the words 'or to be made' and the words 'to be made' were omitted (Sch 10 para 6(9)(b) (as so added)); (3) in Sch 10 para 6(2)(b) the words 'or to be made' were omitted (Sch 10 para 6(9)(c) (as so added)); and (4) Sch 10 para 6(5) were omitted (Sch 10 para 6(9)(d) (as so added)).

14 *Ie* under *ibid* Sch 10 para 6(1), except where that provision applies by virtue of Sch 10 para 5(1)(b) (as substituted: see note 4 supra): Sch 10 para 7(1) (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, art 8).

15 Value Added Tax Act 1994 Sch 10 para 7(1)(a) (as amended: see note 14 supra). The reference in the text to a tenancy, lease or licence becoming a developmental tenancy, developmental lease or developmental licence is a reference to its becoming such a tenancy, lease or licence for the purposes of s 31(1), Sch 9 Pt II Group 1 item 1(b) (see PARA 156 post): Sch 10 para 7(1)(a) (as so amended).

16 In a case falling within Sch 10 para 5(8)(a)(ii) (see note 4 supra), the developer must also give such notification of the appropriate fraction determined in accordance with Sch 10 para 6(8) (see note 11 supra): Sch 10 para 7(1)(b). Where the appropriate fraction has been so notified, any supply made pursuant to the tenancy, lease or licence in question is treated as made pursuant to a developmental tenancy, developmental lease or developmental licence (a 'developmental supply') as if, and only to the extent that, the consideration for the developmental supply is for an amount equal to the whole of the consideration for the supply made pursuant to the tenancy, lease or licence, multiplied by the appropriate fraction: Sch 10 para 7(2).

## UPDATE

### 34 The developer's self-supply charge

NOTE 3--Head (3). EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(i) In general/34A. Self-supply charge to combat intra-Community fraud.

### **34A. Self-supply charge to combat intra-Community fraud.**

If a taxable (but not a zero-rated) supply of goods to which these provisions apply (the 'relevant supply') is made to a person (the 'recipient'), and the total value<sup>1</sup> of the relevant supply and of corresponding supplies<sup>2</sup> made to the recipient in the month in which the relevant supply is made, exceeds £1,000 (the 'disregarded amount'), the relevant supply and the corresponding supplies made to the recipient in the month in which the relevant supply is made are treated<sup>3</sup> as taxable supplies of the recipient (as well as of the person making them) and, in so far as the recipient is supplied in connection with the carrying on by him of any business, as supplies made by him in the course or furtherance of that business<sup>4</sup>. The goods to which these provisions apply are goods of a description specified in an order made by the Treasury<sup>5</sup>; but these provisions do not apply where the supply is an excepted supply, that is a supply which is of a description specified in, or determined in accordance with, any provision contained in an order so made<sup>6</sup>.

If:

- 97 (1) a taxable person makes a supply of goods to a person (the 'recipient') at any time;
- 98 (2) the supply is of goods to which these provisions apply and is not an excepted supply; and
- 99 (3) the recipient is a taxable person at that time and is supplied in connection with the carrying on by him of any business,

it is for the recipient, on the supplier's behalf, to account for and pay tax on the supply and not for the supplier; and the relevant enforcement provisions<sup>7</sup> apply for the purposes of these provisions, in relation to any person so required to account for and pay any value added tax, as if that VAT were VAT on a supply made by him<sup>8</sup>.

1 The value of a supply is determined on the basis that no VAT is chargeable thereon: Value Added Tax Act 1994 s 55A(5) (s 55A added by Finance Act 2006 s 19(8)).

2 'Corresponding supply' means a taxable (but not a zero-rated) supply of goods to which these provisions apply and is not an excepted supply: 1994 Act s 55A(2).

3 I.e. for the purposes of ibid Sch 1. However, no supply is to be disregarded for the purposes of Sch 1 on the grounds that it is a supply of capital assets of the recipient's business: s 55A(4).

4 Ibid s 55A(1)(a), (b), (d), (3). However, the relevant supply and the corresponding supplies are so treated only in so far as their total value exceeds the disregarded amount: s 55A(3). For the meaning of 'taxable supply' see PARA 18 NOTE 3; and for the meaning of 'supply of goods' see PARA 27. For the meaning of 'business' see PARA 30. The Treasury may by order substitute for the disregarded amount specified in the text such sum as it thinks fit: s 55A(12).

5 Ibid s 55A(9).

6 Ibid s 55A(1)(c), (10). Any order made under this provision may describe a supply of goods by reference to the use which has been made of them or other matters unrelated to the characteristics of the goods themselves: s 55A(11). See the Value Added Tax (Section 55A) (Specified Goods and Excepted Supplies) Order 2007, SI 2007/1417.

7 The relevant enforcement provisions means so much of the 1994 Act and any other enactment, and any subordinate legislation, as has effect for the purposes of, or in connection with the enforcement of, any obligation to account for and pay VAT: s 55A(8).

8 Ibid s 55A(6).

The Treasury may by order make such amendments of any provision of the 1994 Act as it considers necessary or expedient for the purposes of these provisions or in connection therewith; and such an order may confer power on the Commissioners for Her Majesty's Revenue and Customs to make regulations or exercise any other function, but no such order may be made on or after 22 March 2009: s 55A(13). Any order made under s 55A (other than one under s 55A(12) (see NOTE 4) may make different provision for different cases and contain supplementary, incidental, consequential or transitional provisions: s 55A(14).

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## **(ii) Time of Supply or Acquisition**

### **A. IN GENERAL**

#### **35. The general rules.**

In relation to goods the general rule<sup>1</sup> is that a supply<sup>2</sup> is treated as taking place for the purposes of the charge to value added tax<sup>3</sup>:

- 100 (1) if the goods are to be removed, at the time of the removal<sup>4</sup>;
- 101 (2) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied<sup>5</sup>; and
- 102 (3) if the goods (having been sent or taken on approval or sale or return or similar terms) are removed before it is known whether a supply will take place, at the time when it becomes certain that the supply has taken place, or, if sooner, 12 months after the removal<sup>6</sup>.

In the case of services, the general rule is that a supply is treated as taking place at the time when the services are performed<sup>7</sup>.

If, before the time applicable under the general rules<sup>8</sup>, the person making the supply issues a VAT invoice<sup>9</sup> in respect of it or if, before the time applicable under head (1) or head (2) above or the time applicable under the general rule in relation to services, he receives a payment in respect of it, the supply is, to the extent covered by the invoice or payment, treated as taking place at the time the invoice is issued or the payment is received<sup>10</sup>. Furthermore if, within 14 days<sup>11</sup> after the time applicable under the general rules, the person making the supply issues a VAT invoice in respect of it, then unless he has notified the Commissioners for Her Majesty's Revenue and Customs in writing that he elects otherwise, the supply is (to the extent that it is not treated as taking place at an earlier date by virtue of the issue of a VAT invoice prior to, or by virtue of payment before, the time applicable under the general rule<sup>12</sup>) treated as taking place at the time the invoice is issued<sup>13</sup>.

The Commissioners may, at the request of a taxable person, by direction alter the time at which supplies made by him, or such supplies made by him as may be specified in the direction, are to be treated as taking place<sup>14</sup>.

1 The general rule (ie the provisions of the Value Added Tax Act 1994 s 6 (as amended) (see the text and notes 2-14 infra) applies subject to s 18 (as amended) (see PARAS 144-145 post) and ss 18B, 18C (as added) (see PARAS 149, 154 post): s 6(1) (amended by the Finance Act 1996 s 26(1), Sch 3 para 1).

2 For the meaning of 'supply' see PARA 27 ante.

3 As to the charge to tax see PARA 18 et seq ante; and as to the rate of charge see PARAS 5-6 ante.

4 Value Added Tax Act 1994 s 6(2)(a). The Commissioners for Her Majesty's Revenue and Customs generally refer to the time of supply as the 'tax point'. By concession, the Commissioners permit operators of coin-operated machines to delay accounting for VAT until the coins are removed from the machines, notwithstanding that the tax point is, technically, the moment when the machine is used: Customs and Excise Public Notice 48 *Extra-Statutory Concessions* (March 2002) PARA 3.6. See also *R v Customs and Excise Comrs, ex p Littlewoods Home Shopping Group Ltd* [1998] STC 445, CA (even where supplies are made on credit terms, the liability to

VAT arises at the time of supply, such liability being measured by reference to the value of the whole consideration regardless of the date on which the consideration is received by the supplier); and *Robertson's Electrical Ltd v Customs and Excise Comrs* (2004) VAT Decision 18765, [2004] STI 2570 (retrospective invoicing of sales of goods paid for over the internet at time of ordering). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 Value Added Tax Act 1994 s 6(2)(b). See also the cases cited in note 4 supra.

6 Ibid s 6(2)(c). See also the cases cited in note 4 supra.

7 Ibid s 6(3). This rule is also subject to s 18 (as amended) (see PARAS 144-145 post) and ss 18B, 18C (as added) (see PARAS 149, 154 post): s 6(1) (as amended: see note 1 supra). See *Trustees for the Greater World Association Trust v Customs and Excise Comrs* [1989] VATTR 91 (in the usual case, an estate agent's services are supplied on completion and not on exchange of contracts); *Mercantile Contracts Ltd v Customs and Excise Comrs* (1990) VAT Decisions 4357, 5266, [1990] STI 90, 918 (where a builder who converted flats was, by the contract, to be paid five years later, and was obliged to maintain the flats in the meantime, his services could be divided into two and VAT was due on completion of the performance of the works of conversion).

8 Ie under the Value Added Tax Act 1994 s 6(1)-(3) (as amended): see the text and notes 1-7 supra.

9 'VAT invoice' means such an invoice as is required under ibid s 58, Sch 11 para 2A (as added) (see PARA 245 post), or would be so required if the person to whom the supply is made were a person to whom such an invoice should be issued: s 6(15) (amended by the Finance Act 2002 s 24(4)(a)). As to the meaning of 'invoice' see PARA 17 note 9 ante. For these purposes a self-billed invoice is not treated as issued by the supplier: Value Added Tax Act 1994 Sch 11 para 2B(3) (Sch 11 para 2B added by the Finance Act 1992 s 24(2)).

The Commissioners have stated that the rules relating to the time of supply which depend on the issue of a VAT invoice do not apply to zero-rated supplies: see Customs and Excise Public Notice 700 *The VAT Guide* (April 2002) PARA 15.10. The consequence is that the tax point for a zero-rated supply cannot be advanced or delayed by the issue of a document purporting to be a VAT invoice, although the tax point could be altered by a payment in advance. This appears to be based on the Value Added Tax Regulations 1995, SI 1995/2518, reg 20(a) (see PARA 278 post) which provides that reg 13 (which imposes an obligation to provide a VAT invoice) does not apply to any zero-rated supply other than a supply for the purposes of acquisition. However, in *Customs and Excise Comrs v Faith Construction Ltd* [1990] 1 QB 905 at 916, [1989] STC 539 at 543, CA (see note 10 infra), Parker LJ stated that the assertion was 'questionable'. A VAT invoice is not 'issued' for the purposes of VAT unless it has been delivered into the purchaser's possession: *Customs and Excise Comrs v Woolfold Motor Co Ltd* [1983] STC 715. A tax point is not created on the issue of a VAT invoice where the supply does not subsequently take place: *Broadwell Land plc v Customs and Excise Comrs* [1993] VATTR 346. See also Case C-342/87 *Genius Holding BV v Staatssecretaris van Financiën* [1989] ECR 4227, [1991] STC 239, ECJ.

10 Value Added Tax Act 1994 s 6(4). Thus, where a deposit is received prior to the supply of goods, the supply takes place partly at the time when the deposit is paid and partly when the goods are supplied, or the remainder of the consideration is paid: *Purshotam M Pattni & Sons v Customs and Excise Comrs* [1987] STC 1 (but consider also the effect of the Value Added Tax Act 1994 s 88 (as amended) (supplies spanning a change in VAT rates: see PARA 36 post) on the facts of that case). Section 6(4)-(8), (10) (see the text and notes 11-14 infra; and PARA 44 post) do not apply for determining when any supply of gold is to be treated as taking place (see s 55(4)); and s 6(4) cannot apply to a case where the effect of its operation would be to treat an otherwise taxable supply as taking place at a time and in circumstances when the supply would fall to be disregarded for VAT purposes (eg because the parties were, at that time, members of the same VAT group); s 6(4) applies only where the person making the supply is a taxable person making a taxable supply, being someone who is in a position to issue a VAT invoice, and does not apply to a person from whom no VAT would be due: see *Customs and Excise Comrs v Thorn Materials Supply Ltd*, *Customs and Excise Comrs v Thorn Resources Ltd* [1996] STC 1490, CA (affd [1998] 3 All ER 342, [1998] 1 WLR 1106, HL).

In *Customs and Excise Comrs v Faith Construction Ltd* [1990] 1 QB 905, [1989] STC 539, CA, schemes were devised to effect payment of consideration for building services prior to such services ceasing to be zero-rated on a change in the law. In each case the court held that payment was received when money was paid into the builder's account, notwithstanding that he immediately lent the money back, or that he could draw the money out of his account only against architects' certificates. It was sufficient that the client had in each case discharged his contractual obligation to make payment. A payment is made for VAT purposes, even if the customer retains an equitable interest in the money pending performance: *Customs and Excise Comrs v Richmond Theatre Management Ltd* [1995] STC 257. See also *Old Chigwellians' Club v Customs and Excise Comrs* [1987] VATTR 66 (payments made towards future life membership of club; no supply for VAT until pupil had been elected to the club); cf *Customs and Excise Comrs v Moonrakers Guest House Ltd* [1992] STC 544 (deposits for holiday accommodation, which would be returned on cancellation if the room was relet, constituted payment for the purpose of the Value Added Tax Act 1994 s 6(4)); *Bruce Banks Sails Ltd v Customs and Excise Comrs* [1990] VATTR 175 (the mere fact that a contract might be rescinded and the deposit returned did not prevent a tax point arising on the receipt of the deposit); *Nigel Mansell Sports Car Ltd v Customs and*



*Excise Comrs* [1991] VATTR 491 (in the absence of a contract for a supply, the payment of a returnable 'good faith' deposit was outside the scope of VAT). There is no tax point by reason of the Value Added Tax Act 1994 s 6(4) where payment is made for non-existent goods, at least where the goods never come into existence: *Theotrope Holdings Ltd v Customs and Excise Comrs* [1983] VATTR 88; *Northern Counties Co-operative Enterprises Ltd v Customs and Excise Comrs* [1986] VATTR 250; *Munn v Customs and Excise Comrs* [1989] VATTR 11. The Value Added Tax Act 1994 s 6(4) involves a permitted derogation from the general rules relating to the time of supply laid down by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 10(1). As to the extent of the right to derogate under art 10(2) see Case C-144/94 *Ufficio IVA di Trapani v Italittica SpA* [1995] ECR I-3653, [1995] STC 1059, ECJ. See also the cases cited in note 4 supra. As to the Sixth Directive see PARA 1 note 1 ante.

11 The Commissioners may, at the request of a taxable person, direct that this provision is to apply in relation to supplies made by the taxable person, or such supplies made by him as may be specified in the direction, as if for the period of 14 days there were substituted such longer period as may be specified in the direction: Value Added Tax Act 1994 s 6(6). See also note 13 infra. For the meaning of 'taxable person' see PARA 63 post.

12 In the time mentioned in *ibid* s 6(4): see the text to note 10 supra.

13 *Ibid* s 6(5). For the purposes of s 6(5), (6), a self-billed invoice in relation to which the conditions mentioned in Sch 11 para 2B(2) (as added) (see PARA 246 post) are complied with must, subject to compliance with such further conditions as may be prescribed, be treated as issued by the supplier: Sch 11 para 2B(4) (as added: see note 9 supra). In such a case, any notice of election given or request made for the purposes of s 6(5) or s 6(6) by the person providing the self-billed invoice is treated for those purposes as given or made by the supplier: Sch 11 para 2B(4) proviso (as so added).

14 *Ibid* s 6(10). This may be done either: (1) by directing those supplies to be treated as taking place at times or on dates determined by or by reference to the occurrence of some event described in the direction (s 6(10)(a)(i)) or at times or on dates determined by or by reference to the time when some event so described would in the ordinary course of events occur (s 6(10)(a)(ii)), the resulting times or dates being in every case earlier than would otherwise apply; or (2) by directing that, notwithstanding s 6(5), (6), those supplies are to be treated, to the extent that they are not treated as taking place at the time mentioned in s 6(4), as taking place either at the beginning of the relevant working period, as defined in his case in and for the purposes of the direction (s 6(10)(b)(i)) or at the end of the relevant working period, as so defined (s 6(10)(b)(ii)).

## UPDATE

### 35 The general rules

NOTE 4--*Robertson's Electrical*, cited, reversed: [2007] STC 612, IH (tax point occurred when online payment made). See also *Grattan plc v HMRC Comrs* (2006) VAT Decision 19515, [2006] STI 1709 (mail order goods paid for on ordering, but customer entitled to full refund without question if goods returned within 14 days; supply took place on payment).

NOTE 10--A supply is not treated as taking place at the time of an advance payment where the goods to be supplied have not been precisely identified at the time of the payment: Case C-419/02 *BUPA Hospitals Ltd v Customs and Excise Comrs* [2006] Ch 446, ECJ.

EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

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### **36. Supplies spanning change of rate etc.**

The general rules relating to the time of supply for the purposes of value added tax<sup>1</sup> are overridden by numerous specific provisions<sup>2</sup> which substitute for the basic tax points<sup>3</sup> dates determined by reference to payment or the issue of a VAT invoice<sup>4</sup> or by agreement between the supplier and the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup>. Where, however, there is a change in the rate of VAT in force<sup>6</sup> or in the descriptions of exempt<sup>7</sup>, zero-rated<sup>8</sup> or reduced-rate<sup>9</sup> supplies or acquisitions, the supplier is free to determine that the tax point should be taken as the basic tax point rather than that which would be established by the specific provisions<sup>10</sup>.

Where:

- 103 (1) any acquisition of goods from another member state which is affected by the change would not have been affected, in whole or in part, if it had been treated as taking place at the time of the event which, in relation to that acquisition, is the first relevant event for the purposes of taxing the acquisition<sup>11</sup>; or
- 104 (2) any acquisition of goods from another member state which is not so affected would have been affected, in whole or in part, if it had been treated as taking place at the time of that event<sup>12</sup>,

the rate at which VAT is chargeable on the acquisition, or any question whether it is zero-rated or exempt or is a reduced-rate acquisition must, if the person making the acquisition so elects, be determined as at the time of that event<sup>13</sup>.

1 See PARA 35 ante.

2 See in particular the Value Added Tax Act 1994 s 6(4)-(6), (10); and PARAS 35 ante, 37 et seq post. Specific arrangements have also been approved for establishing the time of supply in the case of corporate purchasing cards: see Customs and Excise Public Notice 701/48 *Corporate Purchasing Cards* (March 2002) PARA 2.

3 These tax points are those established by the Value Added Tax Act 1994 s 6(1)-(3) (as amended) (see PARA 35 ante) and are generally referred to as 'the basic tax points': see Customs and Excise Public Notice 700 *The VAT Guide* (April 2002) PARAS 14-15.

4 For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

5 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 I.e. the rate in force under the Value Added Tax Act 1994 s 2 (as amended) (see PARA 5 ante) or s 29A (as added) (see PARA 6 ante).

7 As to exempt supplies or acquisitions see PARA 155 et seq post.

8 References for these purposes to an acquisition being zero-rated are references to an acquisition from another member state being one in relation to which the Value Added Tax Act 1994 s 30(3) (see PARA 190 post) provides for no VAT to be chargeable: s 88(7). As to zero-rated supplies or acquisitions generally see PARA 174 et seq post. For the meaning of 'another member state' see PARA 4 note 15 ante; and as to goods acquired in another member state see PARA 19 ante.

9 References for these purposes to a supply being a reduced-rate supply or to an acquisition being a reduced-rate acquisition are references to a supply, or (as the case may be) an acquisition, being one on which

VAT is charged at the rate in force under *ibid* s 29A (as added) (see PARA 6 ante): s 88(8) (s 88(1), (2), (4) amended, s 88(8) added, by the Finance Act 2001 s 99(6), Sch 31 para 4).

10 See the Value Added Tax Act 1994 s 88(1), (2) (as amended: see note 9 supra). Where: (1) a supply affected by the change would, apart from s 6(4), (5), (6) or (10) (see PARA 35 ante), be treated under s 6(2) or (3) (see PARA 35 ante) as made wholly or partly at a time when it would not have been affected by the change; or (2) a supply not so affected by the change would, apart from those provisions, be treated under s 6(2) or (3) as made wholly or partly at a time when it would have been so affected, the rate at which VAT is chargeable on the supply, or any question whether it is zero-rated or exempt or a reduced-rate supply, may, at the election of the supplier, be determined without regard to s 6(4), (5), (6) or (10): s 88(2) (as so amended). Any power to make regulations under the Value Added Tax Act 1994 with respect to the time when a supply is to be treated as taking place includes power to provide for s 88 (as amended) to apply as if the references in s 88(2) to s 6(4), (5), (6) or (10) includes references to specified provisions of the regulations: s 88(3). Section 88 applies as if those references included references to the Value Added Tax Regulations 1995, SI 1995/2518, regs 81, 82, 82A, 84, 85, 86(1)-(4), 88-93, 94B (as added and amended) (see PARAS 33 ante, 37 et seq post): reg 95 (amended by SI 2003/2318; SI 2004/3140). Regulations under the Value Added Tax Act 1994 s 58, Sch 11 para 2A (as added) (see PARA 245 post) may make provision for the replacement or correction of any VAT invoice which relates to a supply in respect of which an election is made under s 88 but which was issued before the election was made: s 88(5) (s 88(5), (6) amended by the Finance Act 2002 s 24(4)(c)). If a VAT invoice has previously been raised for a supply in respect of which an election is made under the Value Added Tax Act 1994 s 88 (as amended), the supplier is, within 14 days of the change, obliged to provide his customer with a credit note headed: 'Credit note - change of VAT rate' and containing specified particulars: see the Value Added Tax Regulations 1995, SI 1995/2518, reg 15 (as amended); and PARA 282 post.

No election may be made under the Value Added Tax Act 1994 s 88 (as amended) in respect of a supply to which Sch 4 para 7 (as added) (see PARA 30 ante) or Sch 11 para 2B(4) (as added) (see PARA 35 ante) applies: s 88(6) (as so amended).

11 *Ibid* s 88(4)(a).

12 *Ibid* s 88(4)(b).

13 *Ibid* s 88(4) (as amended: see note 9 supra).

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## ***B. IN PARTICULAR CASES***

### **37. Power to make specific rules.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may make provision by regulations with respect to the time at which, notwithstanding the general rules<sup>2</sup>, a supply<sup>3</sup> is to be treated as taking place for the purposes of value added tax in cases where:

- 105 (1) it is a supply of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period<sup>4</sup>;
- 106 (2) it is a supply of goods for a consideration the whole or part of which is determined at the time when the goods are appropriated for any purpose<sup>5</sup>;
- 107 (3) there is a supply to which the provisions relating to gold<sup>6</sup> apply<sup>7</sup>; or
- 108 (4) there is a deemed supply<sup>8</sup> of services<sup>9</sup>.

For any such case the regulations may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals<sup>10</sup>.

Where goods are treated as the subject of a self-supply<sup>11</sup>, the supply is treated as taking place when they are appropriated to use by the trader for the purpose of his business<sup>12</sup>.

When goods are transferred or disposed of, otherwise than for consideration, in circumstances such that they cease to form part of the assets of a business and are thereby deemed to be supplied by the trader<sup>13</sup>, the supply is treated as taking place when the goods are so transferred or disposed of<sup>14</sup>.

Where a person ceases to be a taxable person<sup>15</sup>, any goods then forming part of the assets of a business carried on by him are generally deemed to be supplied immediately before he ceases to be a taxable person<sup>16</sup>.

The ordinary tax point rules are excluded in the case of supplies of designated travel services<sup>17</sup> by tour operators<sup>18</sup>. Instead, at the election of the tour operator making them, all supplies comprising (in whole or in part) a designated travel service are treated as taking place either:

- 109 (a) when the traveller commences a journey, or occupies any accommodation supplied, whichever is the earlier<sup>19</sup>; or
- 110 (b) when any payment is received by the tour operator in respect of that supply which, when aggregated with any earlier such payments, exceeds 20 per cent of the total consideration, to the extent covered by that and any earlier such payment, except in so far as any earlier such payment has already been treated as determining the time of part of that supply<sup>20</sup>.

Except as the Commissioners may otherwise allow, all supplies comprising in whole or in part a designated travel service made by the same tour operator are treated as taking place at the time determined under one only of these methods<sup>21</sup>.

The time of supply of fuel appropriated to private use is the time when the fuel is put into the fuel tank of the individual<sup>22</sup>.

- 1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.
- 2 Ie notwithstanding the Value Added Tax Act 1994 s 6(2)-(8), (11)-(13) or s 55(4): see PARA 35 ante; the text and notes 11-14 infra; and PARA 44 post.
- 3 For the meaning of 'supply' see PARA 27 ante.
- 4 Value Added Tax Act 1994 s 6(14)(a). See the Value Added Tax Regulations 1995, SI 1995/2518, reg 90(1) (as amended); and PARA 38 post. For the meaning of 'consideration' generally see PARA 95 post.
- 5 Value Added Tax Act 1994 s 6(14)(b). This caters, eg, for cases where goods are stored on the buyer's premises but the supplier retains the property in them until the buyer appropriates the goods for use. Except in relation to: (1) a supply mentioned in s 6(2)(c) (see PARA 35 ante); or (2) a supply to which s 6(7), (8) (see PARA 44 post) applies, where goods are supplied under an agreement whereby the supplier retains the property therein until the goods or part of them are appropriated under the agreement by the buyer and in circumstances where the whole or part of the consideration is determined at that time, a supply of any of the goods is treated as taking place at the earliest of: (a) the date of appropriation by the buyer (Value Added Tax Regulations 1995, SI 1995/2518, reg 88(1)(a)); (b) the date when a VAT invoice is issued by the supplier (reg 88(1)(b)); or (c) the date when a payment is received by the supplier (reg 88(1)(c)). If, however, within 14 days after appropriation of the goods or part of them by the buyer as mentioned in reg 88(1), the supplier issues a VAT invoice in respect of goods appropriated or a self-billed invoice fulfilling the conditions in reg 13(3A) (as added) (see PARA 279 post) is issued by the customer, the provisions of the Value Added Tax Act 1994 s 6(5) (see PARA 35 ante) apply to that supply (ie the usual tax point applies): Value Added Tax Regulations 1995, SI 1995/2518, reg 88(2) (amended by SI 2003/3220). For these purposes, a reference to receipt of payment (however expressed) includes a reference to receipt by a person to whom a right to receive it has been assigned: Value Added Tax Regulations 1995, SI 1995/2518, reg 94A (added by SI 1999/599).
- 6 Ie the Value Added Tax Act 1994 s 55 (as amended): see PARAS 32 ante, 64 post.
- 7 Ibid s 6(14)(c).
- 8 Ie by virtue of ibid s 5(1), Sch 4 para 5(4) or an order under s 5(4) (ie the Value Added Tax (Supply of Services) Order 1993, SI 1993/1507 (as amended)): see PARA 30 ante. See also the Value Added Tax Act 1994 s 6(13); and note 12 infra.
- 9 Ibid s 6(14)(d). Where such services are supplied for any period, they are treated as being supplied on the last day of the supplier's prescribed accounting period (or periods) in which the services are performed, or the goods made available or used, as the case may be: Value Added Tax Regulations 1995, SI 1995/2518, reg 81(1), (2). For the meaning of 'prescribed accounting period' see PARA 115 note 15 post.
- 10 Value Added Tax Act 1994 s 6(14). See eg the Value Added Tax Regulations 1995, SI 1995/2518, reg 90 (as amended); and PARA 38 post.
- 11 Ie by Treasury order made under the Value Added Tax Act 1994 s 5(5): see PARA 32 ante.
- 12 Ibid s 6(11). Goods are not so appropriated until set aside out of a larger bulk: *A & B Motors (Newton-le-Willows) v Customs and Excise Comrs* [1981] VATTR 29. A similar tax point is found where there is a supply of services by virtue only of the Value Added Tax Act 1994 Sch 4 para 5(4) (see PARA 30 ante); the supply is then treated as taking place when the goods are appropriated to the relevant use: s 6(13).
- 13 Ie where there is a supply of goods by virtue only of ibid Sch 4 para 5(1): see PARA 30 ante.
- 14 Ibid s 6(12).
- 15 For the meaning of 'taxable person' see PARA 63 post.
- 16 See the Value Added Tax Act 1994 Sch 4 para 8 (as amended); and PARA 30 ante.
- 17 A 'designated travel service' is a supply of goods or services acquired for the purposes of his business, and supplied for the benefit of a traveller without material alteration or further processing, by a tour operator in a member state in which he has established his business or has a fixed establishment: Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 3(1).
- 18 Ie as a result of the Value Added Tax Act 1994 s 53(2)(e) and the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806 (as amended): see PARA 214 post.

19 Ibid art 4(2)(a).

20 Ibid art 4(2)(b).

21 Ibid art 4(3). If, however, a tour operator elects to use the payment method of determining the time of supply, but payment is not received in respect of all or part of the supply, the time of any part of the supply which has not been determined by that method is treated as occurring at the earlier of the traveller beginning his journey or first occupying any accommodation supplied to him: art 4(4). In other words, a supply is then treated as taking place for a consideration equal to the residue of the cost of the designated travel service.

22 See the Value Added Tax Act 1994 s 56(6); and PARA 104 post.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(1) SUPPLY OF GOODS AND SERVICES/(ii) Time of Supply or Acquisition/B. IN PARTICULAR CASES/38. Continuous supplies of services and certain goods.

### **38. Continuous supplies of services and certain goods.**

Where services<sup>1</sup> are supplied for a period for a consideration<sup>2</sup> the whole or part of which is determined or payable periodically or from time to time, they are treated as separately and successively supplied at the earlier of the following times:

- 111 (1) each time that a payment in respect of the supplies is received by the supplier<sup>3</sup>; or
- 112 (2) each time that the supplier issues a VAT invoice<sup>4</sup> relating to the supplies<sup>5</sup>.

Where separate and successive supplies of such services are made under an agreement which provides for successive payments, and at or about the beginning of any period not exceeding one year the supplier issues a VAT invoice containing specified additional<sup>6</sup> particulars, the services are treated as separately and successively supplied each time that a payment in respect of them becomes due or is received by the supplier, whichever is the earlier<sup>7</sup>. Where, however, there is a change in the value added tax chargeable on supplies of the description to which such an invoice relates on or before any of the dates that a payment is due as stated on it, that invoice ceases to be treated as a VAT invoice in respect of any such supplies for which payments are due after the change and not received before the change<sup>8</sup>.

In relation to successive payments made in consequence of the grant of a long lease or tenancy which is treated<sup>9</sup> as a supply of goods, the rules for the time of supply are identical to those for the continuous supply of services<sup>10</sup>. Similar provision is also made in respect of most supplies<sup>11</sup> of water<sup>12</sup>, gas<sup>13</sup> or any form of power, heat, refrigeration and ventilation<sup>14</sup>, which are treated as taking place each time that a payment in respect of the supply is received by the supplier, or a VAT invoice relating to the supply is issued by the supplier, whichever is the earlier<sup>15</sup>. Where the whole or part of the consideration for a supply of water or gas, or of power in the form of electricity, is determined or payable periodically or from time to time, goods are treated as separately and successively supplied either each time that a part of the consideration is received by the supplier<sup>16</sup> or each time that the supplier issues a VAT invoice relating to the supply<sup>17</sup>, whichever is the earlier<sup>18</sup>; and where such separate and successive supplies are made under an agreement which provides for successive payments, and at or about the beginning of any period not exceeding one year the supplier issues a VAT invoice containing specified additional particulars<sup>19</sup>, the goods are treated as separately and successively supplied each time that a payment in respect of them becomes due or is received by the supplier, whichever is the earlier<sup>20</sup>. Where, however, there is a change in the VAT chargeable on supplies of the description to which such an invoice relates on or before any of the dates that a payment is due as stated on it, that invoice ceases to be treated as a VAT invoice in respect of any such supplies for which payments are due after the change and not received before the change<sup>21</sup>.

Where supplies<sup>22</sup> which are subject to the rate of VAT in force<sup>23</sup> are provided<sup>24</sup> in circumstances such that either the person making the supply<sup>25</sup> and the person to whom the supply is made are connected with each other<sup>26</sup> or one of those persons is an undertaking in relation to which the other is a group undertaking<sup>27</sup>, goods or services must<sup>28</sup> be treated as separately and successively supplied either at the end of the period of 12 months after the supplies commenced<sup>29</sup> or, where the Commissioners for Her Majesty's Revenue and Customs are satisfied that each category of supply has been adequately identified, on such other period end

date nominated for each category and falling within such period<sup>30</sup> as may be notified by the taxable person<sup>31</sup> to the Commissioners in writing<sup>32</sup>, and thereafter at the end of each subsequent period of 12 months<sup>33</sup>, although where the person making the supply, within the period of six months after the applicable time<sup>34</sup> either issues a VAT invoice<sup>35</sup> or receives a payment<sup>36</sup> in respect of it, the supply must<sup>37</sup> be treated as taking place at the time the invoice is issued or the payment is received, unless the person making the supply has notified the Commissioners in writing that he elects not to avail himself of these provisions<sup>38</sup>. A taxable person may also, after the start of any period to be established for these purposes<sup>39</sup>, in relation to some or all of those supplies<sup>40</sup>, and subject to the Commissioners' approval<sup>41</sup>, select an alternative period end date falling before the date that period would otherwise have ended<sup>42</sup>, from which date subsequent periods of 12 months will end<sup>43</sup>.

A supply of water<sup>44</sup>, gas<sup>45</sup> or any form of power, heat, refrigeration or ventilation which is excluded from these provisions<sup>46</sup> is treated as taking place on the day of the issue of a VAT invoice in respect of the supply<sup>47</sup>.

Where the provision is made for a supply to be treated as taking place each time that a payment (however expressed) is received, or an invoice is issued, the supply is to be treated as taking place only to the extent covered by the payment or invoice<sup>48</sup>.

1    le services other than those which are supplied for the purposes of the construction industry, for which special provision is made: Value Added Tax Regulations 1995, SI 1995/2518, reg 90(1) (amended by SI 1997/2887; and PARA 39 post.

2    For the meaning of 'consideration' see PARA 95 post. There is no payment for the purposes of the Value Added Tax Regulations 1995, SI 1995/2518, reg 90 (as amended) (see the text and notes 3-8 infra) unless the sum in question constitutes consideration for value added tax purposes. Accordingly, overpayments made erroneously by customers receiving continuous services did not fall to be charged to VAT until the following quarter's invoice was issued, crediting the sum overpaid against the customer's then liability: *Customs and Excise Comrs v British Telecommunications plc* [1996] STC 818, CA. Substantial difficulties are encountered in practice in determining whether there is a liability to, and accounting for, VAT on management services, ie supplies of staff etc between connected companies, eg where one company claims to be offering a (possibly free) payroll service to another company rather than providing staff in return for a reimbursement of salary. Such reimbursements are treated as continuous supplies of services: *Customs and Excise Comrs v Tarmac Roadstone Holdings Ltd* [1987] STC 610, CA. In such cases, the time of supply is likely to be the date of payment, which may occur on the date on which a journal transfer is made between purchase and sales ledger accounts or an entry is made in an inter-company account having a debit balance: *Pentex Oil Ltd v Customs and Excise Comrs* (1992) VAT Decision 7989, [1992] STI 927; *Legal and Contractual Services Ltd v Customs and Excise Comrs* [1984] VATTR 85. In *Missionfine Ltd (t/a GT Air Services) v Customs and Excise Comrs* (1993) VAT Decision 10331 (unreported), the tribunal upheld an assessment to VAT which assumed that the time of supply of management services was the date on which the directors of the supplier signed annual accounts which contained an entry in respect of the services. In *Waverley Housing Management Ltd v Customs and Excise Comrs* (1994) VAT Decision 11765, [1994] STI 573, it was held that the temporary retention of rents in lieu of invoicing management services, pending group registration for VAT, did not constitute payment for the purposes of the Value Added Tax Regulations 1995, SI 1995/2518, reg 90. As to VAT on groups of companies see PARA 205 et seq post.

3    Ibid reg 90(1)(a). Reg 90(1) partially implements the Value Added Tax Act 1994 s 6(14)(a) (see PARA 37 ante), which empowers the Commissioners for Her Majesty's Revenue and Customs to make provision with respect to the time at which a supply is to be treated as taking place, inter alia, where it is a supply of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. See also *BJ Rice & Associates v Customs and Excise Comrs* [1996] STC 581, CA (a trader had made continuous supplies of services to a customer at a time when he was not registered for VAT. Although an invoice had been sent to the customer, payment was not received until after the trader had registered; held that the rules for determining the time of the supply (which was taken to be the time of payment because the earlier invoice could not be a VAT invoice) did not also determine whether the supply was made by a taxable person, so that the trader was not liable to account for VAT on the supply). It was also noted in *Rice v Customs and Excise Comrs* supra that the Value Added Tax Regulations 1995, SI 1995/2518, reg 90(1) fails to make specific provision for the case where the consideration for the supply is determined at the end of any period.

For these purposes, a reference to receipt of payment (however expressed) includes a reference to receipt by a person to whom a right to receive it has been assigned: ibid reg 94A (added by SI 1999/599).



4 For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 90(1)(b). See note 3 supra.

6 Ie in addition to the particulars specified in *ibid* reg 14 (as amended) (see PARA 281 post). The specified additional particulars are: (1) the dates on which payments under the agreement are to become due in the period (regs 86(3)(a), 90(2)(a)); (2) the amount payable, excluding value added tax, on each such date (regs 86(3)(b), 90(2)(b)); and (3) the rate of VAT in force at the time of issue of the VAT invoice and the amount of VAT chargeable in accordance with that rate on each of such payments (regs 86(3)(c), 90(2)(c)). See *Simkins Partnership v Customs and Excise Comrs* (1993) VAT Decision 9705 (unreported) (treatment of invoice for 1991-92 contributions to Solicitors Indemnity Fund).

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 90(2).

8 *Ibid* reg 90(3).

9 Ie by virtue of the Value Added Tax Act 1994 s 5(1), Sch 4 para 4 (see PARA 30 ante).

10 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 85.

11 Ie except a supply to which the Value Added Tax Act 1994 s 6(7), (8) (certain intra-Community removals of goods: see PARA 44 post) applies.

12 Ie other than: (1) distilled water, deionised water and water of similar purity; and (2) water comprised in any of the excepted items set out in the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 1 (see PARA 175 post): Value Added Tax Regulations 1995, SI 1995/2518, reg 86(1)(a).

13 Ie either: (1) coal gas, water gas, producer gases or similar gases; or (2) petroleum gases or other gaseous hydrocarbons in a gaseous state: *ibid* reg 86(1)(b), (c).

14 *Ibid* reg 86(1)(d).

15 *Ibid* reg 86(1).

16 *Ibid* reg 86(2)(a).

17 *Ibid* reg 86(2)(b).

18 *Ibid* reg 86(2).

19 As to the specified additional particulars see note 6 supra.

20 Value Added Tax Regulations 1995, SI 1995/2518, reg 86(3).

21 *Ibid* reg 86(4).

22 Ie supplies falling within *ibid* reg 85 (other than a supply which is exempt by virtue of the Value Added Tax Act 1994 Sch 9 Pt II Group 1 (see PARA 156 et seq post) or would be so exempt but for the operation of Sch 10 para 2(1) (see PARA 157 post)), the Value Added Tax Regulations 1995, SI 1995/2518, reg 86(1)-(4), or reg 90 (other than a supply which is exempt by virtue of the Value Added Tax Act 1994 Sch 9 Group 1 or would be so exempt but for the operation of Sch 10 para 2(1)): Value Added Tax Regulations 1995, SI 1995/2518, reg 94B(1)(a)-(c) (reg 94B added by SI 2003/2318). These provisions do not, however, apply either where a person can show that a person to whom he has made such a supply is entitled under the Value Added Tax Act 1994 ss 25, 26 (see PARAS 216-218 post) to credit for all of the VAT on that supply (Value Added Tax Regulations 1995, SI 1995/2518, reg 94B(3) (as so added)) or, and where reg 94B (as added) applies, to the extent that supplies have been treated as having taken place under reg 94B (as added) (reg 94B(14) (as so added)).

23 *Ibid* reg 94B(2)(c) (as added: see note 22 supra). For these purposes, the rate of VAT in force is the rate in force under the Value Added Tax Act 1994 s 2 (as amended) (see PARA 5 ante) or s 29A (as added) (see PARA 6 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 94B(2)(c) (as so added).

24 For the purposes of *ibid* reg 94B (as added), goods or services are provided at the time when and to the extent that, the recipient receives the benefit of them: reg 94B(13) (as added: see note 22 supra).

25 Where the supply is one of the leasing of assets, and that leasing depends on one or more other leases of those assets (the superior lease or leases), then this reference to the person making the supply includes a reference to any lessor of a superior lease: *ibid* reg 94B(11) (as added: see note 22 supra). For these purposes,

a reference to the leasing of assets includes a reference to any letting, hiring or rental of assets however described, and 'lessor' is construed accordingly: reg 94B(12) (as so added).

26 Ibid reg 94B(2)(a) (as added: see note 22 supra).

27 Ibid reg 94B(2)(b) (as added: see note 22 supra). Ie, except where both undertakings are treated under the Value Added Tax Act 1994 ss 43A-43C (as added and amended) (see PARA 75 post) as members of the same group: Value Added Tax Regulations 1995, SI 1995/2518, reg 94B(2)(b) (as so added). Any question whether a person is connected with another is determined in accordance with the Income and Corporation Taxes Act 1988 s 839 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258); and 'undertaking' and 'group undertaking' have the same meanings as in the Companies Act 1985 s 259 (as substituted): Value Added Tax Regulations 1995, SI 1995/2518, reg 94B(4) (as so added).

28 Ie to the extent that they have not already been treated as supplied by virtue of the regulations specified in ibid reg 94B(1) (as added) (see note 22 supra) (or any provision of the Value Added Tax Act 1994 or other regulations made thereunder), and to the extent that they have been provided: Value Added Tax Regulations 1995, SI 1995/2518, reg 94B(5) (as added: see note 22 supra).

29 Ibid reg 94B(5)(b) (as added: see note 22 supra). This is so in the case of supplies the provision of which commenced after 1 October 2003: in the case of supplies the provision of which commenced on or before that date, the date at which goods or services must be treated as separately and successively supplied is the end of the period of 12 months after that date: reg 94B(5)(a) (as so added).

30 Ie the period specified in ibid reg 94B(5)(a) or (b) (as added) (see the text and note 29 supra).

31 For the meaning of 'taxable person' see PARAS 18 note 4 ante, 63 post.

32 Value Added Tax Regulations 1995, SI 1995/2518, reg 94B(5)(c) (as added: see note 22 supra).

33 Ibid reg 94B(5) (as added: see note 22 supra).

34 Ie the time applicable under ibid reg 94B(5) (as added) (see the text and notes 22-33 supra): reg 94B(6) (as added: see note 22 supra). The Commissioners may, at the request of a taxable person, allow reg 94B(6) (as added) to apply in relation to supplies made by him (or such supplies as may be specified) as if for the period of six months there were substituted such other period as may be prescribed by them: reg 94B(7) (as added: see note 22 supra).

35 Ibid reg 94B(6)(a) (as added: see note 22 supra).

36 Ibid reg 94B(6)(b) (as added: see note 22 supra).

37 Ie to the extent that it has not already been treated as taking place at some other time by virtue of the regulations specified in ibid reg 94B(1) (as added) (see note 22 supra) (or any provision of the Value Added Tax Act 1994 or other regulations made thereunder): Value Added Tax Regulations 1995, SI 1995/2518, reg 94B(6) (as added: see note 22 supra).

38 Ibid reg 94B(6) (as added: see note 22 supra).

39 Ie any period to be established under ibid reg 94B(5) (as added) (see the text and notes 22-33 supra).

40 Ibid reg 94B(8)(a) (as added: see note 22 supra).

41 Ibid reg 94B(8)(b) (as added: see note 22 supra).

42 Ie which would otherwise be established under ibid reg 94B(5) (as added) (see the text and notes 22-33 supra). For these purposes, a reference to a period end established under reg 94B(5) (as added) includes a reference to a period end established by an earlier application of reg 94B(8) (as added): reg 94B(10) (as so added).

43 Ibid reg 94B(8) (as added: see note 22 supra). A date selected and approved under reg 94B(8) (as added) will be the date which establishes the end of the taxable person's current period: reg 94B(9) (as so added).

44 As to supplies of water for these purposes see note 12 supra.

45 As to supplies of gas for these purposes see note 13 supra.

46 Ie a supply to which the Value Added Tax Act 1994 s 6(7), (8) (see PARA 44 post) applies: Value Added Tax Regulations 1995, SI 1995/2518, reg 86(5).

47 Ibid reg 86(5).

48 Ibid reg 94 (amended by SI 1997/1525).

## **UPDATE**

### **38 Continuous supplies of services and certain goods**

NOTE 22--Reference to Value Added Tax Act 1994 Sch 10 para 2(1) now to Sch 10 Pt 1 (paras 1-34): SI 1995/2518 reg 94B(1)(a), (c) (amended by SI 2008/1146).

NOTE 27--Reference to Companies Act 1985 s 259 now to Companies Act 2006 s 1161 (see COMPANIES vol 14 (2009) PARAS 26, 27): SI 1995/2518 reg 94B(4) (substituted by SI 2009/1967). A company is not connected with another company only because both are under the control of the Crown, a minister of the Crown, a government department or a Northern Ireland department; and 'company' and 'control' have the same meaning as in the Income and Corporation Taxes Act 1988 s 839: SI 1995/2518 reg 94B(4).

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### 39. Supplies in the construction industry.

In general, where services, or services together with goods, are supplied<sup>1</sup> in the course of the construction, alteration, demolition, repair or maintenance of a building or any civil engineering work under a contract which provides for payment for such supplies to be made periodically or from time to time, those services or goods and services are treated as separately and successively supplied at the earliest of each time that a payment is received by the supplier<sup>2</sup> and each time that the supplier issues a VAT invoice<sup>3</sup>. If, however, at the time the services were or are performed it was or is the intention or expectation of either the supplier or a person responsible for financing<sup>4</sup> the supplier's cost of supplying the services or services together with goods<sup>5</sup> that relevant land<sup>6</sup> would or will become exempt land or continue to be such land<sup>7</sup>, any such services or goods and services are treated as separately and successively supplied on the day on which the services in question are performed<sup>8</sup>. This is also the case if at the time the services were or are performed the supplier had or has received (and used in making his supply) any supply of services or of services together with goods the time of supply of which either was or but for the issue by the supplier of those services or services together with goods of a VAT invoice (other than one which has been paid in full) would have been so determined<sup>9</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 Value Added Tax Regulations 1995, SI 1995/2518, reg 93(1)(a) (reg 93 substituted by SI 1999/1374). A reference to receipt of payment (however expressed) includes a reference to receipt by a person to whom a right to receive it has been assigned: Value Added Tax Regulations 1995, SI 1995/2518, reg 94A (added by SI 1999/599).

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 93(1)(b) (as substituted: see note 2 supra). For the meaning of 'VAT invoice' see PARA 35 note 9 ante. The supply takes place only to the extent covered by the payment or invoice: see reg 94 (as amended); and PARA 38 ante.

These provisions are concerned only with actual supplies of services under a contract and cannot determine the time of a deemed supply made under the Value Added Tax Act 1994 s 47(3) (as amended) (see PARA 209 post): *Wirral Metropolitan Borough v Customs and Excise Comrs* [1995] STC 597 (decided under the Value Added Tax Regulations 1995, SI 1995/2518, reg 93 as originally enacted). It is common practice in the construction industry to adopt special arrangements for the provision of documents corresponding to VAT invoices; in some cases the supplier will operate a self-billing system; in others, the parties will proceed by way of 'authenticated receipts': see PARAS 278-279 post.

4 References to a person's being responsible for financing the supplier's cost of supplying the services or goods and services (as to which see note 5 infra) are references to his being a person who, with the intention or in the expectation that relevant land will become, or continue (for a period at least) to be, exempt land, either: (1) has provided finance for the supplier's cost of supplying the services or services together with goods (ibid reg 93(4)(a) (as substituted: see note 2 supra)); or (2) has entered into any agreement, arrangement or understanding (whether or not legally enforceable) to provide finance for the supplier's cost of supplying the services or services together with goods (reg 93(4)(b) (as so substituted)). As to 'relevant land' and 'exempt land' see note 6 infra. References to providing finance for the supplier's cost of supplying services or services together with goods are references to doing any one or more of: (a) directly or indirectly providing funds for meeting the whole or any part of the supplier's cost of supplying the services or services together with goods (reg 93(5)(a) (as so substituted)); (b) directly or indirectly procuring the provision of such funds by another (reg 93(5)(b) (as so substituted)); (c) directly or indirectly providing funds for discharging, in whole or in part any liability that has been or may be incurred by any person for or in connection with the raising of funds to meet the supplier's cost of supplying the services or services together with goods (reg 93(5)(c) (as so substituted)); and (d) directly or indirectly procuring that any such liability is or will be discharged, in whole or in part, by another (reg 93(5)(d) (as so substituted)). References in reg 93(5) (as substituted) to the provision of funds for a purpose referred to therein include references to: (i) the making of a loan of funds that are or are to be used for that purpose (reg 93(6)(a) (as so substituted)); (ii) the provision of any guarantee or other security in

relation to such a loan (reg 93(6)(b) (as so substituted)); (iii) the provision of any of the consideration for the issue of any shares or other securities issued wholly or partly for raising those funds (reg 93(6)(c) (as so substituted)); or (iv) any other transfer of assets or value as a consequence of which any of those funds are made available for that purpose (reg 93(6)(d) (as so substituted)), but do not include references to funds made available to the supplier by paying to him the whole or any part of the consideration payable for the supply of the services or services together with goods (reg 93(6) (as so substituted)). For the meaning of 'consideration' see PARA 95 post.

5 References to the supplier's cost of supplying the services or services together with goods are to: (1) amounts payable by the supplier for supplies to him of services or of goods used or to be used by him in making the supply of services or of services together with goods (ibid reg 93(7)(a) (as substituted: see note 2 supra)); and (2) the supplier's staff and other internal costs of making the supply of services or of services together with goods (reg 93(7)(b) (as so substituted)).

6 For these purposes, 'relevant land' is land on which the building or civil engineering work to which the construction services relate is, or as the case may be, was situated (ibid reg 93(3) (as substituted: see note 2 supra)); and relevant land is exempt land if either the supplier, a person responsible for financing the supplier's cost of supplying the services or goods and services (see notes 4-5 supra), or a person connected with the supplier or with a person responsible for financing the supplier's cost of supplying the services or goods and services, is in occupation of the land without being in occupation of it wholly or mainly for eligible purposes (reg 93(8) (as so substituted)). Any question whether a person is connected with another is determined in accordance with the Income and Corporation Taxes Act 1988 s 839 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258): Value Added Tax Regulations 1995, SI 1995/2518, reg 93(15) (as so substituted).

For these purposes occupation of land by a body to which the Value Added Tax Act 1994 s 33 (as amended) (see PARA 304 post) applies is occupation of the land for eligible purposes to the extent that the body occupies the land for purposes other than those of a business carried on by that body (Value Added Tax Regulations 1995, SI 1995/2518, reg 93(11)(a) (as so substituted)), and any occupation of land by a government department (within the meaning of the Value Added Tax Act 1994 s 41 (as amended) (see PARA 208 post)) is occupation of the land for eligible purposes (Value Added Tax Regulations 1995, SI 1995/2518, reg 93(11)(b) (as so substituted)). Subject to this, a person's occupation at any time of any land is not capable of being occupation for eligible purposes unless he is a taxable person at that time (reg 93(9) (as so substituted)), and a taxable person in occupation of any land is taken for these purposes to be in occupation of that land for eligible purposes to the extent only that his occupation of that land is for the purpose of making supplies which are, or are to be, made in the course or furtherance of a business carried on by him (reg 93(10)(a) (as so substituted)) and are supplies of such a description that any input tax of his which was wholly attributable to those supplies would be input tax for which he would be entitled to credit (reg 93(10)(b) (as so substituted)). For the meaning of 'taxable person' see PARAS 18 note 4 ante, 63 post. Where land of which a person is in occupation is being held by that person in order to be put to use by him for particular purposes (reg 93(12)(a) (as so substituted)) and is not land of which he is in occupation for any other purpose (reg 93(12)(b) (as so substituted)), that person is deemed, for so long as the conditions in reg 93(12)(a), (b) are satisfied, to be in occupation of the land for the purposes for which he proposes to use it: (reg 93(12) (as so substituted)).

The provisions concerning the occupation of land (ie reg 93(9)-(12) (as substituted)) have effect where land is in the occupation of a person who is not a taxable person (reg 93(13)(a) (as so substituted)) but is a person whose supplies are treated for the purposes of the Act as supplies made by another person who is a taxable person (reg 93(13)(b) (as so substituted)) as if the person in occupation of the land and that other person were a single taxable person (reg 93(13) (as so substituted)).

For the purposes of reg 93 (as substituted) a person is taken to be in occupation of any land whether he occupies it alone or together with one or more other persons and whether he occupies all of that land or only part of it: reg 93(14) (as so substituted).

7 It would or will become (whether immediately or eventually) exempt land or continue (for a period at least) to be such land: ibid reg 93(2)(a) (as substituted: see note 2 supra)).

8 Ibid reg 93(1)(c)(ii), (2)(a) (as substituted: see note 2 supra)). This provision and the provision described in the text and note 9 infra apply to the extent that the services in question have not already been treated as supplied by virtue of the general provisions (ie s 93(1)(a), (b) (as substituted): see the text and notes 1-3 supra): reg 93(1)(c) (as so substituted).

9 Ibid reg 93(2)(b) (as substituted: see note 2 supra)). See note 8 supra; and see also Customs and Excise Public Notice 708 *Buildings and Construction* (June 2002).

## UPDATE

### 39 Supplies in the construction industry

NOTE 6--A company is not connected with another company only because both are under the control of the Crown, a minister of the Crown, a government department or a Northern Ireland department; and 'company' and 'control' have the same meaning as in the Income and Corporation Taxes Act 1988 s 839: SI 1995/2518 reg 93(16) (added by SI 2009/1967).

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#### **40. Retention payments.**

Where any contract (other than a contract for supplies in the construction industry<sup>1</sup>) for the supply<sup>2</sup> of goods<sup>3</sup> or services provides for the retention of any part of the consideration<sup>4</sup> by a person pending full and satisfactory performance of the contract, or any part of it, by the supplier, goods or services are treated as separately and successively supplied at the following times:

- 113 (1) the time determined<sup>5</sup> in accordance with the statutory requirements<sup>6</sup>; and
- 114 (2) the earlier of either the time that a payment in respect of any part of the consideration which has been retained pursuant to the contract is received by the supplier<sup>7</sup> or the time that the supplier issues a VAT invoice<sup>8</sup> relating to any such part<sup>9</sup>.

1    le any contract to which the Value Added Tax Regulations 1995, SI 1995/2518, reg 93 (as substituted) (see PARA 39 ante) applies: reg 89 (amended by SI 1997/2887).

2    For the meaning of 'supply' see PARA 27 ante.

3    le other than a supply to which the Value Added Tax Act 1994 s 6(7), (8) (see PARA 44 post) applies: Value Added Tax Regulations 1995, SI 1995/2518, reg 89.

4    For the meaning of 'consideration' see PARA 95 post.

5    le determined in accordance with the Value Added Tax Act 1994 s 6(2)-(6), (10) or (13), as the case may require: see PARAS 35, 37 ante.

6    Value Added Tax Regulations 1995, SI 1995/2518, reg 89(a) (amended by SI 2003/3220).

7    Value Added Tax Regulations 1995, SI 1995/2518, reg 89(b)(i). A reference to receipt of payment (however expressed) includes a reference to receipt by a person to whom a right to receive it has been assigned: reg 94A (added by SI 1999/599).

8    For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

9    Value Added Tax Regulations 1995, SI 1995/2518, reg 89(b)(ii). The supply takes place only to the extent covered by the payment or invoice: see reg 94 (as amended); and PARA 38 ante.

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#### **41. Special cases relating to land.**

Where a person ('the grantor') grants or assigns the fee simple in any land and at the time of the grant or assignment the total consideration for it is not determinable, then goods are treated as separately and successively supplied at the following times:

- 115 (1) the time determined<sup>1</sup> in accordance with the usual rules<sup>2</sup>; and
- 116 (2) the earlier of either each time that any part of the consideration which was not determinable at the usual time in accordance with those rules is received by the grantor<sup>3</sup> or each time that he issues a VAT invoice<sup>4</sup> in respect of such a part<sup>5</sup>.

These provisions do not, however, apply to a grant or assignment of a fee simple<sup>6</sup> where either or any of the grantor<sup>7</sup>, a financier<sup>8</sup>, or a person connected<sup>9</sup> to the grantor or financier<sup>10</sup>, intend or expect to occupy the land on a date before a date ten years after completion of the building or civil engineering work on the land, without being in occupation of it wholly or mainly for eligible purposes<sup>11</sup>.

Where an interest in, or right over, land is compulsorily purchased<sup>12</sup>, and at the time determined in accordance with the normal rules<sup>13</sup> the person from whom it is purchased does not know the amount of payment that he is to receive in respect of the purchase, then goods or services, as the case may be, are treated as supplied each time that person receives any payment for the purchase<sup>14</sup>.

1   Ie determined in accordance with the Value Added Tax Act 1994 s 6(2)-(6) or (10) as the case may require: see PARA 35 ante.

2   Value Added Tax Regulations 1995, SI 1995/2518, reg 84(2)(a) (amended by SI 2003/3220).

3   Value Added Tax Regulations 1995, SI 1995/2518, reg 84(2)(b)(i). A reference to receipt of payment (however expressed) includes a reference to receipt by a person to whom a right to receive it has been assigned: reg 94A (added by SI 1999/599).

4   For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

5   Value Added Tax Regulations 1995, SI 1995/2518, reg 84(2)(b)(ii). The supply takes place only to the extent covered by the payment or invoice: see reg 94 (as amended); and PARA 38 ante.

6   Ie a grant or assignment which falls within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(a) (see PARA 156 post).

7   Value Added Tax Regulations 1995, SI 1995/2518, reg 84(4)(a) (reg 84(3)-(5) added by SI 2002/2918; and substituted by SI 2003/1069).

8   Value Added Tax Regulations 1995, SI 1995/2518, reg 84(4)(b) (as added and substituted: see note 7 supra). For this purpose, a 'financier' is any person who, with the intention or in the expectation that occupation of the land on a date before a date ten years after completion of the building or civil engineering work would not be wholly or mainly for eligible purposes, either provides finance for the grantor's development of the land (reg 84(4)(b)(i) (as so added and substituted)) or has entered into any agreement, arrangement or understanding (whether or not legally enforceable) to provide finance for the grantor's development of the land (reg 84(4)(b)(ii) (as so added and substituted)).

'Providing finance' has the same meaning as in the Value Added Tax Act 1994 Sch 10 para 3A(4) (as added) (see PARA 158 note 21 post), subject to any appropriate modifications, but does not include paying the consideration for the grantor's grant or assignment within the Value Added Tax Regulations 1995, SI 1995/2518,



reg 84(3) (as added and substituted) (see the text and note 11 *infra*); and 'the grantor's development of the land' means any acquisition by the grantor of an interest in the land, building or civil engineering work and includes the construction of the building or civil engineering work: reg 84(5)(c), (d) (as so added and substituted). The Value Added Tax Act 1994 Sch 9 Pt II Group 1 Note (2) (see PARA 156 note 6 *post*) applies in determining when a building or civil engineering work is completed; and Sch 10 para 3A(8)-(13) (as added and amended) has effect for determining the meanings of 'eligible purposes' and 'occupation': Value Added Tax Regulations 1995, SI 1995/2518, reg 84(5)(a), (b) (as so added and substituted).

9 Any question whether a person is connected with another is determined in accordance with the Income and Corporation Taxes Act 1988 s 839 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258): Value Added Tax Regulations 1995, SI 1995/2518, reg 84(5)(e) (as added and substituted: see note 7 *supra*).

10 *Ibid* reg 84(4)(c) (as added and substituted: see note 7 *supra*).

11 *Ibid* reg 84(2), (3) (reg 84(2) amended by SI 2002/2918; SI 2003/1069; Value Added Tax Regulations 1995, SI 1995/2518, reg 84(3) as added and substituted (see note 7 *supra*)).

12 *Ie* by or under any enactment: Value Added Tax Regulations 1995, SI 1995/2518, reg 84(1). As to the compulsory purchase of land see generally COMPULSORY ACQUISITION OF LAND.

13 *Ie* in accordance with the Value Added Tax Act 1994 s 6(2) or (3): see PARA 35 *ante*.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 84(1).

## UPDATE

### 41 Special cases relating to land

NOTE 8--'Eligible purposes' and 'occupation' now have the meaning given by the Value Added Tax Act 1994 Sch 10 para 16: SI 1995/2518 reg 84(5)(b) (amended by SI 2008/1146). Reference to Value Added Tax Act 1994 Sch 10 para 3A(4) now to Sch 10 para 14(3): SI 1995/2518 reg 84(5)(d) (amended by SI 2008/1146).

NOTE 9--A company is not connected with another company only because both are under the control of the Crown, a minister of the Crown, a government department or a Northern Ireland department; and 'company' and 'control' have the same meaning as in the Income and Corporation Taxes Act 1988 s 839: SI 1995/2518 reg 84(5)(f) (added by SI 2009/1967).

TEXT AND NOTE 11--For 'wholly or mainly' read 'wholly or substantially wholly' which is to be determined in the same way as for the purposes of the Value Added Tax Act 1994 Sch 10 para 15: SI 1995/2518 reg 84(3), (4), (5)(ba) (reg 84(3), (4) amended, reg 84(5) (ba) substituted, by SI 2008/1146).

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#### **42. Barristers' services.**

Services supplied by a barrister (acting in that capacity)<sup>1</sup> are treated as taking place at whichever is the earliest of the following times:

- 117 (1) when the fee in respect of those services is received by the barrister<sup>2</sup>;
- 118 (2) when the barrister issues a VAT invoice<sup>3</sup> in respect of them<sup>4</sup>; or
- 119 (3) the day when the barrister ceases to practise as such<sup>5</sup>.

1 As to a barrister's liability to value added tax see LEGAL PROFESSIONS vol 66 (2009) PARA 1318.

2 Value Added Tax Regulations 1995, SI 1995/2518, reg 92(a). A reference to receipt of payment (however expressed) includes a reference to receipt by a person to whom a right to receive it has been assigned: reg 94A (added by SI 1999/599). See also Customs and Excise Public Notice 700/44 *Barristers and Advocates* (January 2002).

3 For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 92(b).

5 Ibid reg 92(c).

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### **43. Royalties etc.**

Where the whole amount of the consideration<sup>1</sup> for a supply<sup>2</sup> of services was not ascertainable at the time when the services were performed and subsequently the use of the benefit of those services by a person other than the supplier gives rise to any payment of consideration for that supply which is:

- 120 (1) in whole or in part determined or payable periodically or from time to time or at the end of any period<sup>3</sup>;
- 121 (2) additional to the amount, if any, already payable for the supply<sup>4</sup>; and
- 122 (3) not a payment to which the rules relating to continuous supplies of services<sup>5</sup> apply<sup>6</sup>,

a further supply is treated as taking place each time that a payment in respect of the use of the benefit of those services is received by the supplier<sup>7</sup> or a VAT invoice<sup>8</sup> is issued by the supplier, whichever is the earlier<sup>9</sup>.

1 For the meaning of 'consideration' see PARA 95 post.

2 For the meaning of 'supply' see PARA 27 ante.

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 91(a).

4 Ibid reg 91(b).

5 Ie ibid reg 90 (as amended): see PARA 38 ante.

6 Ibid reg 91(c).

7 A reference to receipt of payment (however expressed) includes a reference to receipt by a person to whom a right to receive it has been assigned: ibid reg 94A (added by SI 1999/599).

8 For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 91.

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#### **44. Movement of goods between United Kingdom and other member states.**

Particular rules exist to determine the tax point<sup>1</sup> for supplies<sup>2</sup> connected with the movement of goods from or to the United Kingdom<sup>3</sup>. Where any supply of goods involves both the removal of the goods from the United Kingdom and their acquisition in another member state<sup>4</sup> by a person who is liable for value added tax on the acquisition in accordance with provisions of the law of that member state<sup>5</sup> corresponding to the United Kingdom rules on acquisitions<sup>6</sup>, the general rules<sup>7</sup> do not apply<sup>8</sup> and the supply is treated as taking place on whichever is the earlier of:

- 123 (1) the fifteenth day of the month following that in which the removal in question takes place<sup>9</sup>; and
- 124 (2) the day of issue of a VAT invoice<sup>10</sup> (or other invoice prescribed<sup>11</sup> by the Commissioners for Her Majesty's Revenue and Customs<sup>12</sup>) in respect of the supply<sup>13</sup>.

A corresponding rule applies where goods are acquired from another member state; subject to statutory requirements concerning the place and time of acquisition and supply<sup>14</sup>, in such a case the acquisition is treated as taking place on whichever is the earlier of:

- 125 (a) the fifteenth day of the month following that in which the event occurs which is the first relevant event<sup>15</sup>, in relation to that acquisition, for the purposes of taxing the acquisition<sup>16</sup>; and
- 126 (b) the day of the issue, in respect of the transaction in pursuance of which the goods are acquired, of an invoice of such a description as the Commissioners may prescribe by regulations<sup>17</sup>.

The Commissioners may also by regulations make provision with respect to the time at which an acquisition is to be treated as taking place in prescribed cases where the whole or part of any consideration<sup>18</sup> comprised in the transaction in pursuance of which the goods are acquired is determined or payable periodically, or from time to time, or at the end of a period<sup>19</sup>.

Where goods consisting of certain supplies of water<sup>20</sup>, gas<sup>21</sup> or any form of power, heat, refrigeration or ventilation<sup>22</sup> are acquired from another member state and the whole or part of any consideration comprised in the transaction in pursuance of which the goods are acquired is payable periodically, or from time to time, goods are treated as separately and successively acquired on each occasion that an invoice is issued by either the supplier or the customer<sup>23</sup> in respect of the transaction<sup>24</sup>.

Where there is a reverse charge on relevant services<sup>25</sup>, the time of supply is either the date of payment or, if consideration was otherwise than in money, the last day of the prescribed accounting period<sup>26</sup> in which the services were performed<sup>27</sup>.

1 For the meaning of 'tax point' see PARA 35 note 4 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 See the text and notes 4-27 infra. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4 For the meaning of 'another member state' see PARA 4 note 15 ante; and as to when goods are acquired in another member state see PARA 19 note 6 ante.

5 For the meaning of 'law of another member state' see PARA 17 note 2 ante.

6 Ie corresponding to the Value Added Tax Act 1994 s 10: see PARA 19 ante.

7 Ie ibid s 6(2), (4)-(6), (10)-(12): see PARAS 35, 37 ante.

8 Ibid s 6(7).

9 Ibid s 6(8)(a).

10 For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

11 Ie prescribed by regulations: Value Added Tax Act 1994 s 6(8)(b). At the date at which this volume states the law, no such regulations had been made. A registered taxable person is obliged by the Value Added Tax Regulations 1995, SI 1995/2518, reg 13(1)(b) (see PARA 278 post) to provide a VAT invoice when making a supply of goods or services, other than an exempt supply, to a person in another member state. However, the prescribed contents of such an invoice are somewhat different from those required of a tax invoice provided to a registered person in the United Kingdom: see reg 14(2) (amended by SI 2003/3220).

12 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

13 Value Added Tax Act 1994 s 6(8)(b). These provisions do not apply for determining when any supply of gold is to be treated as taking place: see s 55(4); and PARA 35 ante.

14 Ie ibid s 18 (as amended) (see PARAS 144-145 post) and s 18B (as added) (see PARA 149 post). These provisions are also subject to any regulations made under s 12(3) (see the text and notes 18-19 infra): s 12(1) (amended by the Finance Act 1996 s 26(1), Sch 3 para 3).

15 The event which, in relation to any acquisition of goods from another member state, is the first relevant event for the purposes of taxing the acquisition is the first removal of the goods which is involved in the transaction in pursuance of which they are acquired: Value Added Tax Act 1994 s 12(2).

16 Ibid s 12(1)(a).

17 Ibid s 12(1)(b). Where the time that goods are acquired from another member state falls to be so determined by reference to the day of the issue, in respect of the transaction in pursuance of which the goods are acquired, of an invoice of such description as the Commissioners may by regulations prescribe, the invoice must be one which is issued by the supplier or the customer and which, in either case, is issued under the provisions of the law of the member state where the goods were supplied, corresponding in relation to that member state to the provisions of the Value Added Tax Regulations 1995, SI 1995/2518, regs 13, 13A, 14 (as added and amended) (see PARAS 279-281 post): reg 83 (amended by SI 2003/3220). Where the time of the acquisition of any goods from another member state is determined by reference to the issue of such an invoice, VAT must be accounted for and paid in respect of the acquisition only on so much of its value as is shown on that invoice: Value Added Tax Regulations 1995, SI 1995/2518, reg 26. As to accounting for VAT generally see PARA 245 et seq post.

18 For the meaning of 'consideration' see PARA 95 post.

19 Value Added Tax Act 1994 s 12(3).

20 Ie such water as is described in the Value Added Tax Regulations 1995, SI 1995/2518, reg 86(1)(a): see PARA 38 ante.

21 Ie gas as is described in ibid reg 86(1)(b) or (c): see PARA 38 ante.

22 Ie as described in ibid reg 86(1)(d): see PARA 38 ante.

23 Ie an invoice such as is described in ibid reg 83 (as amended): see note 17 supra.

24 Ibid reg 87 (amended by SI 2003/3220). The supply takes place only to the extent covered by the invoice: see the Value Added Tax Regulations 1995, SI 1995/2518, reg 94 (as amended); and PARA 38 ante.

25 See PARA 33 ante.

- 26 For the meaning of 'prescribed accounting period' see PARA 115 note 15 post.
- 27 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 82; and PARA 33 ante.

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### **(iii) Place of Supply**

#### **A. IN GENERAL**

##### **45. Place of supply; introduction.**

Value added tax is charged on certain supplies of goods and services made in the United Kingdom<sup>1</sup>, on taxable acquisitions of goods from other European Union member states<sup>2</sup>, on the receipt of certain supplies of services from abroad<sup>3</sup>, and on the importation of goods into the United Kingdom from places outside the European Union<sup>4</sup>. In consequence of the creation of the Single European Market<sup>5</sup> there may be said to be two sets of rules determining the place of supply: those which may apply where a transaction involves an European Union element; and those which apply when it does not.

The Treasury may by order provide for varying the rules for determining where a supply<sup>6</sup> of goods or services is made, either in relation to goods or services generally or to particular goods or services specified in the order<sup>7</sup>. Where any order so made<sup>8</sup> provides for services of a description specified in the order to be treated as supplied in the United Kingdom<sup>9</sup>, the services would not have fallen to be so treated apart from the order<sup>10</sup>, the services are not services that would have fallen to be so treated under any provision re-enacted in the order<sup>11</sup>, and the order is expressed to come into force in relation to services supplied on or after a date specified in the order ('the commencement date')<sup>12</sup>, then certain transitional provisions have effect in relation to the order<sup>13</sup>.

1 See PARA 4 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 As to taxable acquisitions see PARA 19 ante.

3 As to the reverse charge see PARA 33 ante.

4 As to VAT on importation see PARA 113 et seq post.

5 See EC Council Directive 91/680 (OJ L376, 31.12.91, p 1) supplementing the common system of value added tax; and PARA 1 ante.

6 For the meaning of 'supply' see PARA 27 ante.

7 Value Added Tax Act 1994 s 7(11). The Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148 (see PARAS 33 ante, 51-52 post) has been made under this provision. By virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806 (as amended) (see PARA 62 post) and the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121 (as amended) (see PARA 54 et seq post) also have effect under these provisions. See also Customs and Excise Public Notice 741 *Place of Supply of Services* (March 2002).

8 Ie made on or after 17 March 1998 under the Value Added Tax Act 1994 s 7(11).

9 Ibid s 97A(1)(a) (s 97A added by the Finance Act 1998 s 22(1)).

10 Value Added Tax Act 1994 s 97A(1)(b) (as added: see note 9 supra).

11 Ibid s 97A(1)(c) (as added: see note 9 supra).

12 Ibid s 97A(1)(d) (as added: see note 9 supra).

13 Ibid s 97A(1) (as added: see note 9 supra). The transitional provisions are:

- 53 (1) that invoices and other documents provided to any person before the commencement date must be disregarded in determining the time of the supply of any services which, if their time of supply were on or after the commencement date, would be treated by virtue of the order as supplied in the United Kingdom (s 97A(2) (as so added));
- 54 (2) that if there is a payment in respect of any services of the specified description that was received by the supplier before the commencement date, so much (if any) of that payment as relates to times on or after that date must be treated as if it were a payment received on the commencement date (s 97A(3) (as so added));
- 55 (3) that if there is a payment in respect of services of the specified description that is or has been received by the supplier on or after the commencement date, so much (if any) of that payment as relates to times before that date must be treated as if it were a payment received before that date (s 97A(4) (as so added)); and
- 56 (4) that a payment in respect of any services must be taken for the purposes of s 97A (as added) to relate to the time of the performance of those services (s 97A(5) (as so added)) (subject to the proviso that, where a payment is received in respect of any services the performance of which takes place over a period a part of which falls before the commencement date and a part of which does not: (a) an apportionment must be made, on a just and reasonable basis, of the extent to which the payment is attributable to so much of the performance of those services as took place before that date (s 97A(6)(a) (as so added)); (b) the payment must, to that extent, be taken for the purposes of s 97A (as added) to relate to a time before that date (s 97A(6)(b) (as so added)); and (c) the remainder, if any, of the payment must be taken for these purposes to relate to times on or after that date (s 97A(6)(c) (as so added))).



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## ***B. SUPPLY OF GOODS***

### **46. The general rule.**

If the supply<sup>1</sup> of any goods does not involve their removal<sup>2</sup> from or to the United Kingdom<sup>3</sup> they are to be treated as supplied in the United Kingdom if they are in the United Kingdom; and they are otherwise<sup>4</sup> to be treated as supplied outside the United Kingdom<sup>5</sup>. This general rule gives way, in particular cases, to more specific rules<sup>6</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 Where goods leave and re-enter the United Kingdom in the course of their removal from a place in the United Kingdom to another place in the United Kingdom, the removal is not to be treated as a removal from or to the United Kingdom: Value Added Tax Act 1994 s 7(8).

3 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante. See also the Value Added Tax (Isle of Man) Order 1982, SI 1982/1067, which makes specific provision for the operation of VAT in relation to transactions involving the Isle of Man; and PARA 15 ante.

4 Presumably 'otherwise' means 'if they are not in the United Kingdom'. The general rule is intended to deal with cases where the goods do not cross the borders of the United Kingdom in the course of the supply.

5 Value Added Tax Act 1994 s 7(1), (2). These provisions apply subject to s 14 (see PARA 22 ante), s 18 (as amended) (see PARAS 144-145 post) and s 18B (as added) (see PARA 149 post): s 7(1) (amended by the Finance Act 1996 s 26(1), Sch 3 para 2).

6 See PARA 47 et seq post.

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#### **47. Installed or assembled goods.**

Goods are treated as supplied in the United Kingdom<sup>1</sup> where their supply<sup>2</sup> involves their installation or assembly at a place in the United Kingdom to which they are removed<sup>3</sup>; and as supplied outside the United Kingdom where their supply involves their installation or assembly at a place outside the United Kingdom to which they are removed<sup>4</sup>.

Where:

- 127 (1) a person belonging in another member state<sup>5</sup> makes a supply of goods to a person who is registered<sup>6</sup> for value added tax, which involves their installation or assembly at a place in the United Kingdom to which they are removed<sup>7</sup>; and
- 128 (2) there would be a taxable acquisition<sup>8</sup> by the registered person if that supply were treated as not being a taxable supply<sup>9</sup> but as involving the removal of the goods from another member state to the United Kingdom<sup>10</sup>,

that supply is to be so treated except for the purposes of the provisions<sup>11</sup> relating to registration<sup>12</sup>. The person making the supply must, however, comply with such requirements as to the furnishing<sup>13</sup> of invoices<sup>14</sup> and other documents<sup>15</sup> and of information to the Commissioners for Her Majesty's Revenue and Customs<sup>16</sup> and to the person supplied as the Commissioners may prescribe by regulations<sup>17</sup>.

A person belonging in another member state who has made or who intends to make a supply to which he wishes heads (1) and (2) above to apply must notify the Commissioners and the registered person in writing of his intention to do so<sup>18</sup>. The notification must be made no later than the provision of the first invoice<sup>19</sup> in relation to the supply to which it relates, and must be sent to the office designated by the Commissioners for the receipt of such notifications<sup>20</sup> and to the registered person to whom the goods are to be supplied<sup>21</sup>. Where a person belonging in another member state has complied with these notification requirements in relation to the first such supply to a registered person, they are deemed to have been satisfied in relation to all subsequent supplies to that registered person while the person making the supply continues to belong in another member state<sup>22</sup>.

1 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 Value Added Tax Act 1994 s 7(3)(a). It will be understood that s 7(3) applies only where the supplier of the goods is also obliged, as part of his supply, to perform, or procure another to perform, the installation or assembly. It is not sufficient if the goods are supplied to the customer in circumstances which require the customer to carry out the installation etc. For an example of a dispute as to the nature of a supply involving the installation of machinery see *AZO-Maschinenfabrik Adolf Zimmerman GmbH v Customs and Excise Comrs* [1987] VATTR 25; cf *George Kuikka Ltd v Customs and Excise Comrs* [1990] VATTR 185 (which appears to have proceeded on the incorrect assumption that it is unnecessary to construe a pre-existing domestic statute in order to comply with a directive subsequent in time, where the United Kingdom has not implemented it; cf Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, [1986] 2 CMLR 430, ECJ; and Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, [1993] BCC 421, ECJ; followed in *Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929, [1993] 1 WLR 49, HL). See also *Centrax Ltd v Customs and Excise Comrs* [1998] V & DR 369.

4 Value Added Tax Act 1994 s 7(3)(b). See note 3 supra.

5 As to when a person belongs in another member state for these purposes see PARA 22 note 4 ante; and For the meaning of 'another member state' see PARA 4 note 15 ante.

6 Ie under the Value Added Tax Act 1994: see PARA 64 et seq post.

7 Ibid s 14(2)(a). As to the general rules relating to the simplified procedure for triangulation see PARA 22 ante.

8 For the meaning of 'taxable acquisition' see PARA 19 ante.

9 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

10 Value Added Tax Act 1994 s 14(2)(b).

11 Ie for the purposes of ibid s 3(2), Sch 3 (as amended): see PARA 72 et seq post.

12 Ibid s 14(2).

13 Ie whether before or after the supply is made: ibid s 14(3).

14 As to the meaning of 'invoice' see PARA 17 note 9 ante.

15 For the meaning of 'document' see PARA 17 note 9 ante.

16 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

17 Value Added Tax Act 1994 s 14(3). The regulations may provide for the times at which, and the form and manner in which, any document or information is to be furnished and for the particulars which it is to contain: s 14(3). In exercise of the power so conferred, the Commissioners have made the Value Added Tax Regulations 1995, SI 1995/2518, reg 12 (see the text and notes 18-22 infra) and regs 19, 20 (see PARAS 278, 283 post).

18 Ibid reg 12(1). The notification must contain: (1) the name and address of the person belonging in another member state (reg 12(2)(a)); (2) the number, including the alphabetical code, by which the person belonging in another member state is identified for VAT purposes in the member state in which he belongs (reg 12(2)(b)); (3) the date upon which the installation or assembly of the goods was commenced or is intended to commence (reg 12(2)(c)); and (4) the name, address and registration number of the registered person to whom the goods have been, or are to be, supplied (reg 12(2)(d)). For the meanings of 'alphabetical code' and 'registration number' see PARA 22 note 14 ante. Notifications must be made separately in relation to each registered person to whom it is intended to make supplies to which the person belonging in another member state wishes the Value Added Tax Act 1994 s 14(2) (see the text and notes 5-12 supra) to apply: Value Added Tax Regulations 1995, SI 1995/2518, reg 12(4).

19 Ie in accordance with ibid reg 19: see PARA 283 post.

20 Ibid reg 12(3)(a).

21 Ibid reg 12(3)(b).

22 Ibid reg 12(5).

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#### **48. Distance selling.**

If the supply<sup>1</sup> of goods involves their removal from another member state<sup>2</sup> to the United Kingdom<sup>3</sup>, otherwise than in circumstances where the supplier must arrange for their installation or assembly<sup>4</sup>, the goods are to be treated as supplied in the United Kingdom where:

- 129 (1) the supply involves the removal of the goods to the United Kingdom by or under the directions of the person who supplies them<sup>5</sup>;
- 130 (2) the supply is a transaction in pursuance of which the goods are acquired in the United Kingdom from another member state by a person who is not a taxable person<sup>6</sup>;
- 131 (3) the supplier is either registered<sup>7</sup> or is liable<sup>8</sup> to be registered for value added tax<sup>9</sup>; and
- 132 (4) the supply is neither a supply of goods consisting in a new means of transport<sup>10</sup> nor anything which is treated<sup>11</sup> as a supply by virtue only of statutory provisions<sup>12</sup> relating to the transfer or removal of goods so as no longer to form part of the assets of a business<sup>13</sup>.

A corresponding rule<sup>14</sup> ensures that goods which do not consist in a new means of transport are treated as supplied outside the United Kingdom where:

- 133 (a) the supply involves the removal of the goods, by or under the direction of the person who supplies them, to another member state<sup>15</sup>;
- 134 (b) the person who makes the supply is taxable in another member state<sup>16</sup>; and
- 135 (c) the provisions of the law of that member state<sup>17</sup> corresponding to the provisions made by heads (1) to (3) above make that person liable to VAT on the supply<sup>18</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 For the meaning of 'another member state' see PARA 4 note 15 ante.

3 As to when goods are treated as removed to the United Kingdom for these purposes see the Value Added Tax Act 1994 s 7(8); and PARA 46 note 2 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4 Ie where the place of supply is not determined under *ibid* s 7(2) or (3): see PARAS 46-47 ante.

5 *Ibid* s 7(4)(a).

6 *Ibid* s 7(4)(b). For the meaning of 'taxable person' see PARAS 18 note 4 ante, 63 post.

7 Ie under the Value Added Tax Act 1994: see PARA 64 et seq post.

8 Ie is liable to be registered under *ibid* s 3(2), Sch 2 (as amended) (see PARA 69 et seq post) or would be so liable if he were not already registered or liable to be registered under s 3(2), Sch 1 (as amended) (see PARA 64 et seq post): s 7(4)(c)(ii).

9 *Ibid* s 7(4)(c). In the case of distance selling, special registration rules exist. In addition to the usual rules in Sch 1 (as amended) (see PARA 64 post), Sch 2 provides that persons making distance sales to United Kingdom consumers whose value exceeds £70,000 during the course of a calendar year must register thereunder: see PARA 69 post.

10 For the meanings of 'means of transport' and 'new means of transport' see PARA 19 note 7 ante.

11 Ie for the purposes of the Value Added Tax Act 1994: s 7(4)(d).

12 Ie by virtue only of *ibid* s 5(1), Sch 4 para 5(1) (see PARA 30 ante) or Sch 4 para 6 (see PARAS 20-21 ante): s 7(4)(d).

13 *Ibid* s 7(4)(d). This rule is intended to prevent distortion of competition in the Single Market during the transitional period by traders selling by mail order from a member state which happens to impose a lower rate of VAT on the goods sold than that where the customers belong, eg, book clubs selling zero-rated books out of the United Kingdom to consumers in other member states, most of which set a lower, but not a zero, rate for supplies of printed matter. The rules introduced by EC Council Directive 91/680 (OJ L376, 31.12.91, p 1) supplementing the common system of value added tax and incorporated in United Kingdom law with effect from 1 January 1993 (see PARA 1 ante) are intended to be of transitional effect only, pending the complete harmonisation of VAT and VAT rates throughout the Community. No date has yet been set for the completion of the transitional period.

14 Ie the Value Added Tax Act 1994 s 7(5): see the text and notes 15-18 *infra*. Section 7(5) applies to goods whose place of supply is not determined under any of s 7(2), (3) or (4): s 7(5).

15 *Ibid* s 7(5)(a).

16 *Ibid* s 7(5)(b). For the meaning of 'taxable in another member state' see PARA 17 note 5 ante.

17 As to references to the law of another member state see PARA 17 note 2 ante.

18 Value Added Tax Act 1994 s 7(5)(c). Section 7(5) does not, however, apply in relation to any supply in a case where the liability mentioned in head (c) in the text depends on the exercise by any person of an option in the United Kingdom corresponding to such an option as is mentioned in Sch 2 para 1(2) (see PARA 69 post) unless that person has given, and has not withdrawn, a notification to the Commissioners for Her Majesty's Revenue and Customs that he wishes his supplies to be treated as taking place outside the United Kingdom where they are supplies in relation to which the other requirements of s 7(5) are satisfied: s 7(5). The rule will not, therefore, apply to treat the supply as made outside the United Kingdom unless, in a case where the supplier has an option whether or not to register as taxable in another member state (because he has yet to reach the relevant threshold for registration for distance selling in that state: see note 9 *supra* for the United Kingdom's limit), he has exercised the option to be taxed in that state. The Commissioners may by regulations provide that a notification for these purposes is not to be given or withdrawn except in such circumstances, and in such form and manner, as may be prescribed: s 7(9). At the date at which this volume states the law, no such regulations had been made. As to the making of regulations generally see PARA 14 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

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#### **49. Importation of goods into the United Kingdom.**

Goods whose place of supply is not determined under any of the statutory rules previously described<sup>1</sup> are treated as supplied in the United Kingdom<sup>2</sup> where their supply<sup>3</sup> involves their being imported from a place outside the member states<sup>4</sup> and the person who supplies them is the person by whom, or under whose directions, they are so imported<sup>5</sup>.

1    Ie under the Value Added Tax Act 1994 s 7(2)-(5): see PARAS 46-48 ante.

2    As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

3    For the meaning of 'supply' see PARA 27 ante.

4    Value Added Tax Act 1994 s 7(6)(a). As to places treated as outside the member states for VAT purposes see PARA 16 ante. As to imported goods see further PARA 113 et seq post.

5    Ibid s 7(6)(b).

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## **50. Removal of goods to or from the United Kingdom.**

Goods whose place of supply is not determined under any of the rules previously described<sup>1</sup>, but whose supply<sup>2</sup> involves their removal to or from the United Kingdom<sup>3</sup>, are treated as supplied in the United Kingdom where their supply involves their removal from the United Kingdom without also involving their previous removal to the United Kingdom<sup>4</sup>; and as supplied outside the United Kingdom in any other case<sup>5</sup>.

1    le under the Value Added Tax Act 1994 s 7(2)-(6): see PARAS 46-48 ante.

2    For the meaning of 'supply' see PARA 27 ante.

3    As to when goods are treated as removed to the United Kingdom for these purposes see the Value Added Tax Act 1994 s 7(8); and PARA 46 note 2 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4    Ibid s 7(7)(a).

5    Ibid s 7(7)(b).

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### **51. Goods in the course of a Community transport.**

Where goods are supplied on board a ship, aircraft or train in the course of a Community transport<sup>1</sup>, they are treated as supplied at the point of departure<sup>2</sup>. Goods supplied for consumption on board a ship or an aircraft in the course of a Community transport are, however, treated as supplied outside the member states<sup>3</sup>. These provisions do not, however, apply to any goods supplied as part of a pleasure cruise<sup>4</sup>.

1 'Community transport' means the transportation of passengers between the point of departure and the point of arrival in the course of which there is a stop in a member state other than that in which lies the point of departure and there is no stop in a country which is not a member state: Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148, art 4. 'Point of departure' means the first place in the member states where it is expected that passengers will commence their journey or, where there has been a leg which involved a stop in a place outside the member states, the first such place after such a leg has been completed; and 'point of arrival' means the last place in the member states where it is expected that passengers who have commenced their journey at a place in a member state will terminate their journey or, where there is to follow a leg which will involve a stop in a place outside the member states, the last such place before that leg is undertaken: art 4. See also Case C-331/94 *EC Commission v Greece* [1996] STC 1168, ECJ (failure of member state to comply with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), arts 2, 9(2)(b) by exempting transport services supplied in territorial waters from VAT). As to the Sixth Directive see PARA 1 note 1 ante.

For these purposes, part of transportation where it is expected that a different means of transport will be used, and the homeward stage of a return trip, are each treated as separate transportation: Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148, art 7(a), (b). 'Homeward stage' means that part of the return trip which ends at the first stop in the country in which the return trip commenced and which involves only such other stops, if any, as are in member states where there have previously been stops (in the course of that return trip); and 'return trip' means any journey involving two or more countries where it is expected that the means of transport will stop in the country from which it originally departed: art 4.

2 Ibid art 5. This provision, taken together with the definition of 'Community transport' (see note 1 supra), effectively ring-fences each part of a journey which takes place within the European Union from any part which takes place outside. Where goods are supplied between the first point of passenger embarkation within the European Union and the last point of disembarkation within the European Union, the place of supply is deemed to be the first point, irrespective of whether in the course of that journey the ship travelled through territorial waters or the high seas: *Peninsular and Oriental Steam Navigation Co v Customs and Excise Comrs* [2000] STC 488, [2000] 3 CMLR 1104. As to third-country stops see also Case C-58/04 *Kohler v Finanzamt Dusseldorf-Nord* [2005] All ER (D) 82 (Sep), ECJ.

3 Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148, art 6.

4 Ibid art 8. 'Pleasure cruise' includes a cruise wholly or partly for the purposes of education or training: art 4. As to pleasure cruises see PARAS 59 note 1, 62 post.

### **UPDATE**

### **51 Goods in the course of a Community transport**

NOTE 1--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 2--Case C-58/04, cited, reported at [2006] 1 CMLR 155, [2006] STC 469.

TEXT AND NOTE 3--For 'ship or aircraft' read 'ship, aircraft or train': SI 2004/3148 art 6 (amended by SI 2009/215).





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## **52. Supplies of gas and electricity.**

Supplies of electricity, or gas supplied through the natural gas distribution network, other than to a dealer<sup>1</sup> are generally treated as supplied at the place where the recipient of the supply has effective use and consumption of the goods<sup>2</sup>. In relation to any part of any electricity or gas so supplied, however, which is not consumed, or where the supply is made to a dealer, the electricity or gas is treated as supplied at either the place where the recipient or dealer has established his business or has a fixed establishment to which the goods are supplied, or, in the absence of such place of business or fixed establishment, the place where he has his permanent address or usually resides<sup>3</sup>.

1 'Dealer' means a person whose principal activity in respect of receiving supplies of electricity, or gas through the natural gas distribution network, is the re-selling thereof and whose own consumption thereof is negligible: Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148, art 9(b). For these purposes, 're-selling' does not include either re-sale as part of a single composite supply of other goods or services or re-sale as a supply that falls to be disregarded under the Value Added Tax Act 1994 s 43(1)(a) (as amended) (see PARA 205 post) where relevant goods are to be effectively used and consumed by a member of a VAT group: Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148, art 9(d). 'VAT group' means any bodies corporate treated under the Value Added Tax Act 1994 ss 43A-43C (as added and amended) (see PARA 75 post) as members of a group: Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148, art 9(e).

2 Ibid art 11(a). The supply by the recipient of supplies of electricity, or gas supplied through the natural gas distribution network, as part of a single composite supply of other goods or services, and the supply of such electricity or gas to a member of a VAT group where the goods are effectively used and consumed by a member of that group, each constitutes effective use and consumption by him of the goods for these purposes (arts 12, 13).

3 Ibid arts 10, 11(b).

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### **C. SUPPLY OF SERVICES**

#### **53. The general rule.**

A supply<sup>1</sup> of services is treated as made in the United Kingdom<sup>2</sup> if the supplier belongs in the United Kingdom<sup>3</sup>; and as made in another country (and not in the United Kingdom) if the supplier belongs in that other country<sup>4</sup>. A supplier of services is treated as belonging in a country if:

- 136 (1) he has a business establishment, or some other fixed establishment, there and no such establishment elsewhere<sup>5</sup>;
- 137 (2) he has no such establishment (there or elsewhere) but his usual place of residence<sup>6</sup> is there<sup>7</sup>; or
- 138 (3) he has such establishments both there and elsewhere but the establishment of his which is most directly concerned with the supply is there<sup>8</sup>.

This general rule gives way to a number of specific rules whereby, in particular cases, the place of supply is deemed to be elsewhere than the country where the supplier belongs<sup>9</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

3 Value Added Tax Act 1994 s 7(10)(a). The question whether, in relation to any supply of services, the supplier or the recipient of the supply belongs in one country or another is to be determined, subject to any provision made under s 8(6) (see PARA 33 ante) in accordance with s 9: see the text and notes 5-8 infra; and PARA 57 post. As to the views of the Commissioners for Her Majesty's Revenue and Customs on the rules determining the place of supply of services see Customs and Excise Public Notice 741 *Place of Supply of Services* (March 2002). See also Customs and Excise Business Brief 8/93 [1993] STI 540-541 on supplies of services to businesses in other EC member states and accounting for VAT; outside the scope and reverse charge services. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. The Commissioners have announced that, in accordance with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 27 (as amended), the United Kingdom has requested the European Commission to consider a proposal for a derogation from art 9 (as amended), which establishes the EC place of supply rules, in order to negate a distortion in competition caused by non-EC supplies of telecommunication services being able to supply such services to EC customers without charging VAT: see Customs and Excise Business Brief 21/96 [1996] STI 1662. See also written answer of the European Commission to European Parliamentary Written Question E-0787/96 (OJ C297, 8.10.96, p 27), reported in [1996] STI 1719. As to derogation under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 27 see PARA 3 ante. As to the Sixth Directive see PARA 1 note 1 ante.

As to the place of supply of a right to services see PARA 54 post.

4 Value Added Tax Act 1994 s 7(10)(b). See note 3 supra; and, regarding the territorial basis of the right to charge VAT, see *R (on the application of IDT Card Services Ltd) v Customs and Excise Comrs* [2004] EWHC 3188 (Admin), [2005] STC 314.

5 Value Added Tax Act 1994 s 9(1), (2)(a). For these purposes, but not for any other purpose, a person carrying on a business through a branch or agency in any country is treated as having a business establishment there: s 9(5)(a). For a case where s 9(5) was impliedly held inapplicable see *DFDS A/S v Customs and Excise Comrs* (1994) VAT Decision 12588, [1994] STI 1305; on appeal [1995] STI 1190, cited in PARA 62 note 2 post; and see *WH Payne & Co v Customs and Excise Comrs* (1995) VAT Decision 13668, [1995] STI 2024, where the tribunal held that the extension of the meaning of 'business establishment' by the Value Added Tax Act 1994 s

9(5)(a) was not consistent with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9 (as amended), since it treated the branch or agency as the business establishment of the trader, rather than as an alternative to be used where treating the supply as having been made at the place where the trader had established his business, and would lead to an irrational result, or would create a conflict with another member state. See further as to agency *Customs and Excise Comrs v Johnson* [1980] STC 624; and PARA 209 post. See also *Customs and Excise Comrs v Chinese Channel (Hong Kong) Ltd* [1998] STC 347.

In EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) the wording is: 'the place where the supplier has established his business or has a fixed establishment': see art 9(1). See also *British United Provident Association Ltd v Customs and Excise Comrs* [2002] 2 CMLR 300 (the place where a company has established its business for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9(2)(e) (as amended) is the place where it is engaged in genuine economic activity). The place where the supplier has established his business is the primary point of reference, so that it is unnecessary to ascertain whether there is also a fixed establishment situated elsewhere (see Case C-190/95 *ARO Lease BV v Inspecteur der Belastingdienst Grote Ondernemingen, Amsterdam* [1997] STC 1272, ECJ): if, however, reference to the place where the supplier has established his business does not lead to a rational result, the place of a fixed establishment may be taken into account (*RAL (Channel Islands) Ltd v Customs and Excise Comrs* [2002] V & DR 524).

In connection with the distinction between business establishments and other fixed establishments see *Binder Hamlyn v Customs and Excise Comrs* [1983] VATTR 171 (company which carried on business only in Jamaica held to belong in the United Kingdom because it had a 'fixed establishment', albeit not a business establishment in the United Kingdom, since it maintained a registered office for company law purposes at its accountants' premises). Cf Case 168/84 *Berkholz v Finanzamt Hamburg-Mitte-Altstadt* [1985] ECR 2251, [1985] 3 CMLR 667, ECJ (taxpayer installed and operated gaming machines, inter alia, on sea-going vessels, without maintaining a permanent staff on board; services could not be deemed to be supplied at an establishment other than the place where the supplier had established his business (ie, a place could not be considered to be a fixed establishment) unless the place in question had a certain minimum size and both the human and technical resources necessary for the provision of the services were permanently present. The installation of the machines on board such vessels did not meet these minimum criteria. Furthermore, the place where the supplier had established his business was the primary point of reference for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9 (as amended), and regard was only to be had to another establishment from which the services were supplied if the reference to the place where the supplier had established his business did not lead to a rational result for tax purposes, or created a conflict with another member state (see *ARO Lease BV v Inspecteur der Belastingdienst Grote Ondernemingen, Amsterdam* supra; and *RAL (Channel Islands) Ltd v Customs and Excise Comrs* supra)). See also Case C-231/94 *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] All ER (EC) 656, [1996] STC 774, ECJ. In *Vincent Consultants Ltd v Customs and Excise Comrs* [1989] 1 CMLR 374, [1988] VATTR 152, the tribunal considered both *Binder Hamlyn v Customs and Excise Comrs* supra and *Berkholz v Finanzamt Hamburg-Mitte-Altstadt* supra and concluded that a distinction was to be drawn between cases dependent on the place where the supplier belonged (*Berkholz v Finanzamt Hamburg-Mitte-Altstadt* supra) and cases dependent on where the recipient belonged (*Binder Hamlyn v Customs and Excise Comrs* supra; *Vincent Consultants Ltd v Customs and Excise Comrs* supra); in the latter case, the test was whether the establishment had a sufficient minimum strength to enable it to receive and use the specified services in question. See also *Chantrey Vellacott v Customs and Excise Comrs* [1992] VATTR 138 (held that not every registered office could be a 'fixed establishment'; and that the test in *Vincent Consultants Ltd v Customs and Excise Comrs* supra was one of fact). In *WH Payne & Co v Customs and Excise Comrs* (1995) VAT Decision 13668, [1995] STI 2024, the tribunal held that for the purpose of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9(2)(e) (as amended), the supplier or customer would have only one business establishment, notwithstanding that there could be any number of fixed establishments from or to which services are supplied or received; and that the phrase 'the place where a person has established his business' referred to the place of its head office, headquarters or principal place of business, if that was the main seat of economic activity, rather than to the registered office, if no economic activity took place there. It followed that a British Virgin Islands company which owned investment properties in the United Kingdom which it employed letting agents to run had no such establishment in the United Kingdom.

6 'Usual place of residence', in the case of a body corporate, means the place where it is legally constituted: Value Added Tax Act 1994 s 9(5)(b). In EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9(1) the test is significantly different, ie 'the place where he has his permanent address or usually resides'.

7 Value Added Tax Act 1994 s 9(2)(b).

8 Ibid s 9(2)(c).

9 See PARAS 45 note 7 ante, 55 et seq post; and see Case C-327/94 *Dudda v Finanzamt Bergisch Gladbach* [1996] STC 1290, ECJ (EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9(1), while laying down the general rule as to where services were to be treated as having taken place, did not take precedence over art 9(2), which set out a number of specific instances when particular services were deemed to be supplied elsewhere).

## UPDATE

### 53 The general rule

NOTES 3, 5, 6, 9--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 4--*IDT*, cited, reversed: [2006] EWCA Civ 29, [2006] STC 1252. See also *Revenue and Customs Comrs v Arachchige* [2009] EWHC 1077 (Ch), [2009] STC 1729.

NOTES 5, 6--See Case C-210/04 *Ministero dell'Economia e delle Finanze v FCE Bank plc* [2007] STC 165, ECJ.

NOTE 5--The place where the services are carried out is far more determinative than the place where the contract for the supply of the services is made: *Revenue and Customs Comrs v Zurich Insurance Co* [2007] EWCA Civ 218, [2007] 2 CMLR 1491. See also Case C-291/07 *Kollektivavtalsstiftelsen TRR Trygghetsradet v Skatteverket* [2009] STC 526, ECJ; Case C-1/08 *Athesia Druck Srl v Ministero dell'Economia e delle Finanze, Agenzia delle Entrate* [2009] STC 1334, ECJ.

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#### **54. Place of supply of right to services.**

The place of supply<sup>1</sup> of a right to services (which includes any right, option or priority with respect to the supply of services and to the supply of an interest deriving from any right to services<sup>2</sup>) is the same as the place of supply of the services to which the right relates, whether or not the right is exercised<sup>3</sup>.

1 For the meaning of 'supply' see PARA 27 ante; and for the general rules governing the place of supply of services see PARA 53 ante.

2 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 21(2) (art 21 added by SI 1997/1524).

3 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 21(1).

#### **UPDATE**

#### **54 Place of supply of right to services**

TEXT AND NOTES--For 'place of supply of the services to which the right relates' read 'place in which the supply of the services to which the right relates would be treated as made if made by the supplier of the right to the recipient of the services': SI 1992/3121 art 21(1) (amended by SI 2006/1683).

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## **55. Place of supply of services relating to land.**

A supply<sup>1</sup> of services which consists of either:

- 139 (1) the grant, assignment or surrender of any interest in or right over land<sup>2</sup>;
- 140 (2) the grant, assignment or surrender of a personal right to call for or be granted any interest in or right over land<sup>3</sup>;
- 141 (3) the grant, assignment or surrender of a licence to occupy land or any other contractual right exercisable over or in relation to land<sup>4</sup>;
- 142 (4) any works of construction, demolition, conversion, reconstruction, alteration, enlargement, repair or maintenance of a building or civil engineering work<sup>5</sup>; or
- 143 (5) services such as are supplied by estate agents, auctioneers, architects, surveyors, engineers and others involved in matters relating to land<sup>6</sup>,

is treated as made where the land in connection with which the supply is made is situated<sup>7</sup>.

<sup>1</sup> For the meaning of 'supply' see PARA 27 ante. For the general rules as to the place of supply of services and a right to services see PARAS 53-54 ante.

<sup>2</sup> Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 4, 5(a)(i).

<sup>3</sup> Ibid art 5(a)(ii).

<sup>4</sup> Ibid art 5(a)(iii).

<sup>5</sup> Ibid art 5(b).

<sup>6</sup> Ibid art 5(c).

<sup>7</sup> Ibid art 5.

### **UPDATE**

## **55 Place of supply of services relating to land**

NOTE 7--See Case C-111/05 *Aktiebolaget NN v Skatteverket* [2008] STC 3203, ECJ (fibre cable connecting two different member states could be taxed by each state pro rata according to length of cable in its area).

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## **56. Services supplied where performed.**

Where a supply<sup>1</sup> of services consists of:

- 144 (1) cultural, artistic, sporting, scientific, educational or entertainment services<sup>2</sup>;
- 145 (2) services relating to exhibitions, conferences or meetings<sup>3</sup>;
- 146 (3) services ancillary to any supply of a description within head (1) or head (2) above, including services of organising any such supply<sup>4</sup>; or
- 147 (4) the valuation of, or work carried out on, any goods<sup>5</sup>,

it is treated as made where the services are physically carried out<sup>6</sup>.

1 For the meaning of 'supply' see PARA 27 ante. For the general rules as to the place of supply of services and a right to services see PARAS 53-54 ante.

2 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 4, 15(a). In *British Sky Broadcasting Ltd v Customs and Excise Comrs* (1994) VAT Decision 12394, [1994] STI 1188, satellite broadcasting was held to be the supply of entertainment; but not of a kind within EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 9(2)(c), and thus not within the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 15(a), since that was concerned with performance before a live audience. See also *Hutchvision Hong Kong Ltd v Customs and Excise Comrs* (1993) VAT Decision 10509, [1993] STI 1124; and Case C-452/03 *RAL (Channel Islands) Ltd v Customs and Excise Comrs* [2005] STC 1025, ECJ, in which it was held that the supply of services consisting of enabling the public to use, for consideration, slot gaming machines installed in amusement arcades established in the territory of a member state should be regarded as constituting entertainment or similar activities within the meaning of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9(2)(c), so that the place where those services were supplied was the place where they were physically carried out. In Case C-327/94 *Dudda v Finanzamt Bergisch Gladbach* [1996] STC 1290, ECJ, it was held that the supply of sound engineering for artistic or entertainment events was of a kind within EC Council Directive 77/388 art 9(2) and was thus deemed to take place where the services were physically performed. As to the Sixth Directive see PARA 1 note 1 ante.

3 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 15(b).

4 Ibid art 15(c).

5 Ibid art 15(d). This excludes such services as are provided for by art 14 (as amended) (see PARA 61 post): art 15(d) (amended by SI 1995/3038).

6 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 15 (as amended: see note 5 supra).

## **UPDATE**

### **56 Services supplied where performed**

NOTES 2-4--See also Case C-114/05 *Ministre de l'Economie, des Finances et de l'Industrie v Gillian Beach Ltd* [2006] STC 1080, ECJ (inclusive service provided by an organiser to exhibitors at a fair or in an exhibition hall fell within Directive 77/388 art 9(2)(c) (now EC Council Directive 2006/112 art 52)).



NOTE 2--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2). See Case C-37/08 *RCI Europe v Revenue and Customs Comrs* [2009] STC 2407, ECJ.

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## **57. Services supplied where received.**

Supplies<sup>1</sup> of certain services are treated as made where the recipient belongs. The services in question are:

- 148 (1) transfers and assignments of copyright, patents, licences, trademarks and similar rights<sup>2</sup>;
- 149 (2) advertising services<sup>3</sup>;
- 150 (3) services of consultants<sup>4</sup>, engineers, consultancy bureaux, lawyers, accountants and other similar services<sup>5</sup>; data processing and provision of information<sup>6</sup>;
- 151 (4) acceptance of any obligation to refrain from pursuing or exercising, in whole or part, any business activity or any copyright, patents, licences, trademarks and similar rights<sup>7</sup>;
- 152 (5) banking, financial and insurance services<sup>8</sup>;
- 153 (6) the provision of access to, and of transport or transmission through, natural gas and electricity distribution systems and the provision of other directly linked services<sup>9</sup>;
- 154 (7) the supply of staff<sup>10</sup>;
- 155 (8) the letting on hire of goods other than means of transport<sup>11</sup>;
- 156 (9) telecommunications services<sup>12</sup>;
- 157 (10) radio and television broadcasting services<sup>13</sup>;
- 158 (11) electronically supplied services<sup>14</sup>; and
- 159 (12) the services rendered by one person to another in procuring for the other any of the services referred to above<sup>15</sup>,

and the supply of any of these services is treated as made where the recipient belongs<sup>16</sup> provided that the recipient either belongs in a country (other than the Isle of Man) which is not a member state<sup>17</sup> or is a person who belongs in a member state, but in a country other than that in which the supplier belongs, and who in either case receives the supply for the purpose of a business carried on by him<sup>18</sup> and is not treated<sup>19</sup> as having himself supplied the services<sup>20</sup>. Additionally, in the case of electronically supplied services<sup>21</sup>, a supply is treated as made where the recipient belongs if the recipient is a person who belongs in a member state<sup>22</sup> and does not receive the supply for the purposes of a business carried on by him<sup>23</sup>, and the supply is received from a person who belongs in a country, other than the Isle of Man, which is not a member state<sup>24</sup>.

If the supply of services is made to an individual and received by him otherwise than for the purposes of any business carried on by him, he is treated as belonging in whatever country he has his usual place of residence<sup>25</sup>. In other cases, the person to whom the supply is made is treated as belonging in a country if:

- 160 (a) either he has a business establishment<sup>26</sup>, or some other fixed establishment, there and no such establishment elsewhere, or he has no such establishment (there or elsewhere) but his usual place of residence is there<sup>27</sup>; or
- 161 (b) he has such establishments both in that country and elsewhere and the establishment of his at which, or for the purposes of which, the services are most directly used or to be used is in that country<sup>28</sup>.

1 For the meaning of 'supply' see PARA 27 ante. For the general rules as to the place of supply of services and a right to services see PARAS 53-54 ante.

2 Value Added Tax Act 1994 s 8(2), Sch 5 para 1; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (amended by SI 1995/3038). The Commissioners for Her Majesty's Revenue and Customs appear to accept that the provision extends to the granting of such rights as well as to their transfer or assignment: see Customs and Excise Public Notice 741 *Place of Supply of Services* (March 2002) PARA 12.2. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 Value Added Tax Act 1994 Sch 5 para 2; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra). See Joined Cases C-68/92, C-69/92, C-73/92 *EC Commission v France, EC Commission v Luxembourg, EC Commission v Spain* [1995] 2 CMLR 1, ECJ ('advertising services' included the supply of free goods in the course of an advertising campaign, as well as the organisation of public relations events and other promotional activities involving the conveyance of a message intended to inform consumers of the existence and qualities of a particular product or service, with a view to increasing sales); *LS & A International Ltd v Customs and Excise Comrs* (1989) VAT Decision 3717 (unreported) (purchase of paper pulp for a client's brochures held to be a supply of advertising services). A professional motor racing team which derived most of its income from sponsorship fees, paid in return for advertising on its cars, was held to be supplying advertising services for these purposes: see *John Village Automotive Ltd v Customs and Excise Comrs* [1998] V & DR 340 (decided under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 9(2)(e) (as amended), to which provisions the Value Added Tax Act 1994 Sch 5 corresponds). See also *Goldsmith Foundation for European Affairs v Customs and Excise Comrs* [2000] V & DR 97 and, regarding the place of supply of advertising services where intermediate customers are involved, Case C-108/00 *Syndicat des Producteurs Indépendants (SPI) v Ministère de l'Économie, des Finances et de l'Industrie* [2001] All ER (EC) 564, ECJ; Case C-438/01 *Design Concept SA v Flanders Expo SA* [2003] STC 912, ECJ. As to the Sixth Directive see PARA 1 note 1 ante.

4 To be a consultant for these purposes a person must be recognised within his peer group as an individual with professional knowledge and skill who knows more about the matter in hand than his peers: *Nasim Mohammed (t/a The Indian Palmist) v Customs and Excise Comrs* VAT Decision 18397, [2004] STI 452 (work of palmist required neither marked intellectual character nor any high level of qualification, and the taxpayer was esteemed by his clients but had no peers (as far as he was aware); nor was there professional regulation).

5 The services of an arbitrator do not correspond to any services of the professions referred to in the Value Added Tax Act 1994 Sch 5 para 3, since an arbitrator's services are principally and habitually concerned with settling disputes between parties and thus differ from all the services principally and habitually provided by any of the professions listed (including that of lawyer): see Case C-145/96 *von Hoffmann v Finanzamt Trier* [1997] All ER (EC) 852, ECJ.

6 Value Added Tax Act 1994 Sch 5 para 3; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra). Excluded from this head are any services relating to land: Value Added Tax Act 1994 Sch 5 para 3; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as so amended).

7 Value Added Tax Act 1994 Sch 5 para 4; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra).

8 Value Added Tax Act 1994 Sch 5 para 5; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra). For these purposes, banking, financial and insurance services include reinsurance, but do not include the provision of safe deposit facilities: Value Added Tax Act 1994 Sch 5 para 5; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as so amended). The grant of a metal option is not a financial service for these purposes, since the Value Added Tax Act 1994 Sch 5 para 5 connotes, and is confined to, services in connection with money and credit (*Gardner Lohmann Ltd v Customs and Excise Comrs* [1981] VATTR 76); nor are the services of rent collection and property management financial services (*Culverpalm Ltd v Customs and Excise Comrs* [1984] VATTR 199).

9 Value Added Tax Act 1994 Sch 5 para 5A (added by the Value Added Tax (Reverse Charge) (Gas and Electricity) Order 2004, SI 2004/3149, arts 2, 3); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra).

10 Value Added Tax Act 1994 Sch 5 para 6; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra). In *Strollmoor Ltd v Customs and Excise Comrs* (1991) VAT Decision 5454, [1991] STI 64, the supply of accounting and administrative staff to non-resident (but United Kingdom incorporated and registered) investment companies owning buildings in the United Kingdom was held

to be outside the scope of this provision both because the recipient belonged in the United Kingdom for the purposes of the supply and because the supply was not of staff but of management services.

11 Value Added Tax Act 1994 Sch 5 para 7; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra). As to the hire of means of transport see PARA 58 post.

12 Value Added Tax Act 1994 Sch 5 para 7A (added by the Value Added Tax (Reverse Charge) (Anti-avoidance) Order 1997, SI 1997/1523, arts 1, 3(2); substituted by the Value Added Tax (Reverse Charge) (Amendment) Order 2003, SI 2003/863, art 2(1), (2)); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra). For the meaning of 'telecommunications services' for these purposes see PARA 33 note 19 ante.

13 Value Added Tax Act 1994 Sch 5 para 7B (Sch 5 paras 7B, 7C added, Sch 5 para 8 amended, by the Value Added Tax (Reverse Charge) (Amendment) Order 2003, SI 2003/863, art 2(1), (3), (4)); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra).

14 Value Added Tax Act 1994 Sch 5 para 7C (as added: see note 13 supra); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra). For examples of electronically supplied services for these purposes see PARA 33 note 21 ante. Where the supplier of a service and his customer communicate via electronic mail, this does not of itself mean that the service performed is an electronically supplied service: Value Added Tax Act 1994 Sch 5 para 7C (as so added:); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as so amended). As to the supply and receipt of electronically supplied services see also the text and notes 21-24 infra.

15 Value Added Tax Act 1994 Sch 5 para 8 (as amended: see note 13 supra); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16 (as amended: see note 2 supra).

16 In connection with the matter of the place where the recipient of services belongs of the interpretation of the expression 'has a business establishment, or some other fixed establishment' in the Value Added Tax Act 1994 s 9(2); and the cases cited in PARA 53 note 5 ante.

17 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16(a).

18 Ibid art 16(b)(i) (art 16(b) substituted by SI 1995/3038). In *Omnicom UK plc v Customs and Excise Comrs* (1994) VAT Decision 12605, [1994] STI 1307 (affd on appeal sub nom *Diversified Agency Services Ltd v Customs and Excise Comrs* [1996] STC 398) the issue arose as to whether the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16(b)(i) (as originally made) was incompatible with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9(2)(e) (as amended) (which identifies the place where the customer belonged as that in which he had established his business), in specifically requiring the supply to be received by the customer for the purpose of a business carried on by him; both the tribunal and, subsequently, the court held that art 9(2)(e), in requiring that the supply be performed 'for' a taxable person, imposed a like requirement. It was, therefore, insufficient for the supplier to be able to treat the supply as outside the scope of VAT that he held evidence of the recipient's taxable status in the country to which he belonged.

19 Ie by virtue of the Value Added Tax Act 1994 s 8 (as amended) (the reverse charge): see PARA 33 ante.

20 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16(b)(ii) (as substituted: see note 18 supra).

21 See note 14 supra.

22 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16A(a) (art 16A added by SI 2003/862).

23 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16A(b) (as added: see note 22 supra).

24 Ibid art 16A(c) (as added: see note 22 supra).

25 Value Added Tax Act 1994 s 9(1), (3). For the meaning of 'usual place of residence' for these purposes see PARA 53 note 6 ante. The concept of a person's 'usual place of residence' encompasses that person's permanent address: *Razzack v Customs and Excise Comrs* [1997] V & DR 392 (United Kingdom not 'usual place of residence' of Indian national temporarily there for sole purpose of pursuing litigation). Foreign military personnel serving in the United Kingdom for an average of three years were held to belong in the United Kingdom in *USAA Ltd v Customs and Excise Comrs* (1993) VAT Decision 10369 (unreported).

26 As to the meaning of 'business establishment' for these purposes see PARA 53 note 5 ante.

27 Value Added Tax Act 1994 s 9(2)(a), (b) (4)(a).

28 Ibid s 9(4)(b).

## **UPDATE**

### **57 Services supplied where received**

NOTES 3, 18--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 3--See also Case C-1/08 *Athesia Druck Srl v Ministero dell'Economia e delle Finanze, Agenzia delle Entrate* [2009] STC 1334, ECJ.

NOTE 4--See also *Revenue and Customs Comrs v Zurich Insurance Co* [2007] EWCA Civ 218, [2007] 2 CMLR 1491, PARA 53 NOTE 5.

NOTE 5--The services of an executor are not similar to those of a lawyer, since those provided by an executor are primarily about the management of economic interests while those provided by a lawyer are primarily to ensure that a claim of a legal nature succeeds: Case C-401/06 *EC Commission v Germany* [2008] STC 2906, ECJ.

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## **58. Services supplied where enjoyed.**

Supplies of certain services<sup>1</sup> are treated as made where the effective use and enjoyment of those services takes place. The services in question are:

- 162 (1) the letting on hire of any means of transport<sup>2</sup> or any goods other than means of transport<sup>3</sup>;
- 163 (2) telecommunications services<sup>4</sup>;
- 164 (3) radio and television broadcasting services<sup>5</sup>; and
- 165 (4) electronically supplied services<sup>6</sup>, when received by a person for the purposes of a business carried on by him<sup>7</sup>,

and where these services would be treated<sup>8</sup> as supplied in the United Kingdom<sup>9</sup>, they must not be treated as so supplied to the extent that the effective use and enjoyment of them takes place outside the member states<sup>10</sup>, and where those services would be treated<sup>11</sup> as supplied in a place outside the member states, they must be treated as supplied in the United Kingdom to the extent that the effective use and enjoyment of them takes place in the United Kingdom<sup>12</sup>.

<sup>1</sup> For the meaning of 'supply' see PARA 27 ante. For the general rules as to the place of supply of services and a right to services see PARAS 53-54 ante.

<sup>2</sup> Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 17(a), 18(a) (arts 17, 18 substituted by SI 1998/763; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 17(b), 18(b) further substituted, and arts 17(c), 18(c) added, by SI 2003/862). In Case 51/88 *Hamann v Finanzamt Hamburg-Eimbüttel* [1989] ECR 767, [1991] STC 193, ECJ, it was held that the term 'means of transport' should be interpreted widely and included anything which might be used to go from one place to another, including ocean-going sailing yachts, even if used by hirers for sporting purposes rather than for the transportation of goods or passengers. However, in *BPH Equipment Ltd v Customs and Excise Comrs* (1996) VAT Decision 13914, [1996] STI 779, the hire of a 'crawler' crane for the purposes of excavations by a United Kingdom company to a company registered in the Netherlands was held to be a supply of services made where the hirer belonged and not a supply of a means of transport made where the owner belonged.

<sup>3</sup> Value Added Tax Act 1994 Sch 5 para 7; Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 17(b), 18(b) (as substituted: see note 2 supra).

<sup>4</sup> Value Added Tax Act 1994 Sch 5 para 7A (added by the Value Added Tax (Reverse Charge) (Anti-avoidance) Order 1997, SI 1997/1523, arts 1, 3(2); substituted by the Value Added Tax (Reverse Charge) (Amendment) Order 2003, SI 2003/863, art 2(1), (2)); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 17(b), 18(b) (as substituted: see note 2 supra). For the meaning of 'telecommunications services' for these purposes see PARA 33 note 19 ante.

<sup>5</sup> Value Added Tax Act 1994 Sch 5 para 7B (Sch 5 paras 7B, 7C added by the Value Added Tax (Reverse Charge) (Amendment) Order 2003, SI 2003/863, art 2(1), (3)); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 17(b), 18(b) (as substituted: see note 2 supra).

<sup>6</sup> The services described in the Value Added Tax Act 1994 Sch 5 para 7C (as added: see note 5 supra): Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 17(c), 18(c) (as added: see note 2 supra). For examples of electronically supplied services for these purposes see PARA 33 note 21 ante. Where the supplier of a service and his customer communicate via electronic mail, this does not of itself mean that the service performed is an electronically supplied service: Value Added Tax Act 1994 Sch 5 para 7C (as so added); Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 17(c), 18(c) (as so added).

<sup>7</sup> Value Added Tax Act 1994 Sch 5 para 7C (as added: see note 5 supra): Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 17(c), 18(c) (as added: see note 2 supra).

- 8    le apart from ibid art 17 (as substituted and amended): art 17 (as substituted: see note 2 supra).
- 9    As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.
- 10   Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 17 (as substituted: see note 2 supra).
- 11   le apart from ibid art 18 (as substituted and amended): art 18 (as substituted: see note 2 supra).
- 12   Ibid art 18 (as substituted: see note 2 supra).

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## 59. The transport of passengers and goods.

Services which consist of the transportation of passengers<sup>1</sup> or goods are treated as supplied in the country in which the transportation takes place to the extent, and only to the extent, that they take place in that country<sup>2</sup>. Any transportation which takes place partly outside the territorial jurisdiction of a country is, however, treated as taking place wholly within that country where it takes place in the course of a journey between two points in that country<sup>3</sup> and the means of transport used does not put in or land in another country in the course of the journey between those two points<sup>4</sup>. Where a supply consists of ancillary transport services<sup>5</sup> it is treated as made where those services are physically performed<sup>6</sup>, unless the services are provided in connection with the intra-Community transport of goods<sup>7</sup> and the recipient makes use of a registration number<sup>8</sup> for the purposes of the supply, in which case the supply is treated as made in the member state which issued the registration number if, and only if, the supply would otherwise be treated as taking place in a different member state<sup>9</sup>.

Any goods or services provided as part of a pleasure cruise<sup>10</sup>, or services consisting of the transportation of any luggage, or motor vehicle, accompanying a passenger<sup>11</sup>, are treated as supplied in the same place as the transportation of the passenger<sup>12</sup> is treated as supplied, whether or not they would otherwise be treated as supplied separately<sup>13</sup>.

1 The transportation of passengers includes, it appears, the supply of a pleasure cruise by the owner of the vessel: *Customs and Excise Comrs v Peninsular and Oriental Steam Navigation Co Ltd* [1996] STC 698; and see Customs and Excise Business Brief 14/96 [1996] STI 1247 (VAT treatment of holiday and other cruises); and Customs and Excise Public Notice 744A *Passenger Transport* (March 2002). Although such services are not specifically mentioned in the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 6 (see the text and note 2 infra), art 8 extends transportation of passengers to include such a cruise for the ancillary purposes of that provision: see note 10 infra. If, however, a pleasure cruise or other passenger transport is part of a supply of designated travel services, the rules for tour operators (see PARA 62 post) will apply.

2 Ibid art 6.

3 Ibid art 7(a). The reference in the text to a journey taking place in the course of a journey between two points in a country is a reference to any such journey whether or not as part of a longer journey involving travel to or from another country: art 7(a). Thus if a ferry transports passengers from Liverpool to Dublin via the Isle of Man, the leg from Liverpool to the Isle of Man is treated as made in the United Kingdom, with the remainder being outside the scope of United Kingdom value added tax: Customs and Excise Public Notice 741 *Place of Supply of Services* (March 2002) PARA 7.2. In Case 283/84 *Trans Tirreno Express SpA v Ufficio Provinciale IVA, Sassari* [1986] ECR 231, [1986] 2 CMLR 100, ECJ, it was held that a member state could impose VAT on a transport operation effected between two points in the same state, but in the course of which the vessel left the national territory and passed through international waters, provided that it did not thereby encroach on the tax jurisdiction of another member state. See also Case C-331/94 *EC Commission v Greece* [1996] STC 1168, ECJ. As to the place of supply of goods in the course of a Community transport (ie a journey which involves making a stop in a member state other than that of departure but does not involve a stop in a country which is not a member state) see the Value Added Tax (Place of Supply of Goods) Order 2004, SI 2004/3148; and PARAS 33, 51-52 ante.

4 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 7(b). See also note 3 supra.

5 'Ancillary transport services' means loading, unloading, handling and similar activities: ibid art 2.

6 Ibid art 9.

7 'Intra-Community transport of goods' means the transportation of goods which begins in one member state and ends in a different member state: ibid art 2.



8 'Registration number' means an identifying number assigned to a person by a member state for the purposes of VAT in that member state: *ibid* art 2.

9 *Ibid* arts 9, 14(b).

10 *Ibid* art 8(a). 'Pleasure cruise' includes a cruise wholly or partly for the purposes of education or training: *ibid* art 2.

11 *Ibid* art 8(b).

12 For these purposes, a pleasure cruise is treated as the transportation of passengers: *ibid* art 8.

13 *Ibid* art 8.

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## **60. The intra-Community transport of goods.**

Where a supply<sup>1</sup> of services consists of the intra-Community transport of goods<sup>2</sup>, it is treated as made in the member state in which the transportation of the goods begins<sup>3</sup>, unless the recipient makes use of a registration number<sup>4</sup> for the purposes of the supply, in which case the supply is treated as made in the member state which issued the registration number if, and only if, the supply would otherwise be treated as taking place in a different member state<sup>5</sup>.

1 For the meaning of 'supply' see PARA 27 ante. For the general rules as to the place of supply of services and a right to services see PARAS 53-54 ante.

2 For the meaning of 'intra-Community transport of goods' see PARA 59 note 7 ante.

3 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 10.

4 For the meaning of 'registration number' see PARA 59 note 8 ante.

5 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, arts 10, 14(a).

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## **61. Services of intermediaries.**

Where services consist of the making of arrangements for the intra-Community transport of goods<sup>1</sup> or of any other activity intended to facilitate the making of such a supply<sup>2</sup>, they are treated as supplied in the member state where the transportation of the goods begins<sup>3</sup>. Where services consist of the making of arrangements for the supply by or to another person of ancillary transport services<sup>4</sup> in connection with the intra-Community transport of goods or of any activity intended to facilitate the making of such a supply, they are treated as supplied in the member state where the ancillary transport services are physically performed<sup>5</sup>. Where services consist of the making of arrangements for a supply by or to another person, or consist of any other activity intended to facilitate the making of such a supply<sup>6</sup>, those services are treated as supplied in the same place as the supply by or to that other person is treated as made<sup>7</sup>.

Where, however, a supply of services falling within the ambit of any of these circumstances<sup>8</sup> consists of either the valuation of, or work carried out on, any goods which are then dispatched or transported out of the member state where those services were physically carried out<sup>9</sup>, or ancillary transport services provided in connection with the intra-Community transport of goods<sup>10</sup>, and the recipient of those services makes use of a registration number<sup>11</sup> for the purposes of the supply, the supply is treated as made in the member state which issued the registration number if, and only if, the supply would otherwise be treated as taking place in a different member state<sup>12</sup>.

1 For the meaning of 'intra-Community transport of goods' see PARA 59 note 7 ante.

2 For the meaning of 'supply' see PARA 27 ante. For the general rules as to the place of supply of services and a right to services see PARAS 53-54 ante.

3 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 11.

4 For the meaning of 'ancillary transport services' see PARA 59 note 5 ante.

5 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 12.

6 I.e. being supply which is not of a description within ibid art 9 (see PARA 59 ante), art 10 (see PARA 60 ante) or art 16 (as amended) (see PARA 57 ante): art 13.

7 Ibid art 13.

8 I.e. any of ibid arts 11-13 (see the text and notes 1-7 supra): art 14(a).

9 Ibid art 14(aa) (added by SI 1995/3038; and amended by SI 1996/2992).

10 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 14(b).

11 For the meaning of 'registration number' see PARA 59 note 8 ante.

12 Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 14 (as amended: see note 9 supra). Whether or not the recipient of the supply is a nominee is otherwise irrelevant: *Walter Hall Group plc v Customs and Excise Comrs* (2002) VAT Decision 18007, [2003] V & DR 257. See also Customs and Excise Business Brief 02/05 [2005] STI 216.

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## **62. Tour operators.**

A designated travel service<sup>1</sup> is treated as supplied in the member state in which the tour operator has established his business<sup>2</sup>. If, however, the supply<sup>3</sup> was made from a fixed establishment, it is treated as made in the member state in which the fixed establishment is situated<sup>4</sup>.

1 For the meaning of 'designated travel service' see PARA 37 note 17 ante. As to the tour operators' margin scheme see PARA 214 post.

2 Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 5(1), (2) (art 5 substituted by SI 1992/3125). There is no need for this provision to consider supplies made from establishments outside the European Union, since these will not be designated travel services: see PARA 37 note 17 ante. In *DFDS A/S v Customs and Excise Comrs* (1994) VAT Decision 12588, [1994] STI 1305; on appeal [1995] STI 1190, the tribunal held that the phrase 'established his business' indicated the headquarters of the taxpayer, or his principal place of business, having regard to EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), arts 9(2)(e) (as amended), 26(2); but that the alternative place of supply (applicable 'if the supply was made from a fixed place of business') had exclusive effect whenever it was capable of applying. However, the fixed place of business of an English agent was not a fixed establishment of the Danish parent for the purposes of the margin scheme, because the Value Added Tax Act 1994 s 9(5) (see PARA 53 ante) (which treats a person carrying on business in a country through a branch or agency as having a business establishment in that country) expressly applies only for the purposes of s 9. On appeal by the Commissioners to the High Court, the question of the establishment of a place of business was referred to the European Court of Justice. See also *Gulliver's Travel Agency Ltd v Customs and Excise Comrs* (1994) VAT Decision 12494, [1994] STI 1258. As to the Sixth Directive see PARA 1 note 1 ante.

3 For the meaning of 'supply' see PARA 27 ante. For the general rules as to the place of supply of services and a right to services see PARAS 53-54 ante.

4 Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 5(2) (as substituted: see note 2 supra).

## **UPDATE**

### **62 Tour operators**

NOTE 2--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(2) TAXABLE PERSONS/(i) In general/63. Taxable persons.

## **(2) TAXABLE PERSONS**

### **(i) In general**

#### **63. Taxable persons.**

In order to be taxable a supply must be made by a taxable person in the course or furtherance of a business<sup>1</sup> carried on by him<sup>2</sup>. A person is a taxable person<sup>3</sup> while he is, or is required to be, registered<sup>4</sup> under the Value Added Tax Act 1994<sup>5</sup>. Each person is entitled only to a single registration for VAT purposes<sup>6</sup>. It follows that, if a person registers for VAT (even voluntarily) in respect of one activity, he is a taxable person for the purposes of all his business activities and must charge and account for VAT accordingly, notwithstanding that the value of the supplies in a particular business is minimal; and even though the value of all his business supplies taken together is below the threshold for registration<sup>7</sup>. However, the question whether any particular activity carried on by that taxable person is within the scope of VAT will still depend on whether that activity amounts to a business for VAT purposes<sup>8</sup>.

There are special provisions which apply to the Crown<sup>9</sup>, local authorities<sup>10</sup>, groups of companies<sup>11</sup>, partnerships<sup>12</sup>, businesses carried on in divisions or by unincorporated bodies<sup>13</sup>, personal representatives<sup>14</sup>, agents<sup>15</sup>, non-residents<sup>16</sup>, co-owners of land<sup>17</sup>, tour operators<sup>18</sup>, persons who buy gold<sup>19</sup> and farmers<sup>20</sup>. In certain circumstances the Commissioners for Her Majesty's Revenue and Customs<sup>21</sup> have power<sup>22</sup> to make a direction treating separate persons (whether legal or natural) as a single taxable person carrying on the activities of a business described in the direction and as liable to be registered for VAT<sup>23</sup>.

1 For the meaning of 'business' see PARA 23 ante; and see also EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 4(1) (a 'taxable person' is any person who independently carries out in any place any economic activity specified in art 4(2) (see PARA 23 note 1 ante), whatever the purpose or results of that activity). As to the Sixth Directive see PARA 1 note 1 ante. It is because employees do not independently carry out any economic activity that they are not taxable persons for value added tax: see *Rickarby v Customs and Excise Comrs* [1973] VATTR 186; and Case C-202/90 *Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas Primera y Segunda* [1991] ECR I-4247, [1993] STC 659, ECJ. Where a person's activity consisted exclusively in providing services for no direct consideration, there was no basis of assessment and the person was not a taxable person: Case 89/81 *Staatssecretaris van Financiën v Hong Kong Trade Development Council* [1982] ECR 1277, [1983] 1 CMLR 73, ECJ. It was held in Case C-60/90 *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen, Arnhem* [1991] ECR I-3111, [1993] STC 222, ECJ, that a holding company whose sole purpose was to acquire holdings in other undertakings, without involving itself directly or indirectly in the management of those undertakings, did not, without prejudice to its rights as a shareholder, have the status of a taxable person; however, transactions affecting securities can come within the scope of VAT, and it was held in Case C-8/03 *Banque Bruxelles Lambert SA (BBL) v Belgium* [2004] STC 1643, ECJ, that the assembly and management, on behalf of and using the capital of subscribers and for a fee, of portfolios consisting of transferable securities, went well beyond the simple acquisition and sale of securities and was aimed at producing income on a continuing basis and was therefore an economic activity for VAT purposes). By EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4(5), states, regional and local government authorities and other bodies governed by public law are not to be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with such activities or transactions. In Case 235/85 *EC Commission v Netherlands* [1987] ECR 1471, [1988] 2 CMLR 921, ECJ, it was held that notaries and bailiffs, when performing their official services, thereby carry out independent economic activities consisting in the supply of services to third parties, in return for fees for their own account and are thus taxable persons for VAT purposes within EC Council Directive 77/388 (OJ L145, 13.6.77, p 1), notwithstanding that they exercise the powers of a public authority. See joined Cases 231/87, 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino and Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* [1989] ECR 3233, [1991]

STC 205, ECJ, where the court drew a distinction between the activities of bodies governed by public law acting 'as public authorities', when they were not to be treated as taxable persons, in accordance with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4(5), if they acted under the special legal regime applicable to them; and activities of such bodies when acting under the same legal conditions as applicable to private traders, when they could not be regarded as acting 'as public authorities' and were prima facie outside the scope of art 4(5). See also Case C-446/98 *Fazenda Pública v Câmara Municipal do Porto* [2001] STC 560, ECJ (the letting of spaces for car-parking was an activity which, where carried on by a body governed by public law, was carried on as a 'public authority' for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4(5) if it was carried on under a special legal regime applicable to bodies governed by public law); and Case C-202/90 *Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas Primera y Segunda* supra (EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4(5) did not apply to the collection of taxes by private individuals, who were entitled to retain a percentage of taxes collected by way of remuneration). On the implementation of art 4(5) in United Kingdom VAT law see *Arts Council of Great Britain v Customs and Excise Comrs* (1994) VAT Decision 11991, [1994] STI 713; cf *Haringey London Borough Council v Customs and Excise Comrs* (1992) VAT Decision 8820, [1994] VATTR 70, [1992] STI 1036 (on appeal [1995] STC 830); *Customs and Excise Comrs v Isle of Wight Council* [2004] EWHC 2541 (Ch), [2005] STC 257; and as to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

2 See the Value Added Tax Act 1994 s 4(1); and PARA 18 ante.

3 In Case 268/83 *DA Rompelman and EA Rompelman-van Deelen v Minister van Financiën* [1985] ECR 655, [1985] 3 CMLR 202, ECJ, it was held that a person who carries out acts of investment closely linked with, and necessary for, the future exploitation of an immovable asset must thenceforward be considered a taxable person for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4. In Case C-110/94 *Intercommunale voor Zeewaterontziltling (INZO) (in liquidation) v Belgium* [1996] ECR I-857, [1996] STC 569, ECJ, it was held that where a tax authority accepts that a company, which has declared its intention to begin an economic activity giving rise to taxable transactions, has the status of a taxable person for the purposes of VAT, the carrying out of a study to investigate the financial viability of the activity itself is part of the economic activity in respect of which input tax may be recovered; and, except in cases of fraud or abuse, the status of a taxable person may not retrospectively be withdrawn if, as a result of the study, taxable transactions do not take place.

4 As to registration see PARA 64 et seq post.

5 Value Added Tax Act 1994 ss 3(1), 96(1).

6 *Customs and Excise Comrs v Glassborow* [1975] QB 465, [1974] 1 All ER 1041, DC. See PARA 77 post.

7 Though he may be entitled to seek to have his registration cancelled, in accordance with the Value Added Tax Act 1994 s 3(2), Sch 1 para 13 (as amended): see PARA 82 post.

8 See PARA 23 et seq ante.

9 See PARA 208 post.

10 See PARA 74 post.

11 See PARAS 75, 205 et seq post.

12 See PARA 77 post.

13 See PARA 76 post.

14 See PARA 79 post.

15 See PARA 209 post.

16 See PARA 71 post.

17 See PARA 77 post.

18 See PARA 214 post.

19 See PARAS 136, 185 post.

20 See PARA 88 et seq post.

21 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

22 le under the Value Added Tax Act 1994 Sch 1 para 2: see PARA 68 post.

23 As to the registration of the single taxable person see PARA 68 post.

## UPDATE

### 63 Taxable persons

NOTES 1, 3--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

NOTE 1--On the implementation of EC Council Directive 77/388 art 4(5) in United Kingdom VAT law, see also *Edinburgh Telford College v Revenue and Customs Comrs* [2006] CSIH 13, [2006] STC 1291. See also Cases C-78/02 and C-80/02 *Elliniko Dimosio v Karageorgou* [2006] STC 1654, ECJ (translator not independently carrying out economic activity: not taxable person); Case C-430/04 *Finanzamt Eisleben v Feuerbestattungsverein Halle eV* [2006] STC 2043, ECJ (private person entitled to rely on EC Council Directive 77/388 art 4(5) in national court to ascertain tax status of public authority with which person allegedly in competition); Case C-288/07 *Revenue and Customs Comrs v Isle of Wight Council* [2008] STC 2964, ECJ (error in judgment corrected at [2009] STC 1096); *Chancellor, Masters and Scholars of the University of Cambridge v Revenue and Customs* [2009] EWHC 434 (Ch), [2009] All ER (D) 105 (Mar); *Revenue and Customs Comrs v Isle of Wight BC* [2009] EWHC 592 (Ch), [2009] STC 1098; *Cambridge University v Revenue and Customs Comrs* [2009] EWHC 434 (Ch), [2009] STC 1288; Case C-102/08 *Finanzamt Dusseldorf-Sud v SALIX Grundstücks-Vermietungsgesellschaft mbH & Co Object Offenbach KG* [2009] STC 1607, ECJ.

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## **(ii) Liability to be Registered**

### **A. IN GENERAL**

#### **64. Registration of persons; the general rules.**

A person is a taxable person<sup>1</sup> while he is, or is required to be, registered under the Value Added Tax Act 1994<sup>2</sup>. A trader may register and thus become a taxable person either voluntarily or by compulsion<sup>3</sup>.

There are two basic tests as to the liability to be registered, the first of which is historic and the second prospective. On the historic basis, a person who makes taxable supplies<sup>4</sup> but is not registered becomes liable to be registered at the end of any month<sup>5</sup> if the value of his taxable supplies in the period of one year then ending has exceeded £60,000<sup>6</sup>; but a person is not liable to be registered on this ground if the Commissioners for Her Majesty's Revenue and Customs are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which he would otherwise have become liable to be registered will not exceed £58,000<sup>7</sup>. On the prospective basis, a person who makes taxable supplies is liable to be registered at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed £60,000<sup>8</sup>.

The value of a supply of goods or services is determined for these purposes on the basis that no VAT is chargeable on the supply<sup>9</sup>. In addition, supplies of goods or services that are capital assets of the business in the course or furtherance of which they are supplied are to be disregarded<sup>10</sup>, as well any taxable supplies which would not be treated as such apart from the statutory provisions with regard to distance selling to consumers in the United Kingdom<sup>11</sup> by a trader belonging in another member state<sup>12</sup>. Supplies made at a time when a person was previously registered for VAT are disregarded for the purposes of the historic basis of liability<sup>13</sup> if his registration was cancelled by the Commissioners<sup>14</sup> and they are satisfied that before that cancellation he had given them all the information they needed in order to determine whether to cancel the registration<sup>15</sup>.

Where a business carried on by a taxable person is transferred to another person as a going concern<sup>16</sup>, the transferee is treated, for the purpose of determining whether he is liable to be registered for VAT, as having carried on the business before as well as after the transfer and supplies by him are treated accordingly<sup>17</sup>. Where the transferee is not registered at the time of the transfer, he becomes liable to be registered at that time if the value of his taxable supplies<sup>18</sup> in the period of one year ending at the time of the transfer has exceeded £60,000<sup>19</sup>, or if there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days beginning at the time of the transfer will exceed that sum<sup>20</sup>.

A person is treated as having become liable to be registered under these provisions<sup>21</sup> at any time when he would have become so liable thereunder but for any registration which is subsequently cancelled<sup>22</sup> either because he was not registrable or because he did not have the intention by reference to which he was registered<sup>23</sup>. A person who is not otherwise registered or liable to be registered becomes so liable in respect of disposals of assets for which a VAT repayment is claimed<sup>24</sup>.

A local authority<sup>25</sup> which makes taxable supplies<sup>26</sup> is liable to be registered for VAT whatever the value of its supplies<sup>27</sup>.



An appeal lies to a VAT and duties tribunal against any decision of the Commissioners as to registration<sup>28</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 See the Value Added Tax Act 1994 s 3(1); and PARA 63 ante. References to registration are references to being registered under any of Schs 1-3, 3A (as amended and added) (see the text and notes 4-24 infra; and PARA 65 et seq post); and persons registered thereunder must be registered in a single register kept by the Commissioners for Her Majesty's Revenue and Customs for the purposes of the Value Added Tax Act 1994: s 3(3). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. The Commissioners may make provision as to the inclusion and correction of information in that register with respect to the Schedule under which any person is registered: s 3(4). See the Value Added Tax Regulations 1995, SI 1995/2518, regs 5-7 (as amended); note 5 infra; and PARA 65, 77, 83 post. As to the making of regulations generally see PARA 14 ante. There is no reference to registration in EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), but all member states have a system by which taxable persons are assigned unique identification numbers, in order to prevent fraud, as permitted by art 22(8). As to the Sixth Directive see PARA 1 note 1 ante.

The Commissioners for Her Majesty's Revenue and Customs may by regulations make provision for requiring taxable persons to notify to them such particulars of changes in circumstances relating to those persons or any business carried on by them as appear to the Commissioners to be required for the purpose of keeping the register up to date: Value Added Tax Act 1994 s 58, Sch 11 para 7(1). Every registered person, except one to whom Sch 1 para 11 (see PARA 80 post), Sch 1 para 12 (see PARA 81 post) or Sch 1 para 13(1), (2) or (3) (see PARA 82 post), Sch 2 para 5 (see PARA 84 post), Sch 3 para 5 (see PARA 86 post) or Sch 3A para 5 (as added) (see PARA 65 post) applies must, within 30 days of any changes being made in the name, constitution or ownership of his business, or of any other event which may necessitate the variation of the register or cancellation of his registration, notify the Commissioners in writing of such a change or event and furnish them with full particulars of it: Value Added Tax Regulations 1995, SI 1995/2518, reg 5(2) (reg 5 substituted by SI 2000/794).

3 As to voluntary registration see PARA 67 post. The Commissioners have no power compulsorily to register a person for a period during which he makes no supplies: *Hassan v Customs and Excise Comrs* (2002) VAT Decision 17949, [2003] STI 952.

4 For the meaning of 'taxable supply' see PARA 18 note 3 ante. References in the Value Added Tax Act 1994 Sch 1 (as amended) to supplies are references to supplies made in the course or furtherance of a business: s 3(2), Sch 1 para 19 (s 3(2) amended by the Finance Act 2000 s 136(1)). By virtue of this statutory definition, in determining liability to register the value of exempt supplies is left out of account but both standard-rated supplies and zero-rated supplies are taken into account. However, a person who makes zero-rated supplies may request the Commissioners to exempt him from registration: see the Value Added Tax Act 1994 Sch 1 para 14(1); and PARA 66 post. As to the standard rate of VAT see PARA 5 ante; and as to zero-rating see PARA 174 et seq post. For the meaning of 'supply' see PARA 27 ante; and for the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

5 He must notify the Commissioners of that liability within 30 days of the end of the relevant month: ibid Sch 1 para 5(1). The Commissioners must register any person to whom this provision applies, whether or not he so notifies them, with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him: Sch 1 para 5(2). The 'relevant month', in relation to a person who so becomes liable to be registered, means the month at the end of which he becomes liable to be registered by virtue of Sch 1 para 1(1)(a) (as amended: see note 6 infra): Sch 1 para 5(3). Registration with effect 'from' the end of a month commences at the beginning of the following month (eg registration from the end of September commences on 1 October): *Henderson (t/a Tony's Fish and Chip Shop) v Customs and Excise Comrs* [2001] STC 47. See also *Arthurs v Customs and Excise Comrs* (1995) VAT Decision 13650, [1995] STI 1977. Where, however, a person becomes liable to be registered by virtue of the Value Added Tax Act 1994 Sch 1 para 1(1)(a) (as amended) and by virtue of Sch 1 para 1(1)(b) (as amended) or Sch 1 para 1(2) (as amended) at the same time, the Commissioners must register him in accordance with Sch 1 para 6(2) (see note 8 infra) or Sch 1 para 7(2) (see note 19 infra), as the case may be, rather than Sch 1 para 5(2): Sch 1 para 8.

Any notification required under Sch 1 (as amended) must be made in such form and contain such particulars as the Commissioners may prescribe by regulations: Sch 1 para 17. Where any person is required under Sch 1 para 5(1), Sch 1 para 6(1) or Sch 1 para 7(1) (see note 19 infra) to notify the Commissioners of his liability to be registered, the notification must contain the particulars, including the declaration, set out in the Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1), Sch 1, Form 1 and must be made in that form; but where the notification is made by a partnership, it must also contain the particulars set out in Sch 1, Form 2 (substituted by SI 2001/3828): Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1) (as substituted (see note 2 supra); and amended by SI 2004/1675). A notification subject to or required by the Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1) (as substituted and amended) may be made instead using an electronic communications

system that remains specified for the purpose in a current general direction given by the Commissioners; and a system so specified may modify or dispense with any particular required for that purpose by reg 5(1) (as substituted and amended): reg 5(4) (reg 5(4)-(14) added by SI 2004/1675). This applies only to a notification that is envisaged by a current direction (Value Added Tax Regulations 1995, SI 1995/2518, reg 5(8) (as so added)), but does not apply at a notification's deadline (ie the latest time by which the notification is required to be made) if the system specified for that notification is not then functioning (reg 5(9) (as so added)). Any such general direction must specify both the form of an electronic communications system and the sole circumstances in which it may be used, and may specify different forms or circumstances for different cases: reg 5(11) (as so added). The Commissioners are not required to give a general direction under reg 5(4) (as added) (reg 5(10) (as so added)), and a direction is not current for these purposes to the extent that it is varied, replaced or revoked by another Commissioners' direction (reg 5(13) (as so added)). A notification made under reg 5(4) (as added) carries the same consequences as a notification under reg 5(1) (as substituted and amended), except in relation to any matter for which alternative or additional provision is made by or under reg 5(4)-(7) (as added): reg 5(14) (as so added).

The time a notification is made using an electronic communications system corresponds to when a fully mechanised feature of that system generates a relevant acknowledgement: reg 5(5) (as so added). If such a feature does not generate an acknowledgement, but would do so in the circumstances alleged, a relevant notification is not made using that system in those alleged circumstances: reg 5(6) (as so added). These provisions apply as conclusive presumptions (reg 5(7) (as so added)), but a system need not include a feature of the type envisaged (reg 5(12) (as so added)).

6 Value Added Tax Act 1994 Sch 1 para 1(1)(a) (Sch 1 paras 1-3 amended by the Value Added Tax (Increase of Registration Limits) Order 2005, SI 2005/727, art 2(a) (made pursuant to the power conferred on the Treasury by the Value Added Tax Act 1994 Sch 1 para 15 by order to substitute for any of the sums for the time being specified in Sch 1 (as amended) such greater sums as it thinks fit)). Regarding the Treasury's powers in this matter, the United Kingdom's authority to set its VAT registration threshold is given by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 24(2)(c). It would therefore appear that the Treasury's power is restricted to adjustments which maintain the value of the threshold in real terms. As to the making of orders generally see PARA 14 ante.

In determining the value of a person's supplies for the purposes of the Value Added Tax Act 1994 Sch 1 para 1(1) or (2) (as amended), supplies to which s 18B(4) (as added) (last acquisition or supply of goods before removal from fiscal warehousing: see PARA 149 post) applies and supplies treated as made by him under s 18C(3) (as added) (self-supply of services on removal of goods from warehousing: see PARA 154 post) are to be disregarded: Sch 1 para 1(9) (added by the Finance Act 1996 s 26(1), Sch 3 para 13).

7 Value Added Tax Act 1994 Sch 1 para 1(3) (as amended: see note 6 supra). In giving effect to Sch 1 para 1(3) (as amended), the Commissioners must consider the case as at the time registration would otherwise take effect and must act only on information which was available to them at that time: *Gray (t/a William Gray & Sons) v Customs and Excise Comrs* [2000] STC 880.

8 Value Added Tax Act 1994 Sch 1 para 1(1)(b) (as amended: see note 6 supra). As to valuation of a person's supplies see note 6 supra. A person who becomes liable to be registered must notify the Commissioners of his liability before the end of the period by reference to which the liability arises (Sch 1 para 6(1)); and the Commissioners must register any such person (whether or not he so notifies them) with effect from the beginning of that period (Sch 1 para 6(2)). As to the mechanisms of registration see note 5 supra. Failure to comply with Sch 1 para 1(1)(b) (as amended) carries serious consequences and its application has therefore to be determinable by some objectively definable criteria, although this does not, for example, require a trader to monitor his business as his turnover approaches the threshold to establish whether Sch 1 para 1(1)(b) applies: see *Bennett v Customs and Excise Comrs* [1999] STC 248.

9 Value Added Tax Act 1994 Sch 1 para 16. This must be understood in the context of the usual rules governing the value of supplies made for a cash consideration that the value of a supply is such amount as, with the addition of the VAT chargeable, is equal to the consideration: see s 19(2); and PARA 94 post. The effect of Sch 1 para 16 is that the value of supplies for registration (and more importantly for the purposes of cancellation of registration: see PARA 82 post) is taken to be the gross and not the net consideration. Thus if a trader sells an asset for £117.50, for the purposes of determining whether or not his registration should be cancelled, the value of the supply is taken to be £117.50 and not £100, even though he will be obliged to account to the Commissioners for £17.50 VAT on the sale. Quære whether the same would be true if the trader were to sell the asset for '£100 plus VAT'.

Where any person makes a supply of goods to another person and that supply is a taxable supply but not a zero-rated supply, the supply is treated for the purposes of Sch 1 (as amended): (1) as a taxable supply of that other person, as well as a taxable supply of the person who makes it (s 55(1)(a)); and (2) in so far as that other person is supplied in connection with the carrying on by him of any business, as a supply made by him in the course or furtherance of that business (s 55(1)(b)); but nothing in head (2) supra requires any supply to be disregarded for the purposes of Sch 1 (as amended) on the grounds that it is a supply of capital assets of that

other person's business (see further the text and note 10 infra): s 55(1). For the meaning of 'supply of gold' see PARA 32 note 12 ante.

10 Ibid Sch 1 para 1(7). Cf the distinction drawn by s 5(1), Sch 4 para 1 (see PARA 30 ante) between the transfer of the whole property in goods, which is a supply of goods, and the transfer of an undivided share of the property, or of the possession of goods, which is a supply of services. Schedule 1 para 1(7) is designed to leave out of account supplies of minor interests in capital goods as well as the transfer of the whole property in such goods. Where, however, an interest in, right over, or licence to occupy any land would be so disregarded for the purposes of Sch 1 para 1(1) or (2) (as amended), it is not disregarded if it is supplied on a taxable supply which is not zero-rated: Sch 1 para 1(8). As to the charge to VAT on the supply of an interest in land see PARA 156 post. As to the meaning of 'capital goods' in the context of turnover taxes see Case 51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, [1977] 1 CMLR 413, ECJ (applied in *Harbig Leasing Two Ltd v Customs and Excise Comrs* [2000] V & DR 469 (cars, purchased by parent company from dealers under buy-back agreements, transferred to subsidiary which received lease income for short period before dealers repurchased cars, not capital assets of subsidiary)); *Trustees of the Mellerstain Trust v Customs and Excise Comrs* [1989] VATTR 223 at 235 et seq (a sale of paintings by trustees to create a maintenance fund for an historic house which it was intended subsequently to open to the public was a supply of capital goods, which fell to be disregarded in accordance with the Value Added Tax Act 1994 Sch 1 para 1(7) when determining whether the trustees were liable to be registered (and thus whether they were obliged to account for VAT on the sale of the paintings)).

11 Ie apart from ibid s 7(4): see PARA 48 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

12 Ibid Sch 1 para 1(7). As to the meaning of 'another member state' see PARA 4 note 15 ante.

13 Ie for the purposes of ibid Sch 1 para 1(1)(a) (as amended): see the text and notes 3-6 supra. This provision also applies in a case falling within Sch 1 para 1(2)(a) (as amended) (transfer of a business as a going concern: see the text and notes 18-19 infra): Sch 1 para 1(4).

14 Ibid Sch 1 para 1(4)(a) (amended by the Finance Act 2000 s 136(6)). The reference in the text to cancellation is to cancellation otherwise than under Sch 1 para 13(3) (see PARA 82 post), Sch 2 para 6(2) (see PARA 85 post), Sch 3 para 6(3) (see PARA 87 post) or Sch 3A para 6(2) (as added) (see PARA 82 post): Sch 1 para 1(4)(a) (as so amended).

15 Ibid Sch 1 para 1(4)(b).

16 As to the VAT treatment of transfers of businesses as going concerns see PARA 210 post.

17 Value Added Tax Act 1994 s 49(1)(a). The Value Added Tax Regulations 1995, SI 1995/2518, reg 6(1) makes provision for the transferor and transferee jointly to apply for the registration number of the transferor to be assigned to the transferee: see PARA 83 post. Consequentially, the transferee becomes liable for any outstanding output tax for which the transferor has failed to account to the Commissioners and entitled to credit for or repayment of any input tax to which the transferor was entitled: see reg 6(3) (as amended); and PARA 83 post.

18 Ie the supplies which are treated as his by virtue of the Value Added Tax Act 1994 s 49(1)(a): see the text and note 17 supra.

19 Ibid Sch 1 para 1(2)(a) (as amended: see note 6 supra). As to valuation of a person's supplies see note 6 supra. A person who becomes liable to be registered by virtue of Sch 1 para 1(2) (as amended) must notify the Commissioners of the liability within 30 days of the time when the business is transferred (Sch 1 para 7(1)); and the Commissioners must register any such person, whether or not he so notifies them, with effect from the time when the business is transferred (Sch 1 para 7(2)).

Where the transferee of a business has been registered in substitution for the transferor, and with the transferor's registration number, any liability of the transferor existing at the date of the transfer to make a return or to account for or pay VAT under the Value Added Tax Regulations 1995, SI 1995/2518, becomes the liability of the transferee: see reg 6(3)(a); and PARA 83 post.

20 Ibid Sch 1 para 1(2)(b) (as amended: see note 6 supra). See also note 19 supra.

21 Ie under ibid Sch 1 (as amended): see the text and notes 1-20 supra.

22 Ie cancelled under ibid Sch 1 para 13(3) (see PARA 82 post), Sch 2 para 6(2) (see PARA 85 post), Sch 3 para 6(3) (see PARA 87 post) or Sch 3A para 6(2) (as added) (see PARA 82 post): Sch 1 para 1(5) (amended by the Finance Act 2000 s 136(6)).

23 Ibid Sch 1 para 1(5) (as amended: see note 22 supra).

24 See *ibid* Sch 3A (as added); and PARA 65 post.

25 'Local authority' means the council of a county, county borough, district, London borough, parish or group of parishes (or, in Wales, community or group of communities), the Common Council of the City of London, the Council of the Isles of Scilly, and any joint committee or joint board established by two or more of the above: *ibid* s 96(1), (4) (amended by the Local Government Reorganisation (Wales) (Consequential Amendments No 2) Order 1995, SI 1995/1510). As to the counties and districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq. As to local authorities in Wales see LOCAL GOVERNMENT vol 29(1) (Reissue) PARAS 22, 23, 37 et seq. As to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) PARAS 5, 29-30, 35 et seq. As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq. As to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

26 As to the business activities of local authorities see PARA 74 post.

27 See the Value Added Tax Act 1994 s 42; and PARA 74 post.

28 *Ibid* s 83(a). As to appeals see generally para 343 et seq post.

## UPDATE

### 64 Registration of persons; the general rules

TEXT AND NOTES--References to £60,000 are now to £68,000 and references to £58,000 are now to £66,000: Value Added Tax Act 1994 Sch 1 para 1 (amended by SI 2009/1031).

NOTES 2, 6--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

NOTE 5--SI 1995/2518 Sch 1 Form 1 substituted: SI 2006/2902.

TEXT AND NOTES 16, 17--'Business' now includes part of a business: 1994 Act Sch 1 para 1(2) (amended by Finance Act 2007 s 100(8)).

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**65. Registration in respect of disposals of assets for which a VAT repayment is claimed.**

A person who is neither registered for value added tax<sup>1</sup> nor liable to be registered<sup>2</sup> becomes liable to be registered<sup>3</sup> at any time if he makes<sup>4</sup>, or there are reasonable grounds for believing that he will make in the period of 30 days then beginning<sup>5</sup>, a supply<sup>6</sup> where:

- 166 (1) the supply is a taxable supply<sup>7</sup>;
- 167 (2) the goods are assets of the business in the course or furtherance of which they are supplied<sup>8</sup>; and
- 168 (3) the person by whom they are supplied, or a predecessor of his<sup>9</sup>, has received or claimed, or is intending to claim, a repayment of VAT<sup>10</sup> on the supply to him, or the importation by him, of the goods or of anything comprised in them<sup>11</sup>.

A person who becomes liable to be registered under these provisions must notify the Commissioners for Her Majesty's Revenue and Customs<sup>12</sup> of the liability either before the end of the period of 30 days beginning with the day on which the liability arises (where he becomes liable to be registered because he makes a relevant supply)<sup>13</sup> or before the end of the period by reference to which the liability arises (where he becomes liable to be registered because there are reasonable grounds for believing that he will make such a supply)<sup>14</sup>, and the Commissioners must register such person (whether or not he so notifies them) with effect from the beginning of the day on which or, as the case may be, the period by reference to which, the liability arises<sup>15</sup>.

A registered person<sup>16</sup> who ceases to make or have the intention of making relevant supplies must notify the Commissioners of that fact within 30 days of the day on which he does so<sup>17</sup>, unless he would, when he so ceases, be otherwise liable or entitled to be registered for value added tax<sup>18</sup> if his registration and any enactment preventing a person from being liable to be registered under different provisions at the same time were disregarded<sup>19</sup>. A person who has become liable to be registered under these provisions will cease to be so liable at any time if the Commissioners are satisfied that he has ceased to make relevant supplies<sup>20</sup>.

A person is treated as having become liable to be registered under these provisions at any time when he would have become so liable by virtue of making relevant supplies (or by virtue of there being reasonable grounds for believing that he will make a relevant supply)<sup>21</sup> but for any registration which is subsequently cancelled<sup>22</sup>.

1    Ie registered under the Value Added Tax Act 1994: see PARA 64 ante. For the meaning of 'registered' see PARAS 18 note 4, 64 note 2 ante.

2    Ie under *ibid* Schs 1-3 (as amended) (see PARAS 64 ante, 66 et seq post).

3    Ie under *ibid* s 3(2), Sch 3A (s 3(2) amended, Sch 3A added, by the Finance Act 2000 s 136(1), (8), Sch 36): see the text and notes 4-22 *infra*.

4    Value Added Tax Act 1994 Sch 3A para 1(1)(a) (as added: see note 3 *supra*).

5    *Ibid* Sch 3A para 1(1)(b) (as added: see note 3 *supra*).

6 For the meaning of 'supply' see PARA 27 ante. The supplies listed in heads (1)-(3) in the text are known as 'relevant supplies' for these purposes: *ibid* Sch 3A para 9 (as added: see note 3 *supra*).

7 *Ibid* Sch 3A para 9(1)(a) (as added: see note 3 *supra*). For the meaning of 'taxable supply' see PARA 18 note 3 ante.

8 *Ibid* Sch 3A para 9(1)(b) (as added: see note 3 *supra*). As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

9 In relation to any goods, a person is the predecessor of another for these purposes if: (1) that other person is a person to whom he has transferred assets of his business by a transfer of that business, or part of it, as a going concern (*ibid* Sch 3A para 9(2)(a) (as added: see note 3 *supra*)); (2) those assets consisted of or included those goods (Sch 3A para 9(2)(b) (as so added)); and (3) the transfer of the assets is one falling by virtue of an order under s 5(3) (see PARA 27 ante) (or under an enactment re-enacted therein) to be treated as neither a supply of goods nor a supply of services (Sch 3A para 9(2)(c) (as so added)); and references to a person's predecessor includes references to the predecessors of his predecessor through any number of transfers (Sch 3A para 9(2) (as so added)).

10 *Ie* such a repayment under a scheme embodied in regulations made under *ibid* s 39 (see PARA 308 post): Sch 3A para 9(3) (as added: see note 3 *supra*).

11 *Ibid* Sch 3A para 9(1)(c) (as added: see note 3 *supra*).

12 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. Any notification required under *ibid* Sch 3A (as added) must be made in such form and contain such particulars as the Commissioners may prescribe by regulations: Sch 3A para 8 (as added: see note 3 *supra*). Where any person is required under Sch 3A para 3(1) or 4(1) (see the text and notes 13-14 *infra*) to notify the Commissioners of his liability to be registered, the notification must contain the particulars, including the declaration, set out in the Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1), Sch 1 Form 7A (as added) and must be made in that form; but where the notification is made by a partnership, it must also contain the particulars set out in Sch 1 Form 2 (substituted by SI 2001/3828): Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1) (reg 5 substituted by SI 2000/794; and amended by SI 2004/1675). See further as to notification under these provisions para 64 note 5 ante.

13 Value Added Tax Act 1994 Sch 3A para 3(1) (as added: see note 3 *supra*). The reference in the text to a person becoming liable to be registered because he makes a relevant supply is a reference to a person becoming so liable by virtue of *ibid* Sch 3A para 1(1)(a) (as added) (see the text and notes 1-4 *supra*).

14 *Ibid* Sch 3A para 4(1) (as added: see note 3 *supra*). The reference in the text to a person becoming liable to be registered because there are reasonable grounds for believing that he will make a relevant supply is a reference to a person becoming so liable by virtue of Sch 3A para 1(1)(b) (as added) (see the text and notes 1-5 *supra*).

15 *Ibid* Sch 3A paras 3(2), 4(2) (as added: see note 3 *supra*).

16 *Ie* a person who is registered under *ibid* Sch 3A para 3 or para 4 (as added) (see the text and notes 12-15 *supra*).

17 *Ibid* Sch 3A para 5(1) (as added: see note 3 *supra*). The notification must be made in writing to the Commissioners and must state the date on which the person ceased to make, or have the intention of making, relevant supplies: Value Added Tax Regulations 1995, SI 1995/2518, reg 5(3)(f) (reg 5 substituted by SI 2000/794).

18 *Ie* registered under the Value Added Tax Act 1994: see PARA 64 ante.

19 *Ibid* Sch 3A para 5(2) (as added: see note 3 *supra*).

20 *Ibid* Sch 3A para 2 (as added: see note 3 *supra*). A person cannot cease to be liable to be registered under Sch 3A (as added) except in accordance with Sch 3A para 2 (as added): Sch 3A para 1(3) (as so added).

21 *Ie* that he would have become liable for registration under *ibid* Sch 3A para 1(1) (see the text and notes 1-11 *supra*).

22 *Ibid* Sch 3A para 1(2) (as added: see note 3 *supra*). The reference in the text to a person's registration becoming subsequently cancelled is a reference to its being cancelled under Sch 1 para 13(3) (see PARA 82 post), Sch 2 para 6(2) (see PARA 85 post), Sch 3 para 6(3) (see PARA 87 post) or Sch 3A para 6(2) (as added) (see PARA 82 post): Sch 3A para 1(2) (as added: see note 3 *supra*).



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## **66. Exemption from registration.**

Where a person who makes or intends to make taxable supplies<sup>1</sup> or other relevant supplies<sup>2</sup> satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> that any such supply is zero-rated<sup>4</sup> or would be zero-rated if he were a taxable person<sup>5</sup>, they may, if he so requests and they think fit, exempt him from registration<sup>6</sup>.

Where there is a material change in the nature of the supplies made by a person so exempted from registration, he must notify the Commissioners of the change within 30 days of the date on which it occurred<sup>7</sup> or, if no particular day is identifiable as the day on which it occurred, within 30 days of the end of the quarter in which it occurred<sup>8</sup>. Where there is a material alteration in any quarter in the proportion of taxable or other relevant supplies of such a person that are zero-rated, he must notify the Commissioners of the alteration within 30 days of the end of the quarter<sup>9</sup>.

1 For the meaning of 'taxable supplies' see PARA 18 note 3 ante. See also PARA 64 note 4 ante.

2 The supplies to which the Value Added Tax Act 1994 Sch 3A (as added) (registration in respect of disposals of assets for which a VAT repayment is claimed) is applicable: see s 3(2), Sch 3A para 9 (s 3(2) amended, Sch 3A added, by the Finance Act 2000 s 136(1), (8), Sch 36); and PARA 65 ante.

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 For the meaning of 'zero-rated' see PARA 174 post.

5 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

6 Value Added Tax Act 1994 Sch 1 para 14(1), Sch 3A para 7(1) (Sch 3A as added: see note 2 supra). The reference in the text to exemption from registration is a reference to exemption from registration under Sch 1 (as amended) (see PARAS 64 ante, 67 et seq post) or Sch 3A (as added) (see PARA 65 ante). Where exemption is granted under Sch 1 (as amended), it continues in effect until it appears to the Commissioners that the request should no longer be acted upon or is withdrawn: Sch 1 para 14(1). Where it appears to the Commissioners that a request under Sch 3A para 7(1) (as added) should no longer have been acted upon on or after any day, or has been withdrawn on any day, they must register the person who made the request with effect from that day: Sch 3A para 7(4) (as so added).

By the operation of Sch 1 para 14(1) the trader is relieved from the administrative burdens attendant upon registration, at the expense of losing the right to repayment of the input tax which he incurs on the purchase of supplies for the purposes of his business: see *Fong v Customs and Excise Comrs* [1978] VATTR 75 (repayment trader (in the sense that her input tax generally exceeded her output tax) applied for exemption from registration under the Value Added Tax Act 1994 Sch 1 para 14(1); the Commissioners claimed that their power to exempt businesses from registration was restricted to those which made only zero-rated supplies; held that, on a correct interpretation of Sch 1 para 14(1), the Commissioners had a discretion to exempt any trader who made, inter alia, zero-rated supplies and, further, that their decision was appealable under s 83(a) (see PARA 346 post)).

7 Ibid Sch 1 para 14(2)(a), Sch 3A para 7(2)(a) (Sch 3A as added: see note 2 supra).

8 Ibid Sch 1 para 14(2)(b), Sch 3A para 7(2)(b) (Sch 3A as added: see note 2 supra).

9 Ibid Sch 1 para 14(3), Sch 3A para 7(3) (Sch 3A as added: see note 2 supra). As to the penalty for failure to comply with these requirements see PARA 328 post.



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## 67. Voluntary registration.

Where a person who is not liable to be registered for value added tax<sup>1</sup> and is not already so registered<sup>2</sup> satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> either that he makes taxable supplies<sup>4</sup> or that he is carrying on a business and intends to make taxable supplies in the course or furtherance of that business<sup>5</sup>, the Commissioners must, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him<sup>6</sup>.

Where a person who:

- 169 (1) has a business establishment<sup>7</sup> in the United Kingdom<sup>8</sup> or his usual place of residence<sup>9</sup> in the United Kingdom<sup>10</sup>;
- 170 (2) does not make and does not intend to make taxable supplies<sup>11</sup>; and
- 171 (3) is not liable to be registered for VAT and is not already so registered<sup>12</sup>,

satisfies the Commissioners either that he makes supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom<sup>13</sup>, that he makes supplies which are specified<sup>14</sup> for the purposes of determining any allowance of input tax<sup>15</sup>, or that he is carrying on a business and intends to make such supplies in the course or furtherance of that business<sup>16</sup>, they must, if he so requests, register him with effect from the day on which the request is made, or from such earlier date as may be agreed between them and him<sup>17</sup>. A person who has been voluntarily registered under this provision and who makes or forms the intention of making taxable supplies must notify the Commissioners of that fact within 30 days of the day on which he does so<sup>18</sup>.

1    Ie under the Value Added Tax Act 1994: see PARA 64 ante. For the meaning of 'registered' see PARAS 18 note 4, 64 note 2 ante. A person may not be liable to registration eg because the value of his supplies or intended supplies fall below the registration threshold.

2    A subsidiary of a group of companies with group registration is not entitled to request individual voluntary registration: *Customs and Excise Comrs v Eastwood Care Homes (Ilkeston) Ltd* [2001] STC 1629.

3    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4    Value Added Tax Act 1994 s 3(2), Sch 1 para 9(a) (s 3(2) amended by the Finance Act 2000 s 136(1)). For the meaning of 'taxable supplies' see PARA 18 note 3 ante. See also PARA 64 note 4 ante.

5    Value Added Tax Act 1994 Sch 1 para 9(b). As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

6    Ibid Sch 1 para 9. The advantage of registration is that it enables the trader to recover the VAT on supplies made to him for the purposes of his business as input tax: see PARA 215 et seq post.

In Case 268/83 *DA Rompelman and EA Rompelman-van Deelen v Minister van Financiën* [1985] ECR 655, [1985] 3 CMLR 202, ECJ, it was held that a taxable activity began as soon as the first investment expenditure was incurred for the purposes of and with a view to carrying on an undertaking, so that an intending trader was immediately entitled to recover tax on supplies made to him for the purposes of that activity under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), art 17; but that the Revenue authorities were permitted to require a declared intention of trading to be supported by objective evidence. See also Case C-110/94 *Intercommunale voor Zeewaterontziltling (INZO) (in liquidation) v Belgium* [1996] ECR I-857, [1996] STC 569, ECJ. In *Merseyside*

*Cablevision Ltd v Customs and Excise Comrs* [1987] VATTR 134 it was held that the United Kingdom system as it then existed did not conform with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1), because it left the discretion as to whether an intending trader might register for VAT with the Commissioners and not with the trader. As a result, the provision which is now the Value Added Tax Act 1994 Sch 1 para 9 was introduced; and the Commissioners are now obliged to register an intending trader provided that he produces the necessary objective evidence of his declared intention to trade. If the Commissioners are not satisfied by the evidence produced by the applicant, he may appeal to the VAT tribunal, which has supervisory jurisdiction: *Golden Pyramid Ltd v Customs and Excise Comrs* [1993] 2 CMLR 321. As to the Sixth Directive see PARA 1 note 1 ante.

7 For these purposes, a person carrying on a business through a branch or agency in the United Kingdom is treated as having a business establishment in the United Kingdom: Value Added Tax Act 1994 Sch 1 para 10(4) (a). As to the meaning of 'business establishment' and related phrases see also PARA 53 note 5 ante.

8 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

9 For these purposes, 'usual place of residence', in relation to a body corporate, means the place where it is legally constituted: Value Added Tax Act 1994 Sch 1 para 10(4)(b).

10 Ibid Sch 1 para 10(3)(a).

11 Ibid Sch 1 para 10(3)(b).

12 Ibid Sch 1 para 10(1).

13 Ibid Sch 1 para 10(1)(a), (2)(a) (Sch 1 para 10(2) substituted by the Finance Act 1997 s 32).

14 Ie in an order under the Value Added Tax Act 1994 s 26(2)(c) (see PARA 217 post).

15 Ibid Sch 1 para 10(1)(a), (2)(b) (as substituted: see note 13 supra).

16 Ibid Sch 1 para 10(1)(b).

17 Ibid Sch 1 para 10(1).

18 Ibid Sch 1 para 12(b). The notification must be made in writing to the Commissioners and must state the date on which he made, or formed the intention of making, taxable supplies: Value Added Tax Regulations 1995, SI 1995/2518, reg 5(3)(c) (reg 5 substituted by SI 2000/794).

## UPDATE

### 67 Voluntary registration

NOTE 6--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## 68. Registration of two or more persons as a single taxable person.

Provision is made for the purpose of preventing the maintenance or creation of any artificial separation of business activities<sup>1</sup> carried on by two or more persons from resulting in an avoidance of value added tax<sup>2</sup>. If the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> so direct<sup>4</sup>, the persons named in the direction are treated as a single taxable person<sup>5</sup> carrying on the activities of a business described in the direction and that taxable person is liable to be registered<sup>6</sup> for VAT with effect from the date of the direction or from such later date as the direction may specify<sup>7</sup>. The Commissioners may not make such a direction naming any person unless they are satisfied that:

- 172 (1) he is making (or has made) taxable supplies<sup>8</sup>;
- 173 (2) the activities in the course of which he makes or made those taxable supplies form only part of certain activities, the other activities being carried on either concurrently or previously (or both) by one or more other persons<sup>9</sup>; and
- 174 (3) if all the taxable supplies of the business described in the direction were taken into account, a person carrying it on would at the time of the direction be liable to be registered<sup>10</sup>.

Such a direction must be served on each of the persons named in it<sup>11</sup>.

Where, after a direction has been so given specifying a description of business, it appears to the Commissioners that a person who was not named in it is making taxable supplies in the course of activities which should be regarded as part of the activities of that business, the Commissioners may make and serve on him a supplementary direction referring to the earlier direction and the description of business specified in it and adding that person's name to those of the persons named in the earlier direction<sup>12</sup>, with effect from either the date on which he began to make those taxable supplies<sup>13</sup> or, if it was later, the date with effect from which the single taxable person referred to in the earlier direction became liable to be registered<sup>14</sup>.

If, immediately before a direction or supplementary direction is made, any person named in it is registered in respect of the taxable supplies made by him which are the subject of the direction<sup>15</sup>, he ceases to be liable to be registered with effect from the date on which the single taxable person concerned became liable to be registered<sup>16</sup> or the date of the direction<sup>17</sup>, whichever is the later<sup>18</sup>.

Where a direction is made, then:

- 175 (a) the taxable person carrying on the business specified in the direction is registrable in such name as the persons named in the direction may jointly nominate by notice in writing given to the Commissioners not later than 14 days after the date of the direction or, in default of such a nomination, in such name as may be specified in the direction<sup>19</sup>;
- 176 (b) any supply of goods or services by or to one of the constituent members<sup>20</sup> in the course of the activities of the taxable person is treated as a supply by or to that person<sup>21</sup>;
- 177 (c) any acquisition of goods from another member state<sup>22</sup> by one of the constituent members in the course of the activities of the taxable person is treated as an acquisition by that person<sup>23</sup>;

- 178 (d) each of the constituent members is jointly and severally liable for any VAT due from the taxable person<sup>24</sup>;
- 179 (e) any failure by the taxable person to comply with any statutory requirement<sup>25</sup> is treated as a failure by each of the constituent members severally<sup>26</sup>; and
- 180 (f) the constituent members are treated as a partnership carrying on the business of the taxable person and any question as to the scope of the activities of that business at any time is to be determined accordingly<sup>27</sup>.

If it appears to the Commissioners that any person who is one of the constituent members should no longer be regarded as such for the purposes of heads (d) and (e) above and they give notice to that effect, he is not to have any liability<sup>28</sup> for anything done after the date specified in that notice and, accordingly, on that date he is treated as having ceased to be a member of the partnership referred to in head (f) above<sup>29</sup>.

1 In determining for these purposes whether any separation of business activities is artificial, regard must be had to the extent to which the different persons carrying on those activities are closely bound to one another by financial, economic and organisational links: Value Added Tax Act 1994 s 3(2), Sch 1 para 1A(2) (s 3(2) amended by the Finance Act 2000 s 136(1); the Value Added Tax Act 1994 Sch 1 para 1A added by the Finance Act 1997 s 31(1), (4)).

2 Value Added Tax Act 1994 Sch 1 para 1A(1) (as added: see note 1 supra).

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 le under the Value Added Tax Act 1994 Sch 1 para 2 (as amended): see the text and notes 5-29 infra.

5 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

6 le under the Value Added Tax Act 1994 Sch 1 (as amended): see PARAS 64-67 ante, 80-83 post.

7 Ibid Sch 1 para 2(1).

8 Ibid Sch 1 para 2(2)(a). For the meaning of 'taxable supplies' see PARA 18 note 3 ante. See also PARA 64 note 4 ante.

9 Ibid Sch 1 para 2(2)(b) (Sch 1 para 2(2)(b), (c) amended by the Finance Act 1997 ss 31(2), 113, Sch 18 Pt IV(1)).

10 Value Added Tax Act 1994 Sch 1 para 2(2)(c) (as amended: see note 9 supra). The reference in the text to being liable to be registered is a reference to being liable to be registered by virtue of Sch 1 para 1 (as amended): see PARA 64 ante.

11 Ibid Sch 1 para 2(3).

12 Ibid Sch 1 para 2(4) (amended by the Finance Act 1997 s 31(2)).

13 Value Added Tax Act 1994 Sch 1 para 2(4)(a).

14 Ibid Sch 1 para 2(4)(b).

15 le the taxable supplies made by him as mentioned in ibid Sch 1 para 2(2) or (4) (as amended): see the text to notes 8-14 supra.

16 Ibid Sch 1 para 2(5)(a).

17 Ibid Sch 1 para 2(5)(b).

18 Ibid Sch 1 para 2(5). He may, of course, wish, or indeed be obliged, to remain registered in respect of other business activities; but he will in any event cease to include the supplies attributable to the single taxable person in his own VAT return.

19 Ibid Sch 1 para 2(7)(a).

20 In relation to a business specified in a direction under *ibid* Sch 1 para 2 (as amended), the persons named in the direction, together with any person named in a supplementary direction relating to that business, being the persons who together are to be treated as the taxable person, are referred to as 'the constituent members': Sch 1 para 2(6).

21 *Ibid* Sch 1 para 2(7)(b).

22 For the meaning of 'another member state' see PARA 4 note 15 ante; and as to acquisitions from another member state see PARA 19 ante.

23 Value Added Tax Act 1994 Sch 1 para 2(7)(c).

24 *Ibid* Sch 1 para 2(7)(d).

25 I.e. any requirement imposed by or under the Value Added Tax Act 1994: Sch 1 para 2(7)(e).

26 *Ibid* Sch 1 para 2(7)(e).

27 *Ibid* Sch 1 para 2(7)(f). This provision is without prejudice to Sch 1 para 2(7)(a)-(e) (see heads (a)-(e) in the text): Sch 1 para 2(7)(f). As to the registration and VAT obligations of partnerships see PARA 77 post.

28 I.e. by virtue of *ibid* Sch 1 para 2(7)(d), (e): see heads (d)-(e) in the text.

29 *Ibid* Sch 1 para 2(8).

## **UPDATE**

### **68 Registration of two or more persons as a single taxable person**

NOTE 1--See Case C-162/07 *Ampilscientifica Srl v Ministero dell'Economia e delle Finanze* [2008] 3 CMLR 162, ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(2) TAXABLE PERSONS/(ii) Liability to be Registered/B. SUPPLIES FROM OTHER MEMBER STATES/69. Registration in the single market; distance sales.

## ***B. SUPPLIES FROM OTHER MEMBER STATES***

### **69. Registration in the single market; distance sales.**

A person who is not registered<sup>1</sup> for value added tax<sup>2</sup> and is not liable to be registered under the general rules relating to taxable supplies<sup>3</sup> becomes liable to be registered<sup>4</sup> on any day if, in the period beginning with 1 January of the year in which that day falls, that person has made supplies whose value exceeds £70,000<sup>5</sup> and which:

- 181 (1) involve the removal of the goods to the United Kingdom<sup>6</sup> by or under the directions of the person making the supply<sup>7</sup>;
- 182 (2) does not involve the installation or assembly of the goods at a place in the United Kingdom<sup>8</sup>;
- 183 (3) is a transaction in pursuance of which goods are acquired in the United Kingdom from another member state<sup>9</sup> by a person who is not a taxable person<sup>10</sup>;
- 184 (4) is made in the course or furtherance of a business<sup>11</sup> carried on by the supplier<sup>12</sup>;
- 185 (5) is neither an exempt supply nor a supply of goods which are subject to a duty of excise or consist in a new means of transport<sup>13</sup> and is not anything which is treated<sup>14</sup> as a supply<sup>15</sup>.

These supplies are known as 'relevant supplies' for these purposes<sup>16</sup>. Once a trader becomes so registrable, his relevant supplies will be treated as made in the United Kingdom and he will be obliged to account for VAT on those sales accordingly<sup>17</sup>.

A person who is not registered or liable to be registered for VAT<sup>18</sup> becomes liable to be registered where:

- 186 (a) that person has exercised any option<sup>19</sup>, in accordance with the law of any member state where he is taxable, for treating relevant supplies made by him as taking place outside that member state<sup>20</sup>;
- 187 (b) the supplies to which the option relates involve the removal of goods from that member state and, apart from the exercise of the option, would be treated as taking place in that member state in accordance with its law<sup>21</sup>; and
- 188 (c) that person makes a relevant supply at a time when the option is in force in relation to him<sup>22</sup>.

A person who is not registered or liable to be registered for VAT also becomes liable to be registered if he makes a supply of goods subject to a duty of excise<sup>23</sup> which involves the removal of the goods to the United Kingdom by or under his directions<sup>24</sup> and fulfils certain other statutory requirements<sup>25</sup>.

A person who becomes liable to be registered under these provisions must notify the Commissioners of his liability within the period of 30 days after the date on which the liability arises<sup>26</sup>, and the Commissioners must register any such person, whether or not he so notifies them, with effect from the day on which the liability arose or from such earlier date as may be agreed between them and him<sup>27</sup>.

A person is treated as having become liable to be registered under these provisions at any time when he would have become so liable thereunder but for any registration which is subsequently cancelled<sup>28</sup>.

1    Ie under the Value Added Tax Act 1994: see PARAS 64 et seq ante, 70 et seq post.

2    Ibid s 3(2), Sch 2 para 1(1)(a) (s 3(2) amended by the Finance Act 2000 s 136(1)).

3    Value Added Tax Act 1994 Sch 2 para 1(1)(b). The reference in the text to being not liable to be registered under the general rules relating to taxable supplies is a reference to being not liable to be registered under Sch 1 (as amended): see PARAS 64, 66-68 ante.

4    Ie under ibid Sch 2 (as amended): see the text and notes 5-28 infra; and PARA 70 et seq post.

5    Ibid Sch 2 para 1(1). The Treasury may by order substitute for any of the sums for the time being specified in Sch 2 (as amended) such greater sums as it thinks fit: Sch 2 para 8. At the date at which this volume states the law, no such order had been made. Cf Sch 1 para 15; and PARA 64 note 6 ante. In determining the value of any relevant supplies for these purposes, so much of the consideration for any supply as represents any liability of the supplier, under the law of another member state, for VAT on that supply, and supplies to which s 18B(4) (as added) (last acquisition or supply of goods before removal from fiscal warehousing: see PARA 149 post) applies, are to be disregarded: Sch 2 para 1(6), (7) (Sch 2 para 1(7) added by the Finance Act 1996 s 26(1), Sch 3 para 14). For the meaning of 'another member state' see PARA 4 note 15 ante; For the meaning of 'supply' see PARA 27 ante; and As to references to the law of another member state see PARA 17 note 2 ante.

6    As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

7    Value Added Tax Act 1994 Sch 2 para 10(a).

8    Ibid Sch 2 para 10(b).

9    As to acquisition from another member state see PARA 19 ante.

10   Value Added Tax Act 1994 Sch 2 para 10(c). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

11   As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

12   Value Added Tax Act 1994 Sch 2 para 10(d).

13   For the meaning of 'new means of transport' see PARA 19 note 7 ante.

14   Ie by reason only of ibid s 5(2), Sch 4 para 5(1) (see PARA 30 ante) or Sch 4 para 6 (see PARAS 20-21 ante): Sch 2 para 10(e).

15   Ibid Sch 2 para 10(e).

16   Ibid Sch 2 para 10.

17   Ordinarily, goods which are supplied from abroad and which must be removed to the United Kingdom would be treated as supplied outside the United Kingdom and thus would not be taxable: see PARAS 18-19, 50 ante. Where, however, goods are sold in circumstances falling within ibid s 7(4) (see PARA 48 ante), they are treated as supplied in the United Kingdom and the supplier must accordingly account for VAT on the sale. One condition of s 7(4) is that the supplier is liable to be registered under Sch 2 (as amended) or would be so liable were he not already registered or liable to be registered under Sch 1 (as amended). Thus, once a distance seller has exceeded the Sch 2 limit in the course of a calendar year, he becomes liable to registration under Sch 2 (as amended) and his subsequent distance sales (though not his prior sales) are treated as made in the United Kingdom (see PARA 64 ante).

18   Ie as mentioned in ibid Sch 2 para 1(1)(a), (b): see the text to notes 1-3 supra.

19   Where a person has exercised an option in the United Kingdom corresponding to such an option, in respect of supplies involving the removal of goods to another member state, he must notify the Commissioners for Her Majesty's Revenue and Customs in writing of the exercise of that option not less than 30 days before the date on which the first supply to which the option relates is made (Value Added Tax Regulations 1995, SI 1995/2518, reg 98(1)); and the notification must contain the name of the member state to which the goods have been, or are to be, removed under the direction or control of the person making the supply (reg 98(2)).

Within 30 days of the first such supply he must furnish to the Commissioners documentary evidence that he has notified the member state of the exercise of his option: reg 98(3). Where a person notified the Commissioners in accordance with reg 98(1), he may withdraw his notification by giving a further written notification, but it must specify the date on which the first notification is to be withdrawn and that date must not be earlier than: (1) the 1 January which is, or next follows, the second anniversary of the date of the making of the first supply to which the option relates (reg 98(4)(a)); and (2) the day 30 days after the receipt by the Commissioners of the further notification (reg 98(4)(b)), and not later than 30 days before the date of the first supply which he intends to make after the withdrawal (reg 98(4)). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 28b(B)(3) (art 28b added by EC Council Directive 91/680 (OJ L376, 31.12.91, p 1)) provides that each member state is to grant an option to a trader who would be treated as making supplies of goods in the country from which the goods are dispatched (because the value of his supplies into the member state of receipt do not exceed the threshold, eg in the United Kingdom of £70,000), entitling him to elect that his supplies should be treated as made in the member state to which the goods are dispatched. It is difficult to find a provision in the United Kingdom legislation which effectively implements art 28b(B)(3) (as so added). It is apprehended that the proviso to the Value Added Tax Act 1994 s 7(5) (see PARA 48 ante) is intended to do so; but it appears to proceed on the basis that the option itself will have been conferred by another provision of the Act, of which there appears to be none. In practice, the Commissioners permit a trader to exercise an option of the kind mentioned in EC Council Directive 77/388 (OJ L376, 31.12.91, p 1) art 28b(B)(3) (as so added): see Customs and Excise Notice 725 VAT: *The Single Market* (October 2002) PARA 15.7; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 98 (see supra). As to the Sixth Directive see PARA 1 note 1 ante.

20 Value Added Tax Act 1994 Sch 2 para 1(2)(a).

21 Ibid Sch 2 para 1(2)(b).

22 Ibid Sch 2 para 1(2)(c).

23 Ibid Sch 2 para 1(3)(a). In this case there is no minimum registration limit.

24 Ibid Sch 2 para 1(3)(b).

25 Ibid Sch 2 para 1(3). Those conditions are that: (1) it is a transaction in pursuance of which the goods are acquired in the United Kingdom from another member state by a person who is not a taxable person (Sch 2 para 1(3)(c)); (2) it is made in the course or furtherance of a business carried on by the supplier (Sch 2 para 1(3)(d)); and (3) it is not anything which is treated as a supply for the purposes of the Value Added Tax Act 1994 by virtue only of Sch 4 para 5(1) or Sch 4 para 6 (Sch 2 para 1(3)(e)).

26 Ibid Sch 2 para 3(1). Any notification required under Sch 2 (as amended) must be made in such form and contain such particulars as the Commissioners may prescribe by regulations: Sch 2 para 9. Where any person is required under Sch 2 para 3(1) to notify the Commissioners of his liability to be registered, the notification must contain the particulars, including the declaration, set out in the Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1), Sch 1 Form 6 and must be made in that form; but where the notification is made by a partnership, it must also contain the particulars set out in Sch 1 Form 2 (substituted by SI 2001/3828): Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1) (reg 5 substituted by SI 2000/794; and amended by SI 2004/1675). As to notification under these provisions see further PARA 64 note 5 ante.

27 Value Added Tax Act 1994 Sch 2 para 3(2).

28 Ibid Sch 2 para 1(4) (amended by the Finance Act 2000 s 136(6)). The reference in the text to a person's registration becoming subsequently cancelled is a reference to its being cancelled under the Value Added Tax Act 1994 Sch 1 para 13(3) (see PARA 82 post), Sch 2 para 6(2) (see PARA 85 post), Sch 3 para 6(3) (see PARA 87 post) or Sch 3A para 6(2) (as added) (see PARA 82 post): Sch 2 para 1(4) (amended by the Finance Act 2000 s 136(6)).

## UPDATE

### 69 Registration in the single market; distance sales

NOTE 19--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).





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## **70. Voluntary registration.**

Where a person who is not liable to be registered for value added tax<sup>1</sup>, and is not already registered, satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> that he intends:

- 189 (1) to exercise an option in another member state to treat his distance sales to the United Kingdom as supplied in the United Kingdom<sup>3</sup> and to make relevant supplies<sup>4</sup> to which that option will relate<sup>5</sup>;
- 190 (2) from a specified date to make relevant supplies to which any such option that he has exercised will relate<sup>6</sup>; or
- 191 (3) from a specified date to make supplies in relation to which the statutory conditions relating to goods subject to a duty of excise<sup>7</sup> will be satisfied<sup>8</sup>,

and requests to be registered<sup>9</sup>, the Commissioners may register him with effect from such date as may be agreed between them and him<sup>10</sup>. The registration may be subject to such conditions as the Commissioners think fit to impose<sup>11</sup>.

1    Ie under the Value Added Tax Act 1994: see PARAS 64 et seq ante, 71 et seq post.

2    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3    Ie such an option as is mentioned in the Value Added Tax Act 1994 s 3(2), Sch 2 para 1(2) (as amended): see PARA 69 ante. For the meaning of 'another member state' see PARA 4 note 15 ante; and As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4    For the meaning of 'relevant supplies' see PARA 69 ante.

5    Value Added Tax Act 1994 s 3(2), Sch 2 para 4(1)(a)(i) (s 3(2) amended by the Finance Act 2000 s 136(1)).

6    Value Added Tax Act 1994 Sch 2 para 4(1)(a)(ii).

7    Ie the conditions mentioned in ibid Sch 2 para 1(3): see PARA 69 ante.

8    Ibid Sch 2 para 4(1)(a)(iii).

9    Ibid Sch 2 para 4(1)(b). The request must be for registration under Sch 2 (as amended): Sch 2 para 4(1)(b).

10   Ibid Sch 2 para 4(1). Where, however, a person who is entitled to be registered under Sch 1 para 9 or 10 (see PARA 67 ante) requests registration under this provision, he must be registered under Sch 1 (as amended) and not under Sch 2 (as amended): Sch 2 para 4(3).

11   Ibid Sch 2 para 4(1). Conditions may be so imposed wholly or partly by reference to, or without reference to, any conditions prescribed for these purposes (Sch 2 para 4(2)(a)), and may, whenever imposed, be subsequently varied by the Commissioners (Sch 2 para 4(2)(b)). At the date at which this volume states the law no such conditions had been prescribed.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(2) TAXABLE PERSONS/(ii) Liability to be Registered/B. SUPPLIES FROM OTHER MEMBER STATES/71. Value added tax representatives.

## **71. Value added tax representatives.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may direct any person<sup>2</sup> who:

- 192 (1) is a taxable person<sup>3</sup> for the purposes of value added tax or who, without being a taxable person, makes taxable supplies<sup>4</sup> or acquires goods in the United Kingdom<sup>5</sup> from one or more other member states<sup>6</sup>;
- 193 (2) is not established, and does not have any fixed establishment, in the United Kingdom<sup>7</sup>;
- 194 (3) is established in a country or territory which appears to the Commissioners to be outside the member states and not to be subject to any mutual assistance provisions<sup>8</sup>; and
- 195 (4) in the case of an individual, does not have his usual place of residence in the United Kingdom<sup>9</sup>,

to appoint another person to act on his behalf in relation to VAT<sup>10</sup>. Any such person, other than one who is established in a country or territory which appears to the Commissioners to be outside the member states and not to be subject to any mutual assistance provisions may also, with the agreement of the Commissioners, appoint a VAT representative without having been required<sup>11</sup> to do so<sup>12</sup>. A person appointed pursuant to any of these provisions is known as a 'VAT representative'<sup>13</sup>.

Where any person is appointed by virtue of these provisions to be a VAT representative of another ('his principal'), then that representative is entitled to act on his principal's behalf for any statutory purpose relating to VAT<sup>14</sup> and must secure his principal's compliance with and discharge of the obligations and liabilities to which his principal is subject<sup>15</sup> in relation to VAT<sup>16</sup>. He is not, however, thereby himself liable to be registered for VAT<sup>17</sup>, although the Commissioners may make regulations requiring the registration of the names of VAT representatives against the names of their principals in any register kept for the purposes of the Value Added Tax Act 1994<sup>18</sup> and making it the duty of a VAT representative, for the purposes of registration, to notify the Commissioners within a prescribed period that his appointment has taken effect or has ceased to have effect<sup>19</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 I.e. any person other than a participant in the special accounting scheme for certain suppliers of electronically supplied services established under the Value Added Tax Act 1994 s 3A, Sch 3B (as added) (see PARA 269 et seq post): Sch 3B para 19 (added by the Finance Act 2003 s 23, Sch 2 paras 1, 4).

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

5 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

6 Value Added Tax Act 1994 s 48(1)(a).

7 Ibid s 48(1)(b) (s 48(1)(b), (2) substituted, s 48(1)(ba), (1A), (1B), (2A) added, by the Finance Act 2001 s 100). As to business establishments and fixed establishments see PARA 53 note 5 ante.

8 Value Added Tax Act 1994 s 48(1)(ba), (1A) (as added: see note 7 supra). For these purposes it is required that a person is established in a country or territory which is neither a member state nor a part of a member state and in respect of which there is no provision for mutual assistance between the United Kingdom and the country or territory similar in scope to the assistance provided for between the United Kingdom and each other member state by the Finance Act 2002 s 134, Sch 39 (as amended), the Finance Act 2003 s 197 (as amended) (see PARA 342 post), and EC Council Regulation 1798/2003 (OJ L264, 15.10.2003, p 1) on administrative cooperation in the field of value added tax (as amended) ('the mutual assistance provisions'): Value Added Tax Act 1994 s 48(1A), (1B) (as so added; s 48(1B) amended by the Finance Act 2003 s 197(7)(a); and the Mutual Assistance Provisions Order 2003, SI 2003/3092, art 2). The Treasury may by order amend the definition of 'the mutual assistance provisions' in the Value Added Tax Act 1994 s 48(1B) (as so added and amended): s 48(9) (added by the Finance Act 2003 s 197(7)(b)).

9 Value Added Tax Act 1994 s 48(1)(c).

10 Ibid s 48(1). Where a person fails to appoint a VAT representative in accordance with any direction under s 48(1) (as amended), the Commissioners may require him to provide such security, or further security, as they may think appropriate for the payment of any VAT which is or may become due from him: s 48(7). Any such sum is deemed for the purposes of the Finance Act 1997 s 51 (as amended) (enforcement by distress: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1139) and any regulations made thereunder (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1140 et seq), and s 52 (as amended) (enforcement by diligence) to be recoverable as if it were VAT due from the person who is required to provide it: Value Added Tax Act 1994 s 48(7A) (added by the Finance Act 1997 s 53(6), (9)).

An appeal to a VAT and duties tribunal lies against a requirement to provide a security under the Value Added Tax Act 1994 s 48(7): s 83(l). As to VAT and duties tribunals see PARA 343 et seq post. A person is not, however, to be treated as having been directed to appoint a VAT representative, or as having been required to provide such security, unless the Commissioners have either served notice of the direction or requirement on him (s 48(8)(a)), or taken all such other steps as appear to them to be reasonable for bringing the direction or requirement to his attention (s 48(8)(b)).

The Commissioners may by regulations make provision as to the manner and circumstances in which a person is to be appointed, or is to be treated as having ceased to be, another's VAT representative: s 48(6). In exercise of the power so conferred, the Commissioners have made the Value Added Tax Regulations 1995, SI 1995/2518, reg 10. The VAT representative must notify the Commissioners of his appointment in accordance with reg 10(1), Sch 1 Form 8, within 30 days of the date on which his appointment became effective and the notification must contain the particulars, including the declaration, set out in that form, and must be accompanied by evidence of his appointment: reg 10(1), (2).

11 Ie under the Value Added Tax Act 1994 s 48(1) (as amended): see the text and notes 1-10 supra.

12 Ibid s 48(2) (as substituted: see note 7 supra).

13 Ibid s 48(2A) (as added: see note 7 supra).

14 Ibid s 48(3)(a). 'Any statutory purpose relating to VAT' means for any of the purposes of the Value Added Tax Act 1994, of any other enactment, whenever passed, relating to VAT, or of any subordinate legislation made under the Value Added Tax Act 1994 or any such enactment: s 48(3)(a). As to subordinate legislation see PARA 14 ante.

15 Ie by virtue of the Value Added Tax Act 1994 or any other enactment, or any subordinate legislation such as is mentioned in note 14 supra: s 48(3)(b).

16 Ibid s 48(3)(b). The VAT representative is personally liable in respect of any failure to secure his principal's compliance with or discharge of any such obligation or liability (s 48(3)(c)(i)), and anything done for purposes connected with acting on his principal's behalf (s 48(3)(c)(ii)), as if the obligations and liabilities imposed on his principal were imposed jointly and severally on the VAT representative and his principal. The VAT representative is not, however, thereby guilty of any offence except in so far as: (1) he has consented to, or connived in, the commission of the offence by his principal (s 48(5)(a)); (2) the commission of the offence by his principal is attributable to any neglect on the part of the VAT representative (s 48(5)(b)); or (3) the offence consists in a contravention by the VAT representative of an obligation which, by virtue of s 48(3), is imposed both on the VAT representative and on his principal (s 48(5)(c)). As to offences see further PARA 316 et seq post.

17 Ibid s 48(4).

18 Ibid s 48(4)(a). Regulations under s 48(6) may include such provision as the Commissioners think fit for these purposes with respect to the making or deletion of entries in the register: s 48(6). Where a person is appointed by virtue of s 48 (as amended) to be a VAT representative, the Commissioners must register the name of that representative against the name of his principal in the register kept for the purposes of the Value Added Tax Act 1994: Value Added Tax Regulations 1995, SI 1995/2518, reg 10(3). Every VAT representative

who is so registered must, within 30 days of any changes being made in the name, constitution or ownership of his business or of his ceasing to be a person's VAT representative, or of any other event occurring which may necessitate the variation of the register, notify the Commissioners in writing of such change, cessation or event and furnish them with full particulars thereof: reg 10(4).

The date upon which the appointment of a VAT representative ('the first VAT representative') is regarded as having ceased for these purposes is treated as being whichever is the earliest of: (1) when the Commissioners receive any notification in accordance with reg 5(2) (see PARA 64 ante) (reg 10(5)(a)); (2) when the Commissioners receive a notification of appointment in accordance with reg 10(1) of a person other than the first VAT representative (reg 10(5)(b)); (3) when the Commissioners receive a notification of cessation in accordance with reg 5(2) (reg 10(5)(c)); (4) when the Commissioners receive a notification of cessation in accordance with reg 10(4) (reg 10(5)(d)); or (5) when a VAT representative dies, becomes insolvent or becomes incapacitated (reg 10(5)(e)). However, if the Commissioners have not received a notification such as is mentioned in all or any of heads (1), (3) or (4) supra and another person has been appointed as a VAT representative by virtue of the Value Added Tax Act 1994 s 48 (as amended), they may treat the date of cessation as the date of appointment of that other person: Value Added Tax Regulations 1995, SI 1995/2518, reg 10(5). In relation to a company which is a VAT representative, the references in head (5) supra to the VAT representative becoming insolvent or incapacitated are to be construed as references to its going into liquidation or receivership or entering administration: reg 10(6) (amended by SI 2003/2096).

19 Value Added Tax Act 1994 s 48(4)(b). See note 18 supra.

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### ***C. ACQUISITIONS FROM OTHER MEMBER STATES***

#### **72. Registration in the single market; taxable acquisitions of goods.**

A person who is not registered for value added tax and is not otherwise liable to be registered<sup>1</sup> becomes liable to be registered<sup>2</sup> either:

- 196 (1) at the end of any month, if, in the period beginning with 1 January of the year in which that month falls, that person had made relevant acquisitions<sup>3</sup> whose value exceeds £60,000<sup>4</sup>; or
- 197 (2) at any time, if there are reasonable grounds for believing that the value of his relevant acquisitions in the period of 30 days then beginning will exceed that sum<sup>5</sup>.

A person who becomes liable to be registered under these provisions must notify the Commissioners for Her Majesty's Revenue and Customs<sup>6</sup> of the liability either within 30 days of the end of the month when he becomes liable (where he becomes liable to be registered because he makes relevant acquisitions to the appropriate value)<sup>7</sup> or before the end of the period by reference to which the liability arises (where he becomes liable to be registered because there are reasonable grounds for believing that he will make relevant acquisitions to the appropriate value)<sup>8</sup>, and the Commissioners must register such person (whether or not he so notifies them) with effect from either the end of the month following the month at the end of which the liability arose (in the former case)<sup>9</sup>, the beginning of the period by reference to which the liability arose (in the latter case)<sup>10</sup>, or from such earlier time as may be agreed between them and him<sup>11</sup>.

A person is treated as having become liable to be registered under these provisions at any time when he would have become so liable but for any registration which is subsequently cancelled<sup>12</sup>.

Where, however, a person who makes or intends to make relevant acquisitions satisfies the Commissioners that any such acquisition would be in pursuance of a transaction which would be zero-rated<sup>13</sup> if it were a taxable supply by a taxable person<sup>14</sup>, the Commissioners may exempt him from registration at his request, and if he thinks fit, until it appears to them that the request should no longer be acted upon or is withdrawn<sup>15</sup>.

<sup>1</sup> ie under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended) or Sch 2 (as amended): see PARA 64 et seq ante.

<sup>2</sup> ie under ibid Sch 3 (as amended): see the text and notes 3-15 infra; and PARA 73 post.

<sup>3</sup> An acquisition of goods from another member state is a 'relevant acquisition' where: (1) it is a taxable acquisition of goods other than goods which are subject to a duty of excise or consist in a new means of transport (ibid Sch 3 para 11(a)); and (2) it is an acquisition otherwise than in pursuance of a taxable supply and is treated for VAT purposes as taking place in the United Kingdom (Sch 3 para 11(b)). For the meaning of 'taxable acquisition' see PARA 19 ante. For the meaning of 'new means of transport' see PARA 19 note 7 ante. For the meaning of 'taxable supply' see PARA 18 note 3 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4 Ibid Sch 3 para 1(1) (Sch 3 para 1(1), (2) amended by the Value Added Tax (Increase of Registration Limits) Order 2005, SI 2005/727, art 3(a) (made pursuant to the power conferred on the Treasury by the Value Added Tax Act 1994 Sch 3 para 9 by order to substitute for any of the sums for the time being specified in Sch 3 (as amended) such greater sums as it thinks fit)). In determining the value of any person's relevant acquisitions for these purposes, so much of the consideration for any acquisition as represents any liability of the supplier, under the law of another member state, for VAT on the transaction in pursuance of which the acquisition is made, and supplies to which s 18B(4) (as added) (last acquisition or supply of goods before removal from fiscal warehousing: see PARA 149 post) applies, are to be disregarded: Sch 3 para 1(5), (6) (Sch 3 para 1(6) added by the Finance Act 1996 s 26(1), Sch 3 para 15). For the meaning of 'another member state' see PARA 4 note 15 ante; for the meaning of 'supply' see PARA 27 ante; and as to references to the law of another member state see PARA 17 note 2 ante.

5 Value Added Tax Act 1994 Sch 3 para 1(2) (as amended: see note 4 supra). As to determining the value of the acquisitions see note 4 supra.

6 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. Any notification required under ibid Sch 3 (as amended) must be made in such form and contain such particulars as the Commissioners may prescribe by regulations: Sch 3 para 10. Where any person is required under Sch 3 para 3(1) (see the text and notes 7-8 infra) to notify the Commissioners of his liability to be registered, the notification must contain the particulars, including the declaration, set out in the Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1), Sch 1 Form 7 and must be made in that form; but where the notification is made by a partnership, it must also contain the particulars set out in Sch 1 Form 2 (substituted by SI 2001/3828): Value Added Tax Regulations 1995, SI 1995/2518, reg 5(1) (substituted by SI 2000/794; and amended by SI 2004/1675). As to notification under these provisions see further PARA 64 note 5 ante.

7 Value Added Tax Act 1994 Sch 3 para 3(1)(a). The reference in the text to a person becoming liable to be registered because he makes relevant acquisitions to the appropriate value is a reference to a person becoming so liable by virtue of Sch 3 para 1(1) (as amended) (see the text and notes 1-4 supra).

8 Ibid Sch 3 para 3(1)(b). The reference in the text to a person becoming liable to be registered because there are reasonable grounds for believing that he will make a relevant acquisitions to the appropriate value is a reference to a person becoming so liable by virtue of ibid Sch 3 para 1(2) (as amended) (see the text and note 5 supra).

9 Ibid Sch 3 para 3(3)(a).

10 Ibid Sch 3 para 3(3)(b).

11 Ibid Sch 3 para 3(2).

12 Ibid Sch 3 para 1(3) (amended by the Finance Act 2000 s 136(7)). The reference in the text to a person's registration becoming subsequently cancelled is a reference to its being cancelled under the Value Added Tax Act 1994 Sch 1 para 13(3) (see PARA 82 post), Sch 2 para 6(2) (see PARA 85 post), Sch 3 para 6(3) (see PARA 87 post) or Sch 3A para 6(2) (as added) (see PARA 82 post): Sch 3 para 1(3) (as so amended).

13 For the meaning of 'zero-rated' see PARA 174 post.

14 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

15 Value Added Tax Act 1994 Sch 3 para 8(1). Where a person who is so exempted from registration makes any relevant acquisition in pursuance of any transaction which would, if it were a taxable supply by a taxable person, be chargeable to VAT otherwise than as a zero-rated supply, he must notify the Commissioners of the change within 30 days of the date on which he made the acquisition: Sch 3 para 8(2). For a similar provision exempting a person from an obligation to register when making zero-rated supplies see Sch 1 para 14; para 66 ante; and *Fong v Customs and Excise Comrs* [1978] VATTR 75.

## UPDATE

### 72 Registration in the single market; taxable acquisitions of goods

TEXT AND NOTE 4--Now £68,000: Value Added Tax Act 1994 Sch 3 para 1 (amended by SI 2009/1031).

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### **73. Voluntary registration.**

Where a person who is not liable to be registered for value added tax and is not already registered<sup>1</sup> satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup>:

- 198 (1) that he makes relevant acquisitions<sup>3</sup>; or
- 199 (2) that he intends to make relevant acquisitions from a specified date<sup>4</sup>,

and requests to be registered<sup>5</sup>, they must register him<sup>6</sup>. In a case falling within head (1) above, the registration takes effect from the day on which the request is made or from such earlier date as may be agreed between them and him<sup>7</sup>, while in a case falling within head (2) above the registration may be subject to such conditions as the Commissioners think fit to impose<sup>8</sup> and takes effect from such date as may be agreed between them and him<sup>9</sup>. Registration under these provisions cannot be backdated for more than three years<sup>10</sup>.

1 For the meaning of 'registered' see PARAS 18 note 4, 64 note 2 ante.

2 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 Value Added Tax Act 1994 s 3(2), Sch 3 para 4(1) (s 3(2) amended by the Finance Act 2000 s 136(1)). For the meaning of 'relevant acquisitions' see PARA 72 note 3 ante.

4 Value Added Tax Act 1994 Sch 3 para 4(2)(a).

5 Ibid Sch 3 para 4(1), (2)(b). In a case falling within head (2) in the text, the request must be for registration under Sch 3 (as amended) (see PARA 72 ante): Sch 3 para 4(2)(b).

6 Ibid Sch 3 para 4(1), (2). Where, however, a person who is entitled to be registered under Sch 1 para 9 or 10 (see PARA 67 ante) requests registration, he must be registered under Sch 1 (as amended) (see PARA 64 et seq ante) and not under Sch 3 (as amended): Sch 3 para 4(4).

7 Ibid Sch 3 para 4(1).

8 Ibid Sch 3 para 4(3). The conditions may be imposed wholly or partly by, or without, reference to any conditions prescribed for these purposes (Sch 3 para 4(3)(a)) and may, whenever imposed, subsequently be varied by the Commissioners (Sch 3 para 4(3)(b)). For the meaning of 'prescribed' see PARA 17 note 4 ante.

9 Ibid Sch 3 para 4(2).

10 See Customs and Excise Public Notice 700/01 *Should I be Registered for VAT?* (May 2002) PARA 2.4.



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## ***D. REGISTRATION IN SPECIAL CASES***

### **74. Local authorities.**

A local authority<sup>1</sup> which makes taxable supplies<sup>2</sup> is liable to be registered<sup>3</sup> whatever the value of its supplies, and accordingly the registration provisions<sup>4</sup> apply in a case where the value of taxable supplies made by a local authority in any period of one year does not exceed the sum specified for the time being as the threshold for compulsory registration<sup>5</sup> as if that value exceeded that sum<sup>6</sup>.

1 For the meaning of 'local authority' see PARA 64 note 25 ante.

2 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

3 For the meaning of 'registered' see PARAS 18 note 4, 64 note 2 ante.

4 Ie the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended): see PARA 64 et seq ante.

5 Ie the sum for the time being specified in ibid Sch 1 para 1(1)(a) (as amended): see PARA 64 ante.

6 Ibid s 42.

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## **75. Groups of companies.**

Two or more bodies corporate are eligible to be treated as members of a group<sup>1</sup> for the purposes of value added tax if each is resident<sup>2</sup>, or has a fixed establishment<sup>3</sup>, in the United Kingdom and either:

- 200 (1) one of them controls<sup>4</sup> each of the others<sup>5</sup>;
- 201 (2) one person (whether a body corporate or an individual) controls all of them<sup>6</sup>;  
or
- 202 (3) two or more individuals carrying on a business in partnership control all of them<sup>7</sup>.

In order to prevent certain suppliers from being in the same VAT group as their customers where third parties either control the suppliers or receive most of the benefits of their activities, it is also provided that certain specified bodies corporate are eligible to be treated as members of VAT groups if, in addition to satisfying the conditions set out above, they satisfy two further conditions known as 'the benefits condition' and 'the consolidated accounts condition'<sup>8</sup>. The bodies corporate specified for these purposes are those which carry on a relevant business activity<sup>9</sup> and in respect of which either the value of the group's supplies in the year then ending has exceeded £10 million<sup>10</sup> or there are reasonable grounds for believing that the value of the group's supplies in the year then beginning will exceed that amount<sup>11</sup>, and those which, at any time when the relevant business activity is being carried on, are not wholly-owned subsidiaries of a person<sup>12</sup> who controls all of the other members of the group<sup>13</sup>, are managed, directly or indirectly, in respect of the business activity concerned, by a third party<sup>14</sup> in the course or furtherance of a business carried on by him<sup>15</sup>, or are the sole general partners of limited partnerships<sup>16</sup>. These provisions are not, however, applicable to bodies corporate that control all of the members of the group<sup>17</sup>, whose activities another body corporate is empowered by statute to control<sup>18</sup>, or whose only activity is acting as the trustee of a pension scheme<sup>19</sup>, or to charities<sup>20</sup>. In relation to the bodies specified for this purpose, the benefits condition is satisfied unless more than 50 per cent of the benefits of the relevant business activity<sup>21</sup> accrue, directly or indirectly, to one or more third parties<sup>22</sup>, and the consolidated accounts condition is satisfied if consolidated accounts<sup>23</sup> prepared for a person<sup>24</sup> who controls all of the other members of the group<sup>25</sup> would be required by generally accepted accounting practice to include accounts for the specified body as his subsidiary<sup>26</sup> and consolidated accounts prepared for a third party would not be required by generally accepted accounting practice to include accounts for the specified body as his subsidiary<sup>27</sup>.

An application to the Commissioners for Her Majesty's Revenue and Customs for two or more bodies corporate to be treated as members of a group<sup>28</sup> must be made by one of them or by the person controlling them<sup>29</sup> and appoint one of them as the representative member<sup>30</sup>, and will be taken to be granted with effect from either the day on which the application is received by the Commissioners<sup>31</sup> or such earlier or later time as the Commissioners may allow<sup>32</sup>. The Commissioners may, however, refuse an application<sup>33</sup> if it appears to them to be necessary either on the grounds of the ineligibility<sup>34</sup> of any body or bodies for membership of a group<sup>35</sup> or for the protection of the revenue<sup>36</sup>. This procedure also applies where two or more bodies corporate are treated as members of a group and an application is made to the Commissioners either for another eligible<sup>37</sup> body corporate to be treated as a member of the group<sup>38</sup>, for a body corporate to cease to be treated as a member of a group<sup>39</sup>, for a member to be substituted as

the group's representative member<sup>40</sup>, or for the bodies corporate no longer to be treated as members of a group<sup>41</sup>, except that in any of these circumstances the application is not required to appoint a representative member<sup>42</sup>. A body corporate may not be treated as a member of more than one group at a time<sup>43</sup>, and a body which is a member of one group is not eligible<sup>44</sup> to be treated as a member of another group<sup>45</sup>: accordingly, if a body is a subject of two or more applications to be treated as a member of a group<sup>46</sup> that have not been granted or refused, the applications have no effect<sup>47</sup>.

The Commissioners may terminate a body's treatment as a member of a group where it appears to them to be necessary for the protection of the revenue<sup>48</sup>, and must terminate a body's treatment as a member of a group if it appears to them that the body is not, or is no longer, eligible<sup>49</sup> to be so treated<sup>50</sup>.

To ensure that these provisions are not used for the avoidance of tax, the Commissioners may in certain circumstances<sup>51</sup> give a direction requiring it to be assumed, in relation to a body corporate, that it did not fall to be treated, or is not to be treated, as a member of a group, or of a particular group described in the direction, for a specified period<sup>52</sup>.

1 As to the effect of treatment as a group see further PARAS 205-207 post. The Commissioners for Her Majesty's Revenue and Customs have no discretion to treat two or more companies as a group unless one of the conditions specified in the Value Added Tax Act 1994 s 43A(1) (as added) (see the text and notes 2-7 infra) is fulfilled (*Du Vergier & Co Ltd v Customs and Excise Comrs* [1973] VATTR 11); but in certain circumstances they may give a direction that a body corporate was, or is, to be treated as a member of any group of which it was, or is, eligible to be a member for a specified period (see the Value Added Tax Act 1994 s 43(9), Sch 9A para 3(3)(b) (Sch 9A added by the Finance Act 1996 s 29(1), (2)); and PARA 207 post). See also the Value Added Tax (Groups: eligibility) Order 2004, SI 2004/1931; and the text and notes 8-27 infra. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. A tour operator is not eligible to be treated as a member of a group for VAT if any other member of the group has an overseas establishment (Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, reg 13(a)), makes supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom (reg 13(b)) and supplies goods or services which will become, or are intended to become, a designated travel service (reg 13(c)). As to the rules relating to the tour operators' margin scheme see PARA 214 post; and as to the place of supply of designated travel services see PARA 62 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 A company which is controlled and managed outside the United Kingdom is not resident in the United Kingdom for these purposes: see *Shamrock Leasing Ltd v Customs and Excise Comrs* [1998] V & DR 323.

3 As to business establishments and fixed establishments see PARA 53 note 5 ante.

4 For these purposes, a body corporate is taken to control another body corporate if it is empowered by statute to control that body's activities or if it is that body's holding company within the meaning of the Companies Act 1985 s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25) (Value Added Tax Act 1994 s 43A(2) (ss 43A-43C added by the Finance Act 1999 s 16, Sch 2 para 2)); and an individual or individuals is or are taken to control a body corporate if he or they, were he or they a company, would be that body's holding company within the meaning of that Act (Value Added Tax Act 1994 s 43A(3) (as so added)).

5 Ibid s 43A(1)(a) (as added: see note 4 supra).

6 Ibid s 43A(1)(b) (as added: see note 4 supra).

7 Ibid s 43A(1)(c) (as added: see note 4 supra).

8 Value Added Tax (Groups: eligibility) Order 2004, SI 2004/1931, art 2. This order is made pursuant to the Value Added Tax Act 1994 s 43AA (added by the Finance Act 2004 s 20(1)), which empowers the Treasury by order to provide for the Value Added Tax Act 1994 s 43A (as added) (see the text and notes 1-7 supra) to have effect with specified modifications in relation to a specified class of person (s 43AA(1) (as so added)). Such an order may, in particular: (1) make provision by reference to generally accepted accounting practice (s 43AA(2) (a) (as so added)); (2) define generally accepted accounting practice for that purpose by reference to a specified document or instrument (and provide for the reference to be read as including a reference to any later document or instrument that amends or replaces the first) (s 43AA(2)(b) (as so added)); (3) adopt any statutory or other definition of generally accepted accounting practice (with or without modification) (s 43AA(2)(c) (as so added)); (4) make provision by reference to what would be required or permitted by generally accepted accounting practice if accounts, or accounts of a specified kind, were prepared for a person (s 43AA(2)(d) (as so added)).

added)); and (5) make provision by reference to the nature of a person (s 43AA(3)(a) (as so added)), past or intended future activities of a person (s 43AA(3)(b) (as so added)), the relationship between a number of persons (s 43AA(3)(c) (as so added)), and the effect of including a person within a group or of excluding a person from a group (s 43AA(3)(d) (as so added)). An order may also make provision which applies generally or only in specified circumstances (s 43AA(4)(a) (as so added)), make different provision for different circumstances (s 43AA(4)(b) (as so added)), and include supplementary, incidental, consequential or transitional provision (s 43AA(4)(c) (as so added)). As to the making of orders generally see PARA 14 ante.

9 A business activity is a relevant business activity for these purposes if it involves making one or more supplies of goods or services to one or more members of the group (ie the group of which the body is a member or to which an application under *ibid* s 43B(1) or (2)(a) (as added) (see the text and notes 28, 37-38 *infra*) relates, as the case may require (Value Added Tax (Groups: eligibility) Order 2004, SI 2004/1931, art 7(4))) and: (1) those supplies are not incidental to that business activity (art 4(1)(a)); (2) at least one of those supplies is or would be chargeable to VAT at a rate other than zero (art 4(1)(b)); and (3) the representative member (see the text and note 30 *infra*) is not or would not be entitled to credit for the whole of the VAT on such supplies as fall within art 4(1)(b) as input tax (art 4(1)(c)). In determining for these purposes whether a body corporate makes any supplies to any members of the group, a supply would be chargeable to VAT at a rate other than zero, or the representative member would not be entitled to credit for the whole of the VAT on the supply as input tax, a body corporate that is a member of the group is deemed not to be a member (art 4(2)(a)-(c)). In determining whether the sole general partner of a limited partnership (a 'general partner') is carrying on a relevant business activity, this provision applies as if references to the body or specified body, as the case requires, are references to the limited partnership: art 7(1)(b).

10 *Ibid* art 3(1)(a). In determining the value of the supplies made by a body corporate that is the sole general partner of a limited partnership this provision applies as if references to the body or specified body, as the case requires, are references to the limited partnership: art 7(1)(a).

11 *Ibid* art 3(1)(b). For the purposes of determining this value, a body that is not a member of the group is deemed to be a member: art 3(2). See also note 10 *supra*.

12 A body corporate is a wholly-owned subsidiary of a person if it is a wholly-owned subsidiary of his within the meaning given by the Companies Act 1985 s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25), or would be if the person were a company (Value Added Tax (Groups: eligibility) Order 2004, SI 2004/1931, art 3(5)(a)); and in determining whether a body corporate is a wholly-owned subsidiary of a person, the membership of any excepted individual who is not acting on behalf of another person is disregarded (art 3(5)(b)). An individual is an excepted individual if he is either an employee or director of the body (art 7(3)(a)) or, where the body is a limited liability partnership, a member of the body (art 7(3)(b)).

13 *Ibid* art 3(2)(a). Alternatively, a body corporate may qualify for these purposes if, at any time when the relevant business activity is being carried on, it is not a wholly-owned subsidiary of a person who is or will be a member of the group and controls all of the other members of the group apart from himself: art 3(2)(a). References to a person controlling a body corporate include a reference to his controlling the body together with one or more other individuals with whom he is carrying on a business in partnership: art 7(5).

14 A person is a third party for these purposes if: (1) he does not control the body corporate and all of the other members of the group (*ibid* art 7(2)(a)); (2) a person who controls the body corporate and all of the other members of the group does not control him (art 7(2)(b)); and (3) he is not an excepted individual (art 7(2)(c)).

15 *Ibid* art 3(2)(b).

16 *Ibid* art 3(2)(c).

17 *Ibid* art 3(4)(a). Alternatively, these provisions are not applicable to bodies corporate that are members of the group and control all of the members of the group apart from themselves: art 3(4)(a).

18 *Ibid* art 3(4)(b).

19 *Ibid* art 3(4)(c). 'Pension scheme' means an occupational pension scheme established under a trust and 'occupational pension scheme' has the meaning given by the Pension Schemes Act 1993 s 1 (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 741): Value Added Tax (Groups: eligibility) Order 2004, SI 2004/1931, art 3(5)(c).

20 *Ibid* art 3(4)(d).

21 Profits (whether or not distributed), charges for managing the business activity (including charges for providing staff to manage it), and the amounts, if any, by which any other charges made to the body exceed the open market value of the goods or services concerned, are benefits of a business activity for these purposes: *ibid* art 5(3)(a)-(c).

22 Ibid art 5(1). Benefits that accrue to a person in his capacity as a member of a body corporate which controls all of the other members of the group (or, where the body is or will be a member of the group, all of the other members apart from itself) are not regarded as accruing to a third party: art 5(2). If there are no such benefits, the business activity is deemed to generate profits of £100: art 5(4).

In determining whether the benefits condition is satisfied in relation to a general partner this provision applies as if references to the body or specified body, as the case requires, are references to the limited partnership: art 7(1)(c).

23 For the purpose of the application of these provisions at a particular time the reference to consolidated accounts is a reference to consolidated accounts for a period including that time (ibid art 6(2)(a)(i)) and in so far as they relate to that time (art 6(2)(a)(ii)), and any principle of generally accepted accounting practice that permits accounts of a subsidiary undertaking to be excluded from a consolidation as being immaterial must be disregarded (art 6(2)(b)). For the meaning of 'generally accepted accounting practice' see the Finance Act 2004 s 50(1) (definition applied by the Value Added Tax (Groups: eligibility) Order 2004, SI 2004/1931, art 6(3)(a)) or, in relation to any time when the Finance Act 2004 s 50(1) does not have effect, the Income and Corporation Taxes Act 1988 s 836A (as added; repealed by the Finance Act 2005 ss 80(1), 104, Sch 4 para 25, Sch 11 Pt 2(7)), in relation to periods of account beginning on or after 1 January 2005) (definition applied by the Value Added Tax (Groups: eligibility) Order 2004, SI 2004/1931, art 6(3)(b)).

24 For the purpose of the application of these provisions at a particular time the reference to consolidated accounts prepared for a person is a reference to consolidated accounts of a kind that could be prepared for him in accordance with generally accepted accounting practice, for which purpose it does not matter either whether accounts are actually prepared for him (whether for a particular period or at all) (ibid art 6(3)(c)(i)), or, in particular, whether he is required to prepare accounts (art 6(3)(c)(ii)).

25 Alternatively, where a person is or will be a member of the group, controls all of the other members apart from himself: ibid art 6(1)(a).

26 Ibid art 6(1)(a). In determining whether the consolidated accounts condition is satisfied in relation to a general partner this provision applies as if references to the body or specified body, as the case requires, are references to the limited partnership: art 7(1)(d).

27 Ibid art 6(1)(b).

28 Value Added Tax Act 1994 s 43B(1) (as added: see note 4 supra; ss 43B(1), (2)(a), (5)(a), (b), 43C(3)(b) amended by the Finance Act 2004 s 20(4)).

29 Value Added Tax Act 1994 s 43B(3)(a) (as added: see note 4 supra).

30 Ibid s 43B(3)(b) (as added: see note 4 supra). The purpose of these provisions is to enable a group of companies to be treated as if it were a single taxable entity, taxable through its representative member: *Customs and Excise Comrs v Kingfisher plc* [1994] STC 63. The functions of the representative member are therefore statutory, rather than being in the nature of an agency or trusteeship for the rest of the group, and the representative member at any one time accordingly stands in the shoes of its predecessors; in particular, it can be assessed for tax due before it was appointed as such: *Thorn plc v Customs and Excise Comrs* (1998) VAT Decision 15283, [1998] STI 338.

31 Value Added Tax Act 1994 s 43B(4)(a) (as added: see note 4 supra). If an application for two or more bodies corporate to be treated as members of a group (ie under s 43B(1) (as added and amended): see the text and note 28 supra) would have effect from a time in accordance with s 43B(4) (as added) but at that time one or more of the bodies specified in the application is a member of a group other than that to which the application relates (and is therefore excluded from registration: see s 43D(1), (2) (as added); and the text and notes 43-45 infra), the application has effect from that time but with the exclusion of the specified body or bodies: s 43D(3) (s 43D added by the Finance Act 2004 s 20(2)).

32 Ibid s 43B(4)(b) (as added: see note 4 supra); and see note 31 supra; and *Customs and Excise Comrs v Save and Prosper Group Ltd* [1979] STC 205 (decided under the former legislation).

33 If the Commissioners wish to refuse an application they must do so within the period of 90 days starting with the day on which it was received by them (Value Added Tax Act 1994 s 43B(5) (as added: see note 4 supra), and the application will be taken never to have been granted (s 43B(6) (as so added)). Appeal against a refusal by the Commissioners to allow a group registration lies to a VAT and duties tribunal: see s 83(k) (substituted by the Finance Act 1999 s 16, Sch 2 para 3); and PARA 346 et seq post.

34 Eligibility to be treated as a member of a group is governed by the Value Added Tax Act 1994 s 43A (as added) (see the text and notes 1-7 supra), which by virtue of s 43AA (as added) includes bodies which are

eligible by virtue of the Value Added Tax (Groups: eligibility) Order 2004, SI 2004/1931 (see the text and notes 8-27 supra).

35 Value Added Tax Act 1994 s 43B(5)(a), (b) (as added and amended: see notes 4, 28 supra).

36 Ibid s 43B(5)(c) (as added: see note 4 supra). For the limitations on the Commissioners' powers in this regard see *National Westminster Bank plc v Customs and Excise Comrs* [1999] V & DR 201.

37 See note 34 supra.

38 Value Added Tax Act 1994 s 43B(2)(a) (as added and amended: see notes 4, 28 supra). If an application for another eligible body to be treated as a member of a group (ie under s 43B(2)(a) (as added and amended)) would have effect from a time in accordance with s 43B(4) (as added) (see the text and notes 31-32 supra) but at that time the body specified in the application is a member of a group other than that to which the application relates (and is therefore excluded from registration: see s 43D(1), (2) (as added); and the text and notes 43-45 infra), the application has no effect: s 43D(4) (as added: see note 31 supra).

39 Ibid s 43B(2)(b) (as added: see note 4 supra).

40 Ibid s 43B(2)(c) (as added: see note 4 supra).

41 Ibid s 43B(2)(d) (as added: see note 4 supra).

42 Ibid s 43B(3)(b) (as added: see note 4 supra). A company which leaves a group of companies does not automatically cease to be treated as a member of that group for tax purposes: the statutory procedures as to the entry to and exit from a group must be followed: *Customs and Excise Comrs v Barclays Bank plc* [2001] EWCA Civ 1513, [2002] 1 CMLR 73.

43 Value Added Tax Act 1994 s 43D(1) (as added: see note 31 supra).

44 See note 34 supra.

45 Value Added Tax Act 1994 s 43D(2) (as added: see note 31 supra). In connection with attempted registrations of duplicated groups see notes 31, 38 supra.

46 Ie either under ibid s 43B(1) (as added) (see the text and note 28 supra) or s 43B(2)(a) (as added and amended) (see the text and notes 37-38 supra).

47 Ibid s 43D(5) (as added: see note 31 supra).

48 Ibid s 43C(2) (as added: see note 4 supra). Termination is effected by notice given to the body corporate and has effect from a date which is specified in the notice (s 43C(1)(a) (as so added)) and which is, or falls after, the date on which the notice is given (s 43C(1)(b) (as so added)). Appeal against the giving of a notice under s 43C(1) (as added) lies to a VAT and duties tribunal: see s 83(ka) (added by the Finance Act 1999 s 16, Sch 2 para 3); and PARA 346 et seq post.

49 See note 34 supra.

50 Value Added Tax Act 1994 s 43C(3)(a), (b) (as added and amended: see notes 4, 28 supra). Termination is effected by notice given to the body and has effect from a date which is specified in the notice (s 43C(3) (as so added)), which may be earlier than the date on which the notice is given but must not be earlier than either the first date on which, in the opinion of the Commissioners, the body was not eligible to be treated as a member of the group (s 43C(4)(a) (as so added)) or the date on which, in the opinion of the Commissioners, the body ceased to be eligible to be treated as a member of the group (s 43C(4)(b) (as so added)). Appeal against the giving of a notice under s 43C(3) (as added and amended) lies to a VAT and duties tribunal: see s 83(ka) (as added: see note 48 supra); and PARA 346 et seq post.

51 Ie in the circumstances set out in ibid Sch 9A (as added): see PARA 207 post.

52 Ibid Sch 9A para 3(3)(a) (as added: see note 1 supra). See further PARA 207 post.

## UPDATE

### 75 Groups of companies

NOTE 4--Reference to Companies Act 1985 s 736 now to Companies Act 2006 s 1159, Sch 6 (see COMPANIES vol 14 (2009) PARA 25): Value Added Tax Act 1994 s 43A(2) (amended by SI 2009/1890).

NOTE 12--Reference to Companies Act 1985 s 736 now to Companies Act 2006 s 1159, Sch 6: SI 2004/1931 art 3(5) (amended by SI 2009/1890).

NOTE 36--See also *Prudential Assurance Co Ltd v HMRC Comrs* (2005) VAT Decision 19607, [2006] STI 2109.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(2) TAXABLE PERSONS/(ii) Liability to be Registered/D. REGISTRATION IN SPECIAL CASES/76. Registration where business is carried on in divisions.

## **76. Registration where business is carried on in divisions.**

The registration<sup>1</sup> of a body corporate carrying on a business<sup>2</sup> in several divisions may, if it so requests, and the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> see fit, be in the names of those divisions<sup>4</sup>.

1 For the meaning of 'registration' see PARA 64 note 2 ante.

2 For these purposes, references to a business include references to any other activities in the course or furtherance of which any body corporate acquires goods from another member state: Value Added Tax Act 1994 s 46(6). As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante. As to acquisitions from another member state see PARA 19 ante.

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 Value Added Tax Act 1994 s 46(1). Thus a company carrying on business in divisions may, if it so requests, have more than one registration number.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(2) TAXABLE PERSONS/(ii) Liability to be Registered/D. REGISTRATION IN SPECIAL CASES/77. Registration of partnerships and co-owners.

## **77. Registration of partnerships and co-owners.**

The registration<sup>1</sup> for value added tax of persons carrying on either a business<sup>2</sup> in partnership<sup>3</sup> or any other activities in partnership in the course or furtherance<sup>4</sup> of which they acquire goods from other member states<sup>5</sup>, may be in the name of the firm<sup>6</sup>. No account is taken, in determining whether goods or services are supplied to or by such persons, or are acquired by such persons from another member state<sup>7</sup>, of any change in the partnership<sup>8</sup>. If the same persons carry on in partnership together more than one business, they may have only a single registration for VAT, even if each business is carried on under different names<sup>9</sup>.

A person who has ceased to be a member of a partnership is regarded<sup>10</sup> as continuing to be a member for the purposes of VAT (and, in particular, for the purpose of any liability for VAT on the supply of goods or services by the partnership, or on the acquisition of goods by the partnership from another member state) until the date on which a change in the partnership is notified to the Commissioners for Her Majesty's Revenue and Customs<sup>11</sup>.

As from a day to be appointed, provision is made in connection with the VAT treatment of supplies of land by two or more persons<sup>12</sup>. Where two or more persons together make, or are treated as making, a supply consisting in the grant, assignment or surrender of any interest in or right over land<sup>13</sup>, those persons ('the grantors') are to be treated, both in relation to that supply and in relation to any other supply with respect to which the grantors are the same, as a single person ('the property-owner') who is distinct from each of the grantors individually<sup>14</sup>. Registration of the property-owner for VAT is made in the names of the grantors acting together as a property-owner<sup>15</sup>. The grantors are jointly and severally liable in respect of the obligations treated as falling on the property-owner<sup>16</sup>. Where there is a change in some (but not all) of the persons who are for the time being to be treated as the grantors in relation to any such supply, the change is disregarded for VAT purposes in relation to any prescribed accounting period<sup>17</sup> beginning before the change is notified to the Commissioners in the prescribed manner<sup>18</sup>.

1 For the meaning of 'registration' see PARA 64 note 2 ante.

2 For the meaning of 'business' see PARA 23 ante.

3 Value Added Tax Act 1994 s 45(1)(a).

4 As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

5 Value Added Tax Act 1994 s 45(1)(b).

6 Ibid s 45(1). The predecessor of this provision did not affect the obligation of the Commissioners to raise separate assessments, and to serve separate notices of assessment, on each partner, since for VAT purposes a partnership was not a person but a group of taxable persons: *Customs and Excise Comrs v Evans (t/a the Grape Escape Wine Bar)* [1982] STC 342. The law was changed as a result of *Customs and Excise Comrs v Evans* supra with the result that it is now necessary, where a partnership takes over a business previously carried on by one member, or a partner continues a business previously carried on by the partnership, to treat the change as requiring the cancellation of the previous registration and the registration of the continuing trader. In addition, it is no longer necessary to serve an assessment on each partner: see note 11 infra. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

7 For the meaning of 'another member state' see PARA 4 note 15 ante; and as to acquisitions from another member state see PARA 19 ante.

8 Value Added Tax Act 1994 s 45(1). Section 45(1), (3) (see note 11 infra) does not affect the extent to which, under the Partnership Act 1890 s 9 (see PARTNERSHIP vol 79 (2008) PARA 74), a partner is liable for VAT owed by the firm; but where a person is a partner in a firm during part only of a prescribed accounting period, his liability for VAT on the supply by the firm of goods or services during that accounting period or on the acquisition during that period by the firm of any goods from another member state is such proportion of the firm's liability as may be just: Value Added Tax Act 1994 s 45(5). For the meaning of 'supply' see PARA 27 ante; and for the meaning of 'prescribed accounting period' see PARA 216 note 6 post.

9 *Customs and Excise Comrs v Glassborow* [1975] QB 465, [1974] 1 All ER 1041, DC; *J & E Harris v Customs and Excise Comrs* (1977) VAT Decision 373 (unreported). Cf *H Saunders and TG Sorrell v Customs and Excise Comrs* [1980] VATTR 53 (where A and B form two limited partnerships, in one of which A is the general partner and B the limited partner and in the other of which the position is reversed, each partnership is entitled to separate registration).

10 le without prejudice to the Partnership Act 1890 s 36 (rights of persons dealing with firm against apparent members of firm): see PARTNERSHIP vol 79 (2008) PARA 195.

11 Value Added Tax Act 1994 s 45(2). This provision puts the responsibility for informing the Commissioners of the dissolution of a partnership firmly on the partners themselves, since only they could know of the dissolution and in the absence of this provision could avoid VAT liability by simply asserting it, which could not be just: see *Customs and Excise Comrs v Jamieson* [2002] STC 1418 (husband and wife partnership dissolved for tax purposes when Commissioners notified of dissolution and not when marriage ended). The Commissioners may make provision by regulations under the Value Added Tax Act 1994 for determining by what persons anything required by or under that Act to be done by a person carrying on a business is to be done where the business is carried on in partnership: s 46(2). Where any notice is required to be given for the purposes of VAT by a partnership, it is the joint and several liability of all the partners to give such notice, provided that a notice given by one partner is a sufficient compliance with any such requirement: Value Added Tax Regulations 1995, SI 1995/2518, reg 7(1).

Where a person ceases to be a member of a partnership during a prescribed accounting period, or is treated as so doing by virtue of the Value Added Tax Act 1994 s 45(2), any notice, whether of assessment or otherwise, which is served on the partnership and relates to, or to any matter arising in, that period or any earlier period during the whole or part of which he was a member of the partnership is to be treated as served also on him: s 45(3). See also note 8 supra. Thus service of a notice of assessment on the partnership will operate as service on all the partners (including any ex-partner who has failed to notify the Commissioners in writing that he has ceased to be a member of the firm: see *Bengal Brasserie v Customs and Excise Comrs* [1991] VATTR 210 (doubting *Ahmed v Customs and Excise Comrs* [1988] VATTR 1).

Without prejudice to the Partnership Act 1890 s 16 (notice to acting partner to be notice to the firm) (see PARTNERSHIP vol 79 (2008) PARA 45), any notice, whether of assessment or otherwise, which is addressed to a partnership by the name in which it is registered by virtue of the Value Added Tax Act 1994 s 45(1) and is served in accordance with the Value Added Tax Act 1994 is treated for the purposes of that Act as served on the partnership and accordingly, where s 45(3) applies, as served also on the former partner: s 45(4).

12 See *ibid* s 51A (prospectively added by the Finance Act 1995 s 26(1), (4), as from a day to be appointed under s 26(3)); and the text and notes 13-18 infra. At the date at which this volume states the law no such day had been appointed.

13 For this purpose, a licence to occupy land is to be taken to be a right over land: Value Added Tax Act 1994 s 51A(1)(a) (prospectively added: see note 12 supra).

14 *Ibid* s 51A(1), (2) (prospectively added: see note 12 supra).

15 *Ibid* s 51A(3) (prospectively added: see note 12 supra).

16 *Ibid* s 51A(4) (prospectively added: see note 12 supra).

17 For the meaning of 'prescribed accounting period' see PARA 216 note 6 post.

18 Value Added Tax Act 1994 s 51A(6)(a) (prospectively added: see note 12 supra). Any notice (whether of assessment or otherwise) which is addressed to the property-owner by the name in which the property-owner is registered and is served on any of the grantors is treated as served on the property-owner (s 51A(5)) (as so prospectively added); and any notice, whether of assessment or otherwise, which is served, at any time after a notification of change in some but not all of the persons who are the grantors, and which relates to a prescribed accounting period beginning before the change, is treated as served on the persons who were the property-owner in the earlier period (s 51A(6)(b)) (as so prospectively added). As to the similar provisions in relation to partnerships see note 11 supra.

## **UPDATE**

### **77 Registration of partnerships and co-owners**

NOTE 6--A partnership does not have a distinct personality for VAT purposes on its registration: *Scrace v Revenue and Customs Comrs* [2006] All ER (D) 195 (Jul).

NOTE 9--*Glassborow*, cited, applied in *Revenue and Customs Comrs v Pal* [2006] EWHC 2016 (Ch), [2008] STC 2442 (inclusion of non-partners on registration application form of no effect in relation to other individuals).

TEXT AND NOTES 12-18--Repealed: SI 2008/1146.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(2) TAXABLE PERSONS/(ii) Liability to be Registered/D. REGISTRATION IN SPECIAL CASES/78. Registration of clubs, associations and organisations.

## 78. Registration of clubs, associations and organisations.

Anything required to be done for value added tax purposes<sup>1</sup> by or on behalf of a club, association or organisation the affairs of which are managed by its members or a committee or committees of its members, is the joint and several responsibility of either:

- 203 (1) every member holding office as president, chairman, treasurer, secretary or any similar office<sup>2</sup>;
- 204 (2) in default of any of the above, every member holding office as a member of a committee<sup>3</sup>; or
- 205 (3) in default of any of these, every member<sup>4</sup>,

provided that if it is done by any official, committee member or member referred to above, that is sufficient compliance with any such requirement<sup>5</sup>.

The registration<sup>6</sup> of any such club, association or organisation may be in the name of the club, association or organisation<sup>7</sup>. In determining whether goods or services are supplied<sup>8</sup> to or by such a club, association or organisation, or whether goods are acquired by it from another member state<sup>9</sup>, no account is taken of any change in its members<sup>10</sup>.

1    le anything required to be done by or under the Value Added Tax Act 1994, the Value Added Tax Regulations 1995, SI 1995/2518, or otherwise: reg 8 (made pursuant to the Value Added Tax Act 1994 s 46(2), which empowers the Commissioners for Her Majesty's Revenue and Customs by regulations to make provision for determining by what persons anything required to be done by or under the Value Added Tax Act 1994 by a person carrying on a business is to be done where the business is carried on by a club, association or organisation the affairs of which are managed by its members or a committee or committees of its members). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. As to the making of regulations generally see PARA 14 ante. As to the meaning of 'business', and connected expressions, for these purposes, see PARA 76 note 2 ante.

2    Value Added Tax Regulations 1995, SI 1995/2518, reg 8(a).

3    Ibid reg 8(b).

4    Ibid reg 8(c).

5    Ibid reg 8. See also Customs and Excise Public Notice 701/5 *Clubs and Associations* (March 2002).

6    For the meaning of 'registration' see PARA 64 note 2 ante.

7    Value Added Tax Act 1994 s 46(3).

8    The provision of the facilities or advantages of membership for a subscription or other consideration is deemed to be the carrying on of a business: see ibid s 94(2)(a); and PARA 24 ante.

9    As to registration in respect of taxable acquisitions from other member states see PARA 72 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

10   Value Added Tax Act 1994 s 46(3).

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### **79. Effect on registration of persons dying, becoming bankrupt or otherwise incapacitated.**

If a taxable person<sup>1</sup> dies or becomes bankrupt or incapacitated<sup>2</sup> the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> may, from the date on which he died or became bankrupt or incapacitated until some other person is registered in respect of the taxable supplies<sup>4</sup> made or intended to be made by that taxable person in the course or furtherance of his business<sup>5</sup>, or until the incapacity ceases, treat as a taxable person any person carrying on that business<sup>6</sup>. In consequence, the provisions of the Value Added Tax Act 1994 and of any regulations made thereunder apply to the person who is so treated as though he were a registered person<sup>7</sup>. Any person carrying on the business of a person who has died or become bankrupt or incapacitated must, within 21 days of commencing to do so, inform the Commissioners, in writing, of the fact that he has begun to do so and also of the date of the death or of the bankruptcy order, or of the nature of the incapacity and the date on which it began<sup>8</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 In relation to a company which is a taxable person, references to the taxable person becoming or having become bankrupt or becoming or having become incapacitated is to be construed as a reference to its being in or going into liquidation, receivership or administration: Value Added Tax Act 1994 s 46(5) (amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096, art 4, Schedule Pt 1 paras 24, 25); Value Added Tax Regulations 1995, SI 1995/2518, reg 9(3) (amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096, art 5, Schedule Pt 2 paras 55, 56). 'Going into receivership' contemplates the general incapacity which results from administrative receivership and not the partial incapacity which results from the appointment of a receiver of specific properties under the Law of Property Act 1925 or an equivalent power: *Sargent v Customs and Excise Comrs* [1995] 1 WLR 821, [1995] STC 398, CA. A receiver with such specific powers only could not, therefore, be treated by the Commissioners as a taxable person; but was nevertheless obliged to account to the Commissioners for the VAT on rents he collected under the Law of Property Act 1925 s 109(8): *Sargent v Customs and Excise Comrs* supra. See also *Re John Willment (Ashford) Ltd* [1979] 2 All ER 615, [1980] 1 WLR 73.

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

5 As to the meaning of 'business', and connected expressions, for these purposes, see PARA 76 note 2 ante. As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 9(1) (reg 9 (as amended) made pursuant to the Value Added Tax Act 1994 s 46(4), which empowers the Commissioners for Her Majesty's Revenue and Customs by regulations to make provision for persons who carry on a business of a taxable person who has died or become bankrupt or has become incapacitated to be treated for a limited time as taxable persons, and for securing continuity in the application of the Value Added Tax Act 1994 in cases where persons are so treated). As to subordinate legislation generally see PARA 14 ante. As to the priority of VAT in bankruptcy or winding up see the Insolvency Act 1986 ss 175, 328, 386, 387 (s 386 as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 577, 579; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 763. See also PARA 301 post.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 9(1).

8 Ibid reg 9(2) (amended by SI 1996/1250).

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### **(iii) Termination and Cancellation of Registration**

#### **A. TERMINATION ETC RELATING TO TAXABLE SUPPLIES**

##### **80. Termination of liability to registration.**

A person who has become liable to be registered for value added tax<sup>1</sup> ceases to be so liable<sup>2</sup> at any time if the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> are satisfied in relation to that time that he has ceased to make taxable supplies<sup>4</sup> or that he is not at that time a person in relation to whom any of the statutory conditions<sup>5</sup> is satisfied<sup>6</sup>.

A person who has become liable to be, and has been, registered for VAT ceases to be so liable at any time after being registered if the Commissioners are satisfied that the value of his taxable supplies in the period of one year then beginning will not exceed £58,000<sup>7</sup>. He does not, however, so cease to be liable if the Commissioners are satisfied that the reason the value of his taxable supplies will not exceed that sum is that in the period in question he will cease making taxable supplies or will suspend making them for a period of 30 days or more<sup>8</sup>.

A registered person<sup>9</sup> who ceases to make, or have the intention of making, taxable supplies must notify the Commissioners of the day on which he does so unless he would, when he so ceases, be otherwise liable or entitled to be registered if his registration and any enactment preventing a person from being liable to be registered under different provisions at the same time were disregarded<sup>10</sup>. Every such notification must be made in writing to the Commissioners and must state the date on which the person ceased to make, or have the intention of making, taxable supplies<sup>11</sup>.

1    Ie under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended): see PARA 64 et seq ante.

2    A person does not, however, cease to be liable to be registered except in accordance with the Value Added Tax Act 1994 Sch 1 para 2(5) (see PARA 68 ante), Sch 1 para 3 or Sch 1 para 4 (as amended) (see the text and notes 7-8 infra): Sch 1 para 1(6).

3    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4    Value Added Tax Act 1994 Sch 1 para 3(a). For the meaning of 'taxable supply' see PARA 18 note 3 ante. See also PARA 64 note 4 ante.

5    Ie the conditions specified in the Value Added Tax Act 1994 Sch 1 para 1(1)(a), (b), (2)(a), (b) (as amended): see PARAS 64, 68 ante.

6    Ibid Sch 1 para 3(b).

7    Ibid Sch 1 para 4(1) (Sch 1 para 4(1), (2) amended by the Value Added Tax (Increase of Registration Limits) Order 2005, SI 2005/727, art 2(b)). In determining the value of a person's supplies for these purposes, supplies of goods or services that are capital assets of the business in the course or furtherance of which they are supplied, and any taxable supplies which would not be taxable supplies apart from the Value Added Tax Act 1994 s 7(4) (distance selling: see PARA 48 ante) are to be disregarded: Sch 1 para 4(3). Where, however, an interest in, right over or licence to occupy any land would thereby be disregarded, it is not to be so if it is supplied on a taxable supply which is not zero-rated: Sch 1 para 4(4). As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante; and as to zero-rating see PARA 174 et seq post.

8 Ibid Sch 1 para 4(2) (as amended: see note 7 supra).

9 le a person registered under ibid Sch 1 para 5 or 6 (see PARA 64 ante) or Sch 1 para 9 (see PARA 67 ante): Sch 1 para 11.

10 Ibid Sch 1 para 11.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 5(3)(a) (substituted by SI 2000/794).

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### **81. Cessation of entitlement to voluntary registration.**

A person who has been voluntarily registered<sup>1</sup> and who ceases to make, or have the intention of making, supplies outside the United Kingdom<sup>2</sup> which would be taxable supplies<sup>3</sup> if made in the United Kingdom<sup>4</sup>, must notify the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup> of that fact within 30 days of the day on which he does so unless he would, when he so ceases, be otherwise liable or entitled to be registered if his registration and any enactment preventing a person from being liable to be registered under different provisions at the same time were disregarded<sup>6</sup>. The notification must be made in writing and must state the date on which he ceased to make, or have the intention of making, the supplies in question<sup>7</sup>.

1    le under the Value Added Tax Act 1994 s 3(2), Sch 1 para 10 (as amended): see PARA 67 ante.

2    As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

3    For the meaning of 'taxable supplies' see PARA 18 note 3 ante. See also PARA 64 note 4 ante.

4    le supplies within the Value Added Tax Act 1994 Sch 1 para 10(2) (as amended): see PARA 67 ante.

5    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6    Value Added Tax Act 1994 Sch 1 para 12(a).

7    Value Added Tax Regulations 1995, SI 1995/2518, reg 5(3)(b) (substituted by SI 2000/794).



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## **82. Cancellation of registration.**

Where a person who is registered in respect of taxable supplies<sup>1</sup> satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> that he is not liable to be so registered<sup>3</sup>, the Commissioners must, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him<sup>4</sup>. They may not, however, so cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement<sup>5</sup> to be registered for value added tax<sup>6</sup>.

Where the Commissioners are satisfied that a person registered in respect of taxable supplies<sup>7</sup> or a person who is registered in respect of disposals of assets for which a VAT repayment is claimed<sup>8</sup> has ceased to be registrable or to be liable to be so registered, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him<sup>9</sup> but they may not so cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled<sup>10</sup>, to be registered for VAT<sup>11</sup>.

Where the Commissioners are satisfied that on the day on which a registered person was registered he was not registrable, they may cancel his registration with effect from that day<sup>12</sup>.

Provision is also made for the cancellation of the registrations of persons who intend to participate in the special accounting scheme for certain suppliers of electronically supplied services<sup>13</sup>.

Appeal lies to a VAT and duties tribunal against any decision of the Commissioners as to the cancellation of registration<sup>14</sup>.

1    I.e. a person who is registered under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended) (see PARA 64 et seq ante): Sch 1 para 13(7).

2    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3    I.e. registered under the Value Added Tax Act 1994 Sch 1 (as amended): Sch 1 para 13(1).

4    Ibid Sch 1 para 13(1). It appears that the power to cancel a person's VAT registration is discretionary but subject to the supervision of the VAT and duties tribunal: *Brookes v Customs and Excise Comrs* [1994] VATTR 35. However, this area of the law is currently in some confusion: see PARA 346 post; and *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941, CA (function of tribunal is appellate, not supervisory). The Commissioners may effectively alter a registration date by cancelling a registration and creating a new one: *Daniels and Stevenson (t/a Homeforce) v Customs and Excise Comrs* [2002] V & DR 591.

5    In determining whether a person would be subject to a requirement to be registered at any time, so much of any provision of the Value Added Tax Act 1994 as prevents a person from becoming liable or entitled to be registered when he is already registered or when he is so liable under any other provision is to be disregarded: Sch 1 para 13(6).

6    Ibid Sch 1 para 13(4).

7    See note 1 supra.

8     le a person who is registered under the Value Added Tax Act 1994 Sch 3A (as added) (see PARA 65 ante): Sch 3A para 6 (Sch 3A added by the Finance Act 2000 s 136(8), Sch 36).

9     Value Added Tax Act 1994 Sch 1 para 13(2), Sch 3A para 6(1) (as added: see note 8 supra).

10    In determining whether a person would be subject to a requirement, or entitled, to be registered at any time, so much of any provision of the Value Added Tax Act 1994 as prevents a person from becoming liable or entitled to be registered when he is already registered or when he is so liable under any other provision is to be disregarded: Sch 1 para 13(6), Sch 3A para 6(4) (as added: see note 8 supra).

11    Ibid Sch 1 para 13(5), Sch 3A para 6(3) (as added: see note 8 supra).

12    Ibid Sch 1 para 13(3), Sch 3A para 6(2) (as added: see note 8 supra).

13    le the scheme established under ibid s 3A, Sch 3B (as added): see Sch 3B para 19 (as added); and PARAS 269-273 post.

14    See ibid s 83(a); and PARA 346 et seq post.

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### **83. Cancellation and transfer of registration on transfer of a going concern.**

Where a business is transferred as a going concern<sup>1</sup> and:

- 206 (1) the registration<sup>2</sup> of the transferor has not already been cancelled<sup>3</sup>;
- 207 (2) on the transfer of the business, the registration of the transferor is to be cancelled and either the transferee becomes liable to be registered or the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> agree to register him<sup>5</sup> voluntarily<sup>6</sup>; and
- 208 (3) an application is made in the prescribed form<sup>7</sup> by or on behalf of both the transferor and the transferee of that business<sup>8</sup>,

the Commissioners may cancel the registration of the transferor as from the date of the transfer and register the transferee with the registration number<sup>9</sup> previously allocated to the transferor<sup>10</sup>.

Where the transferee of a business has been so registered in substitution for the transferor of that business, and with the transferor's registration number:

- 209 (a) any liability of the transferor existing at the date of the transfer to make a return or to account for or pay value added tax<sup>11</sup> becomes the liability of the transferee<sup>12</sup>;
- 210 (b) any right of the transferor, whether or not existing at the date of the transfer, to credit for, or to repayment of, input tax<sup>13</sup> becomes the right of the transferee<sup>14</sup>;
- 211 (c) any right of either the transferor, whether or not existing at the date of the transfer, or the transferee to payment by the Commissioners<sup>15</sup> is satisfied by payment to either of them<sup>16</sup>;
- 212 (d) any right of the transferor, whether or not existing at the date of the transfer, to claim a refund<sup>17</sup> becomes the right of the transferee<sup>18</sup>; and
- 213 (e) any liability of the transferor, whether or not existing at the date of the transfer, to account<sup>19</sup> for an amount to the Commissioners, becomes that of the transferee<sup>20</sup>.

Additionally, where the transferee of a business has been registered in substitution for, and with the registration number of, the transferor during a prescribed accounting period<sup>21</sup> subsequent to that in which the transfer of the business took place but with effect from the date of the transfer of the business, and any return has been made<sup>22</sup>, VAT accounted for and paid<sup>23</sup> or right to credit for input tax claimed<sup>24</sup>, either by or in the name of the transferee or the transferor, it is treated as having been done by the transferee<sup>25</sup>.

1 Value Added Tax Regulations 1995, SI 1995/2518, reg 6(1)(a). As to transfers of businesses as going concerns see PARA 64 text and notes 16-20 ante. For the meaning of 'business' see PARA 23 ante.

2 I.e. under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended): see PARA 64 et seq ante.

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 6(1)(b).

- 4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.
- 5 Ie under the Value Added Tax Act 1994 Sch 1 para 9: see PARA 67 ante.
- 6 Value Added Tax Regulations 1995, SI 1995/2518, reg 6(1)(c).
- 7 Ie in the form set out in *ibid* reg 6(1)(d), Sch 1 Form 3: reg 6(1)(d). An application is valid if it is made using the official form, and once the form has been submitted the application remains valid notwithstanding that the original form is lost or that the Commissioners did not act upon it: see *Ruttle Plant (Midlands) Ltd v Customs and Excise Comrs* (2003) VAT Decision 18048, [2003] STI 1090.
- 8 Value Added Tax Regulations 1995, SI 1995/2518, reg 6(1)(d). An application under reg 6(1) constitutes notification for the purposes of the Value Added Tax Act 1994 Sch 1 para 11 (see PARA 80 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 6(2). An application under reg 6(1) can prove exceedingly expensive for the transferee: see eg *Ponsonby and Ponsonby v Customs and Excise Comrs* [1988] STC 28. In *Bjellica (t/a Eddy's Domestic Appliances) v Customs and Excise Comrs* [1994] 1 CMLR 437, [1993] STC 730 (affd on other grounds [1995] STC 329, CA) Leonard J rejected the contention for the trader that the Value Added Tax Regulations 1995, SI 1995/2518, reg 6(1) is inconsistent with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), since it imposes the obligation to pay VAT only on 'taxable persons who carry out taxable transactions' and not on the successors to such a person. The relevant assessment had been raised, *inter alia*, on the original trader; and his successors had given a contractual undertaking, in their application form for the transfer of the VAT number, to the Commissioners to discharge the predecessor's outstanding VAT liability if called upon to do so. As to the Sixth Directive see PARA 1 note 1 ante.
- 9 For the meaning of 'registration number' see PARA 22 note 14 ante.
- 10 *Ibid* reg 6(1).
- 11 Ie under the Value Added Tax Regulations 1995, SI 1995/2518, reg 25 or reg 40 (as substituted and amended): see PARAS 247-248 post.
- 12 *Ibid* reg 6(3)(a) (amended by SI 2004/1675). As to the transferee's liability to account for and pay VAT under these provisions see *Ponsonby and Ponsonby v Customs and Excise Comrs* [1988] STC 28; *Pets Place (UK) Ltd v Customs and Excise Comrs* [1996] V & DR 418.
- 13 For the meaning of 'input tax' see PARA 215 post.
- 14 Value Added Tax Regulations 1995, SI 1995/2518, reg 6(3)(b) (reg 6(3)(b) amended, reg 6(3)(d), (e) added, by SI 1997/1086).
- 15 Ie under the Value Added Tax Act 1994 s 25(3): see PARA 216 post.
- 16 Value Added Tax Regulations 1995, SI 1995/2518, reg 6(3)(c).
- 17 Ie under the Value Added Tax Act 1994 s 36 (as amended): see PARA 307 post.
- 18 Value Added Tax Regulations 1995, SI 1995/2518, reg 6(3)(d) (as added: see note 14 supra).
- 19 Ie under *ibid* Pt XIXA (regs 172ZC-172E) (as added and amended) (see PARA 307 post).
- 20 *Ibid* reg 6(3)(e) (as added: see note 14 supra).
- 21 For the meaning of 'prescribed accounting period' para 115 note 15 post.
- 22 Value Added Tax Regulations 1995, SI 1995/2518, reg 6(4)(a).
- 23 *Ibid* reg 6(4)(b).
- 24 *Ibid* reg 6(4)(c).
- 25 *Ibid* reg 6(4).

## UPDATE

### 83 Cancellation and transfer of registration on transfer of a going concern

TEXT AND NOTES--These provisions are now extended to the transfer of part of a business: SI 1995/2518 reg 6 (amended by SI 2007/2085).

NOTE 8--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## ***B. TERMINATION ETC RELATING TO DISTANCE SALES***

### **84. Matters affecting continuance of registration.**

A person who has become liable to be registered for value added tax by reason of his distance sales into the United Kingdom<sup>1</sup> ceases to be so liable if at any time:

- 214 (1) the relevant supplies<sup>2</sup> made by him in the year ending with 31 December last before that time did not have a value exceeding £70,000 and did not include any supply<sup>3</sup> in relation to which the statutory conditions<sup>4</sup> were satisfied<sup>5</sup>; and
- 215 (2) the Commissioners for Her Majesty's Revenue and Customs<sup>6</sup> are satisfied that the value of his relevant supplies in the year immediately following that year will not exceed £70,000 and that those supplies will not include a supply in relation to which those conditions are satisfied<sup>7</sup>.

A person does not, however, cease to be liable to be so registered except in accordance with the above provisions<sup>8</sup> nor at any time when an option for treating relevant supplies made by him as taking place outside a member state where he is taxable<sup>9</sup> is in force in relation to him<sup>10</sup>.

Any person registered by reason of his distance sales into the United Kingdom who ceases to be so registrable<sup>11</sup> must notify the Commissioners of that fact within 30 days of the day on which he does so<sup>12</sup>. A person who has been voluntarily registered<sup>13</sup> by reference to any intention of his to exercise any option or to make supplies of any description must notify the Commissioners within 30 days of exercising that option or, as the case may be, of the first occasion after his registration when he makes such a supply, that he has exercised the option or made such a supply<sup>14</sup>.

Where a person has exercised an option in accordance with the law of any member state<sup>15</sup> where he is taxable for treating relevant supplies made by him as taking place outside that member state<sup>16</sup> and that option ceases to have effect in relation to any relevant supplies by him, whether as a consequence of its revocation or otherwise, he must notify the Commissioners, within 30 days of the option's ceasing to have effect, that it has done so<sup>17</sup>.

1    I.e. any person registered under the Value Added Tax Act 1994 s 3(2), Sch 2 (as amended): see PARA 69 et seq ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2    As to the relevant supplies for these purposes see PARA 69 ante.

3    For the meaning of 'supply' see PARA 27 ante.

4    I.e. the conditions mentioned in the Value Added Tax Act 1994 Sch 2 para 1(3): see PARA 69 ante.

5    Ibid Sch 2 para 2(1)(a).

6    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

7    Value Added Tax Act 1994 Sch 2 para 2(1)(b).

8    Ibid Sch 2 para 1(5).

9     Ie such an option as is mentioned in ibid Sch 2 para 1(2): see PARA 69 ante.

10    Ibid Sch 2 para 2(2).

11    For these purposes, a person ceases to be registrable under ibid Sch 2 (as amended) where: (1) he ceases to be a person who would be liable or entitled to be registered if his registration and any enactment preventing a person from being liable to be registered under different provisions at the same time were disregarded (Sch 2 para 5(4)(a)); or (2) in the case of a person who, having been registered under Sch 2 para 4 (voluntary registration: see PARA 70 ante), has not been such a person during the period of his registration, he ceases to have any such intention as is mentioned in Sch 2 para 4(1)(a) (Sch 2 para 5(4)(b)).

12    Ibid Sch 2 para 5(1). The notification must be made in writing to the Commissioners and must state the date on which he ceased to be registrable for these purposes: Value Added Tax Regulations 1995, SI 1995/2158, reg 5(3)(d) (substituted by SI 2000/794).

13    Ie under the Value Added Tax Act 1994 Sch 2 para 4: see PARA 70 ante.

14    Ibid Sch 2 para 5(2).

15    As to references to the law of another member state see PARA 17 note 2 ante.

16    Ie such an option as is mentioned in the Value Added Tax Act 1994 Sch 2 para 1(2): see PARA 69 ante.

17    Ibid Sch 2 para 5(3).

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## **85. Cancellation of registration.**

Where a person registered in respect of his distance sales<sup>1</sup> satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> that he is not liable to be so registered, they must, if he so requests cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him<sup>3</sup>. They may not, however, so cancel a person's registration with effect from any time unless they are satisfied that it is not a time when he would be subject to a requirement<sup>4</sup> to be registered for value added tax<sup>5</sup>.

Where the Commissioners are satisfied that, on the day on which a person was registered in respect of his distance sales, he was not liable to be so registered<sup>6</sup> and he did not, in the case of a person voluntarily registered<sup>7</sup>, have the intention by reference to which he was registered<sup>8</sup>, they may cancel his registration with effect from that day<sup>9</sup>.

Where the Commissioners are satisfied that a person who has been voluntarily registered, and is not for the time being liable to be registered, in respect of his distance sales either:

- 216 (1) has not, by the date specified in his request to be registered, begun to make relevant supplies<sup>10</sup>, exercised the option in question or, as the case may be, begun to make supplies in relation to which the statutory conditions<sup>11</sup> are satisfied<sup>12</sup>; or
- 217 (2) has contravened any condition<sup>13</sup> of his registration<sup>14</sup>,

they may cancel his registration with effect from the date so specified or, as the case may be, the date of the contravention, or from such later date as may be agreed between them and him<sup>15</sup>. They may not, however, so cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled<sup>16</sup>, to be registered for VAT<sup>17</sup>.

The registration of a person who has exercised an option in accordance with the law of any member state<sup>18</sup> where he is taxable for treating relevant supplies made by him as taking place outside that member state<sup>19</sup> may not be cancelled with effect from any time before the 1 January which is, or next follows, the second anniversary of the date on which his registration took effect<sup>20</sup>.

Appeal lies to a VAT and duties tribunal against any decision of the Commissioners as to the cancellation of registration<sup>21</sup>.

1    le registered under the Value Added Tax Act 1994 s 3(2) (as amended), Sch 2: see PARA 69 et seq ante.

2    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3    Value Added Tax Act 1994 Sch 2 para 6(1).

4    In determining whether a person would be subject to a requirement to be registered at any time, so much of any provision of the Value Added Tax Act 1994 as prevents a person from becoming liable or entitled to be registered when he is already registered or when he is so liable under any other provision is to be disregarded: Sch 2 para 7(4).

5    Ibid Sch 2 para 7(1).



- 6 Ibid Sch 2 para 6(2)(a).
- 7 Ie registered under ibid Sch 2 para 4: see PARA 70 ante.
- 8 Ibid Sch 2 para 6(2)(a).
- 9 Ibid Sch 2 para 6(2).
- 10 For the meaning of 'relevant supplies' see PARA 69 ante.
- 11 Ie the conditions mentioned in the Value Added Tax Act 1994 Sch 2 para 1(3): see PARA 69 ante.
- 12 Ibid Sch 2 para 6(3)(a).
- 13 As to the imposition of conditions see PARA 70 ante.
- 14 Value Added Tax Act 1994 Sch 2 para 6(3)(b).
- 15 Ibid Sch 2 para 6(3).
- 16 As to the determination of a person's entitlement to be registered for these purposes see note 4 supra.
- 17 Ibid Sch 2 para 7(2).
- 18 As to references to the law of another member state see PARA 17 note 2 ante.
- 19 Ie such an option as is mentioned in the Value Added Tax Act 1994 Sch 2 para 1(2): see PARA 69 ante.
- 20 Ibid Sch 2 para 7(3).
- 21 See ibid s 83(a); and PARA 346 et seq post.

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### ***C. TERMINATION ETC IN RESPECT OF TAXABLE ACQUISITIONS***

#### **86. Matters affecting continuance of registration.**

A person who has become liable to be registered in respect of his taxable acquisitions from other member states<sup>1</sup> ceases to be so liable if at any time:

- 218 (1) his relevant acquisitions<sup>2</sup> in the year ending with 31 December last before that time did not have a value exceeding £60,000<sup>3</sup>; and
- 219 (2) the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> are satisfied that the value of his relevant acquisitions in the year immediately following that year will not exceed £60,000<sup>5</sup>.

A person does not, however, cease to be liable to be so registered except in accordance with these above provisions<sup>6</sup> or if at any time there are reasonable grounds for believing that the value of his relevant acquisitions in the period of 30 days then beginning will exceed £60,000<sup>7</sup>.

Any person so registered in respect of his taxable acquisitions from other member states who ceases to be registrable for value added tax<sup>8</sup> must notify the Commissioners of that fact within 30 days of the day on which he does so<sup>9</sup>. The notification must be made in writing to the Commissioners and must state the date on which he ceased to be registrable for these purposes<sup>10</sup>.

A person who has been voluntarily registered<sup>11</sup> must notify the Commissioners in writing, within 30 days of the first occasion after his registration when he makes a relevant acquisition, that he has done so<sup>12</sup>.

1 le registered under the Value Added Tax Act 1994 s 3(2), Sch 3 (as amended): see PARA 72 et seq ante.

2 For the meaning of 'relevant acquisition' see PARA 72 note 3 ante.

3 Value Added Tax Act 1994 Sch 3 para 2(1)(a) (Sch 3 para 2(1), (2) amended by the Value Added Tax (Increase of Registration Limits) Order 2005, SI 2005/727, art 3(a)). As to the Treasury's power to substitute a greater sum see PARA 72 note 4 ante.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 Value Added Tax Act 1994 Sch 3 para 2(1)(b) (as amended: see note 3 supra).

6 Ibid Sch 3 para 1(4).

7 Ibid Sch 3 para 2(2) (as amended: see note 3 supra).

8 For these purposes, a person ceases to be registrable under the Value Added Tax Act 1994 where: (1) he ceases to be a person who would be liable or entitled to be registered if his registration and any enactment preventing a person from being liable to be registered under different provisions at the same time were disregarded (Sch 2 para 5(3)(a)); or (2) in the case of a person who, having been registered under Sch 3 para 4(2) (voluntary registration: see PARA 73 ante), has not been such a person during his period of registration, he ceases to have any intention of making relevant acquisitions (Sch 2 para 5(3)(b)).

9 Ibid Sch 3 para 5(1).

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 5(3)(e) (substituted by SI 2000/794).

11 Ie under the Value Added Tax Act 1994 Sch 3 para 4(2): see PARA 73 ante.

12 Ibid Sch 3 para 5(2).

## **UPDATE**

### **86 Matters affecting continuance of registration**

TEXT AND NOTES--References to £60,000 are now to £68,000: Value Added Tax Act 1994 Sch 3 para 2 (amended by SI 2009/1031).

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## **87. Cancellation of registration.**

Where a person who has been registered in respect of his taxable acquisitions<sup>1</sup> satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> that he is not liable to be so registered, the Commissioners must, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him<sup>3</sup>. The Commissioners may not, however, so cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement<sup>4</sup> to be registered for value added tax<sup>5</sup>.

Where the Commissioners are satisfied that a person registered in respect of his taxable acquisitions has ceased, since his registration, to be so registrable<sup>6</sup>, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him<sup>7</sup>. The Commissioners may not, however, so cancel his registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled<sup>8</sup>, to be registered for VAT<sup>9</sup>.

Where the Commissioners are satisfied that:

- 220 (1) on the day on which a person was registered in respect of his taxable acquisitions he was not so registrable<sup>10</sup> and, in the case of a person who was voluntarily registered<sup>11</sup>, that he did not have the intention by reference to which he was registered<sup>12</sup>, they may cancel his registration with effect from that day<sup>13</sup>;
- 221 (2) a person who has been voluntarily registered<sup>14</sup> and is not for the time being liable to be registered has not begun, by the date specified in his request to be registered, to make relevant acquisitions<sup>15</sup>, or has contravened any condition<sup>16</sup> of his registration<sup>17</sup>, they may cancel his registration with effect from the date so specified or, as the case may be, the date of the contravention, or from such later date as may be agreed between them and him<sup>18</sup>.

The registration of a person who is voluntarily registered<sup>19</sup> or who would not, if he were not registered, be liable or entitled to be registered under any provision of the Value Added Tax Act 1994 except the provisions relating to voluntary registration in respect of taxable acquisitions<sup>20</sup>, must not be cancelled with effect from any time before the 1 January which is, or next follows, the second anniversary of the date on which his registration took effect<sup>21</sup>; although this does not apply to cancellation under head (1) or head (2) above<sup>22</sup>.

1 le registered under the Value Added Tax Act 1994 s 3(2), Sch 3 (as amended): see PARA 72 et seq ante.

2 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 Ibid Sch 3 para 6(1).

4 In determining for these purposes whether a person would be subject to a requirement to be registered at any time, so much of any provision of the Value Added Tax Act 1994 as prevents a person from becoming liable or entitled to be registered when he is already registered or when he is so liable under any other provision is to be disregarded: Sch 3 para 7(5).

5 Ibid Sch 3 para 7(1).

6 For these purposes, a person is registrable under *ibid* Sch 3 (as amended) at any time when he is liable to be so registered or is a person who makes relevant acquisitions: Sch 3 para 6(5). As to the relevant acquisitions for these purposes see *PARA 72* note 3 *ante*.

7 Ibid Sch 3 para 6(2).

8 See note 4 *supra*.

9 Value Added Tax Act 1994 Sch 3 para 7(2).

10 Ibid Sch 3 para 6(3)(a).

11 *Ie* under *ibid* Sch 3 para 4(2): see *PARA 73 ante*.

12 Ibid Sch 3 para 6(3)(b).

13 Ibid Sch 3 para 6(3).

14 See note 11 *supra*.

15 Value Added Tax Act 1994 Sch 3 para 6(4)(a).

16 As to the imposition of conditions see *PARA 73 ante*.

17 Value Added Tax Act 1994 Sch 3 para 6(4)(b).

18 Ibid Sch 3 para 6(4). The Commissioners may not, however, so cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under the Value Added Tax Act 1994: Sch 3 para 7(2).

19 Ibid Sch 3 para 7(3)(a). Voluntary registration is registration under Sch 3 para 4(1)-(4): see *PARA 73 ante*.

20 Ibid Sch 3 para 7(3)(b). The provisions relating to voluntary registration in respect of taxable acquisitions are set out in Sch 3 para 4: see *PARA 73 ante*.

21 Ibid Sch 3 para 7(3).

22 Ibid Sch 3 para 7(4).

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#### **(iv) Certification of Farmers etc**

##### **88. Power to certify farmers etc for value added tax purposes.**

A farmer who would otherwise be obliged to be registered for value added tax, or who would be eligible for voluntary registration, may instead apply to the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> for certification under the flat-rate scheme for farmers<sup>2</sup>. The Commissioners may certify<sup>3</sup> any person who satisfies them:

- 222 (1) that he is carrying on a business involving one or more designated farming activities<sup>4</sup>;
- 223 (2) that he is of such a description and has complied with such requirements as may be prescribed<sup>5</sup>; and
- 224 (3) where an earlier certification of that person has been cancelled, that more than the prescribed period has elapsed since the cancellation or that such other conditions as may be prescribed are satisfied<sup>6</sup>.

Where a person is for the time being so certified then, whether or not he is a taxable person<sup>7</sup>, so much of any supply<sup>8</sup> to him or any goods or services as is allocated to the relevant part of his business<sup>9</sup> in accordance with provision contained in regulations is disregarded for the purposes of determining whether he is, has become or has ceased to be liable or entitled to be registered<sup>10</sup> for VAT with respect to his taxable supplies<sup>11</sup>. Where he makes supplies of goods or services in the course or furtherance of the relevant part of his business to a taxable person, he must include a flat-rate amount in the consideration which may be treated as VAT incurred by the recipient for the purposes of input tax credit<sup>12</sup>. This amount ('the flat-rate addition') is retained by the farmer and may be recovered by the recipient of the supply as if it were input tax<sup>13</sup>. The flat-rate addition may be included in all supplies, even those that would be zero-rated if made by a taxable person, since it is not a rate of VAT but merely a method of compensating farmers for the input tax they have foregone by electing not to register. If a flat-rate farmer sells goods by auction, the flat-rate addition may be added to the price at which the goods are sold, if purchased by a taxable person, except where the auctioneer acts as principal, rather than as the farmer's agent<sup>14</sup>.

Regulations made for these purposes may provide:

- 225 (a) for the form and manner in which an application for certification, or for the cancellation of any such certification, is to be made<sup>15</sup>;
- 226 (b) for the cases and manner in which the Commissioners may cancel a person's certification<sup>16</sup>;
- 227 (c) for entitlement to a credit in respect of input tax<sup>17</sup> to depend on the issue of an invoice<sup>18</sup> containing such particulars as may be prescribed, or as may be notified by the Commissioners in accordance with provision contained in regulations<sup>19</sup>; and
- 228 (d) for the imposition on certified persons of obligations with respect to the keeping, preservation and production of such records as may be prescribed and of obligations to comply with such requirements with respect to any of those matters as may be so notified<sup>20</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 See the text and notes 3-20 *infra*; and PARA 89 *et seq post*.

3 *Ie* in accordance with such provision as may be contained in regulations made by them under the Value Added Tax Act 1994: ss 54(1), 96(1). See the Value Added Tax Regulations 1995, SI 1995/2518, Pt XXIV (regs 202-211) (as amended); and PARA 90 *et seq post*.

4 Value Added Tax Act 1994 s 54(1)(a). 'Designated activities' means such activities, being activities carried on by a person who, by virtue of carrying them on, falls to be treated as a farmer for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 25 (common flat-rate scheme for farmers), as the Treasury may by order designate: Value Added Tax Act 1994 s 54(8). For the activities (and associated services) so designated see the Value Added Tax (Flat-rate Scheme for Farmers) (Designated Activities) Order 1992, SI 1992/3220 (which corresponds to EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 25(2), Annex A, B); and PARA 89 *post*. The European Court of Justice has held that the common flat-rate scheme for farmers applies only to the supply of the agricultural products and services specified in art 25(2), Annex A, B, and that other operations carried out by flat-rate farmers are subject to the general scheme for VAT: see Case C-43/04 *Finanzamt Arnsberg v Stadt Sundern* [2005] All ER (D) 421 (May), ECJ. For the meaning of 'business' see PARA 23 ante. As to the Sixth Directive see PARA 1 note 1 ante.

5 Value Added Tax Act 1994 s 54(1)(b). For the meaning of 'prescribed' see PARA 17 note 4 ante.

6 *Ibid* s 54(1)(c).

7 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

8 For the meaning of 'supply' see PARA 27 ante.

9 For these purposes, references in relation to any person to the relevant part of his business are references: (1) where the whole of his business relates to the carrying on of one or more designated activities, to that business (Value Added Tax Act 1994 s 54(7)(a)); and (2) in any other case, to so much of his business as does so relate (s 54(7)(b)).

10 *Ie* under *ibid* s 3(2), Sch 1 (as amended): see PARA 64 *et seq ante*.

11 *Ibid* s 54(2).

12 The Commissioners may by regulations provide for an amount included in the consideration for any taxable supply which is made: (1) in the course or furtherance of the relevant part of his business by a person who is for the time being certified under *ibid* s 54 (s 54(3)(a)); (2) at a time when that person is not a taxable person (s 54(3)(b)); and (3) to a taxable person (s 54(3)(c)), to be treated, for the purpose of determining the entitlement of the person supplied to credit under ss 25, 26 (see PARAS 216-217 *post*), as VAT on a supply to that person (s 54(3)); and see the Value Added Tax Regulations 1995, SI 1995/2518, reg 209(1). The amount which, for the purposes of any provision so made, may be included in the consideration for any supply is to be an amount equal to such percentage as the Treasury may by order specify of the sum which, with the addition of that amount, is equal to the consideration for the supply: Value Added Tax Act 1994 s 54(4). At the date at which this volume states the law, no such order had been made but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax (Flat-rate Scheme for Farmers) (Percentage Addition) Order 1992, SI 1992/3221, has effect as if so made. The percentage referred to is 4%: art 2. As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

13 Save as the Commissioners may otherwise allow or direct generally or specially, a taxable person claiming entitlement to a credit of such an amount must do so on the return made by him for the prescribed accounting period in which the invoice specified in the Value Added Tax Regulations 1995, SI 1995/2518, reg 209(3) is issued by a certified person: reg 209(2). A taxable person is not so entitled to credit unless there has been issued an invoice containing the following particulars: (1) an identifying number (reg 209(3)(a)); (2) the name, address and certificate number of the certified person by whom the invoice is issued (reg 209(3)(b)); (3) the name and address of the person to whom the goods or services are supplied (reg 209(3)(c)); (4) the time of the supply (reg 209(3)(d)); (5) a description of the goods or services supplied (reg 209(3)(e)); (6) the consideration for the supply or, in the case of any increase or decrease in the consideration, the amount of that increase or decrease excluding the amount as is mentioned in reg 209(1) (reg 209(3)(f)); and (g) the amount as so mentioned, which is entitled 'Flat-rate Addition' or 'FRA' (reg 209(3)(g)). For the meaning of 'prescribed accounting period' see PARA 115 note 15 *post*.

14 See Customs and Excise Public Notice 700/46 *Agricultural Flat Rate Scheme* (January 2002) PARA 8.

- 15 Value Added Tax Act 1994 s 54(6)(a). See PARA 90 post.
- 16 Ibid s 54(6)(b). See PARA 93 post.
- 17 ie such a credit as is mentioned in ibid s 54(3): s 54(6)(c).
- 18 For the meaning of 'invoice' see PARA 17 note 9 ante.
- 19 Value Added Tax Act 1994 s 54(6)(c).
- 20 Ibid s 54(6)(d). See PARA 91 post.

## **UPDATE**

### **88 Power to certify farmers etc for value added tax purposes**

NOTE 4--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).



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## 89. Designated activities.

The designated activities<sup>1</sup> for the purposes of the flat-rate scheme for farmers<sup>2</sup> are:

- 229 (1) crop production<sup>3</sup>;
- 230 (2) general stock farming, poultry farming, rabbit farming, bee-keeping, silkworm farming and snail farming<sup>4</sup>;
- 231 (3) forestry consisting of the growing, felling and general husbandry of trees in a forest, wood or copse<sup>5</sup>;
- 232 (4) fresh-water fishing, fish farming, the breeding of mussels, oysters and other molluscs and crustaceans and frog farming<sup>6</sup>; and
- 233 (5) the processing by a person of products derived from his activities falling within any of these descriptions, provided that he uses only such means as are normally employed in the course of such activities<sup>7</sup>.

Certain services<sup>8</sup> are also designated activities provided that:

- 234 (a) the person performing them also carries out activities falling within one or more of heads (1) to (5) above<sup>9</sup>;
- 235 (b) he performs them himself or they are performed by his employees, or both<sup>10</sup>; and
- 236 (c) any equipment he uses in carrying them out, or hires to another for agricultural purposes, is equipment which he also uses for carrying out his other designated activities<sup>11</sup>.

1 For the meaning of 'designated activities' see PARA 88 note 4 ante.

2 Value Added Tax (Flat-rate Scheme for Farmers) (Designated Activities) Order 1992, SI 1992/3220, art 2(1). As to the flat-rate scheme for farmers see PARA 88 et seq ante. See also Customs and Excise Public Notice 700/46 *Agricultural Flat Rate Scheme* (January 2002).

3 Value Added Tax (Flat-rate Scheme for Farmers) (Designated Activities) Order 1992, SI 1992/3220, art 2(1), Schedule Pt I. 'Crop production' for these purposes consists of: (1) general agriculture, including viticulture (Schedule Pt I para 1); (2) the growing of fruit and vegetables, flowers and ornamental plants, whether in the open or under glass (Schedule Pt I para 2); (3) the production of mushrooms, spices, seeds and propagating materials (Schedule Pt I para 3); and (4) nurseries (Schedule Pt I para 3).

4 Ibid Schedule Pt II.

5 Ibid Schedule Pt III.

6 Ibid Schedule Pt IV.

7 Ibid Schedule Pt V.

8 Those services are: (1) field work, reaping and mowing, threshing, bailing, collecting, harvesting, sowing and planting (ibid Schedule Pt VI para 1); (2) packing and preparing for market (including drying, cleaning, grinding, disinfecting and ensilaging) of agricultural products for market (Schedule Pt VI para 2); (3) storage of agricultural products (Schedule Pt VI para 3); (4) stock minding, rearing and fattening (Schedule Pt VI para 4); (5) hiring out of equipment for use in any designated activities (Schedule Pt VI para 5); (6) technical assistance in relation to any designated activities (Schedule Pt VI para 6); (7) destruction of weeds and pests, dusting and spaying of crops and land (Schedule Pt VI para 7); (8) operation of irrigation and drainage equipment (Schedule

Pt VI para 8); and (9) lopping, tree felling and other forestry services (Schedule Pt VI para 9). The European Court of Justice has held that the granting of hunting licences is not an agricultural service for these purposes (see Case C-43/04 *Finanzamt Arnsberg v Stadt Sundern* [2005] All ER (D) 421 (May), ECJ), while the Commissioners for Her Majesty's Revenue and Customs do not consider the following, inter alia, to be designated activities: dealing in, and the training of, animals; dairy co-operatives that do not produce their own milk; sawmills; and other activities once removed from farming: Customs and Excise Business Brief 10/92 [1992] STI 726 at 727. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

9 Value Added Tax (Flat-rate Scheme for Farmers) (Designated Activities) Order 1992, SI 1992/3220, art 2(2) (a).

10 Ibid art 2(2)(b).

11 Ibid art 2(2)(c).

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## **90. Admission to the scheme and certification.**

If:

- 237 (1) a person satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> that he is carrying on a business involving one or more designated activities<sup>2</sup>;
- 238 (2) that person has not in the three years preceding the date of his application for certification been convicted of any offence in relation to value added tax<sup>3</sup>, made any payment<sup>4</sup> to compound proceedings in respect of VAT<sup>5</sup>, or been assessed<sup>6</sup> to a penalty<sup>7</sup>;
- 239 (3) he makes an application for certification<sup>8</sup>; and
- 240 (4) he satisfies the Commissioners that he is a person in respect of whom the total of the amounts to be treated as credits for input tax<sup>9</sup> relating to supplies made in the year following the date of his certification will not exceed by £3,000 or more the amount of input tax to which he would otherwise be entitled to credit in that year<sup>10</sup>,

the Commissioners must certify that that person is a flat-rate farmer for the purposes of the flat-rate scheme<sup>11</sup>. An appeal lies to a VAT and duties tribunal against any refusal of certification under these provisions<sup>12</sup>.

Where a person is for the time being so certified, then whether or not that person is a taxable person<sup>13</sup>, any supply<sup>14</sup> of goods or services made by him in the course or furtherance of the relevant part of his business<sup>15</sup> is to be disregarded for the purpose of determining whether he is, has become or has ceased to be liable or entitled to be registered<sup>16</sup> for VAT<sup>17</sup>.

Where the Commissioners certify that a person is a flat-rate farmer for the purposes of the scheme, the certificate issued by them is effective from either the date on which the application for certification is received by them<sup>18</sup> or, if the person so requests, a later date which is no more than 30 days after that date<sup>19</sup>. An earlier date may, however, be agreed<sup>20</sup>, but no certificate is to be effective from a date before the date when the person's registration<sup>21</sup> is cancelled<sup>22</sup>.

Where a person who has been certified and is no longer so certified makes a further application, that person may not be certified for a period of three years from the date of the cancellation<sup>23</sup> of his previous certificate except in certain specified circumstances<sup>24</sup>.

If a farmer deregisters solely in order to become a flat-rate farmer he will not have to account for output tax on his stocks and other physical assets on hand, even if he claimed input tax when purchasing them<sup>25</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Value Added Tax Regulations 1995, SI 1995/2518, reg 204(a). For the meaning of 'designated activities' see PARAS 88 note 4, 89 ante.

3 Ibid reg 204(b)(i).

- 4    le under the Customs and Excise Management Act 1979 s 152 (as amended; applied by the Value Added Tax Act 1994 s 72(12) (see PARA 316 post)).
- 5    Value Added Tax Regulations 1995, SI 1995/2518, reg 204(b)(ii).
- 6    le under the Value Added Tax Act 1994 s 60 (see PARA 321 post).
- 7    Value Added Tax Regulations 1995, SI 1995/2518, reg 204(c).
- 8    Ibid reg 204(c). Applications for certification must be made on the form set out in Sch 1, Form 14: reg 204(c).
- 9    le the amounts mentioned in ibid reg 209 (see PARA 88 ante).
- 10   Ibid reg 204(d).
- 11   Ibid reg 203(1). As to the flat-rate scheme see PARA 88 et seq ante.
- 12   See the Value Added Tax Act 1994 s 83(m); and PARA 346 et seq post.
- 13   For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.
- 14   For the meaning of 'supply' see PARA 27 ante.
- 15   For the meaning of 'the relevant part of his business' see PARA 88 note 8 ante; and as to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.
- 16   le under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended): see PARA 64 et seq ante.
- 17   Value Added Tax Regulations 1995, SI 1995/2518, reg 203(2).
- 18   Ibid reg 205(a).
- 19   Ibid reg 205(c).
- 20   Ibid reg 205(b).
- 21   le under the Value Added Tax Act 1994 Sch 1 (as amended) or Sch 3 (as amended): see PARA 64 et seq ante.
- 22   Value Added Tax Regulations 1995, SI 1995/2518, reg 205. As to the cancellation of registration see PARA 80 et seq ante.
- 23   As to the cancellation of certificates see PARA 93 post.
- 24   Value Added Tax Regulations 1995, SI 1995/2518, reg 208. The Commissioners may certify from the date of his further application a person who has not been registered under the Value Added Tax Act 1994 Sch 1 (as amended) or Sch 3 (as amended) at any time since the cancellation of the previous certificate (Value Added Tax Regulations 1995, SI 1995/2518, reg 208(a)); and where the circumstances as are mentioned in the Value Added Tax Act 1994 s 5(1), Sch 4 para 8(1)(c) (see PARA 30 ante) apply, the Commissioners may certify the person mentioned in Sch 4 para 8(1)(c) on a date after the expiry of one year from the date of the cancellation of his previous certificate (Value Added Tax Regulations 1995, SI 1995/2518, reg 208(b)).
- 25   See Customs and Excise Business Brief 10/92 [1992] STI 726 at 727.

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## **91. Duty to keep and produce records.**

For the purposes of the flat-rate scheme for farmers<sup>1</sup> every certified person<sup>2</sup> must keep and preserve his business and accounting records<sup>3</sup> and copies of all specified invoices<sup>4</sup> issued by him or on his behalf<sup>5</sup>. Upon demand made by an authorised person<sup>6</sup>, every certified person must produce any such documents, or cause them to be produced, for inspection at his principal place of business or such other place as the authorised person may reasonably require<sup>7</sup>, and at such time as he may so require<sup>8</sup>. He must permit an authorised person to take copies of, or make extracts from, any such document, or to remove it at a reasonable time and for a reasonable period<sup>9</sup>. Where any documents so removed are lost or damaged, the Commissioners for Her Majesty's Revenue and Customs are liable to compensate their owner for any expenses reasonably incurred by him in replacing or repairing the documents<sup>10</sup>.

1 As to the flat-rate scheme for farmers see PARA 88 et seq ante.

2 'Certified person' means a person certified as a flat-rate farmer for the purposes of the flat-rate scheme under the Value Added Tax Regulations 1995, SI 1995/2518, reg 203: see PARA 90 ante.

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 210(1)(a).

4 ie all invoices specified in ibid reg 209(3): see PARA 88 note 13 ante.

5 Ibid reg 210(1)(b). Every certified person must comply with such requirements with respect to the keeping, preservation and production of records as the Commissioners for Her Majesty's Revenue and Customs may notify to him: reg 210(2). He must keep and preserve such records as are required by reg 210(1) or by notification for a period of six years or such lesser period as the Commissioners may allow: reg 210(3). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 'Authorised person' means any person acting under the authority of the Commissioners: Value Added Tax Act 1994 s 96(1).

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 211(1)(a)(i).

8 Ibid reg 211(1)(a)(ii).

9 Ibid reg 211(1)(b). Where a document removed by an authorised person is reasonably required for the proper conduct of a business, he must, as soon as practicable, provide a copy of that document, free of charge, to the person by whom it was produced or caused to be produced: reg 211(2).

10 Ibid reg 211(3).

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## **92. Death, bankruptcy or incapacity of certified person.**

If a certified person<sup>1</sup> dies or becomes bankrupt or incapacitated<sup>2</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> may treat any person carrying on his designated activities<sup>4</sup> as a certified person from the date on which the first person died or became bankrupt or incapacitated, until either some other person is certified in respect of those activities, or the incapacity ceases<sup>5</sup>.

1 For the meaning of 'certified person' see PARA 91 note 2 ante.

2 In relation to a company which is a certified person, references to that person becoming bankrupt or incapacitated are to be construed as references to its going into liquidation or receivership or entering administration: Value Added Tax Regulations 1995, SI 1995/2518, reg 207(3) (amended by SI 2003/2096).

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 For the meaning of 'designated activities' see PARAS 88 note 4, 89 ante. A person carrying on such designated activities must, within 30 days of commencing to do so, inform the Commissioners in writing of that fact and of the date of the death, or of the nature of the incapacity and the date on which it began: Value Added Tax Regulations 1995, SI 1995/2518, reg 207(2).

5 Ibid reg 207(1). The provisions of the Value Added Tax Act 1994 and of any regulations made thereunder apply to any person so treated as if he were a certified person: Value Added Tax Regulations 1995, SI 1995/2518, reg 207(1).

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### 93. Cancellation of certificates.

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may cancel a person's certificate under the flat-rate scheme for farmers<sup>2</sup> in any case where:

- 241 (1) a statement false in a material particular was made by him or on his behalf in relation to his application for certification<sup>3</sup>;
- 242 (2) he has been convicted of an offence in connection with value added tax or has made a payment<sup>4</sup> to compound such proceedings<sup>5</sup>;
- 243 (3) he has been assessed<sup>6</sup> to a penalty<sup>7</sup>;
- 244 (4) he ceases to be involved in designated activities<sup>8</sup>;
- 245 (5) he dies, becomes bankrupt or incapacitated<sup>9</sup>;
- 246 (6) he is liable to be registered<sup>10</sup> for VAT<sup>11</sup>;
- 247 (7) he makes an application in writing for cancellation<sup>12</sup>;
- 248 (8) he makes an application in writing<sup>13</sup> for registration<sup>14</sup>;
- 249 (9) they consider it necessary to do so for the protection of the revenue<sup>15</sup>; or
- 250 (10) they are not satisfied that any of the grounds for cancellation of a certificate mentioned in heads (1) to (8) above do not apply<sup>16</sup>.

An appeal lies to a VAT and duties tribunal against any cancellation of a person's certificate under these provisions or any refusal to cancel such certification<sup>17</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 As to the flat-rate scheme for farmers see PARA 88 et seq ante.

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 206(1)(a). The effective date of the cancellation is the date when the Commissioners discover that such a statement has been made: reg 206(2)(a).

4 Ie under the Customs and Excise Management Act 1979 s 152 (as amended; applied by the Value Added Tax Act 1994 s 72(12) (see PARA 316 post)).

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 206(1)(b). The effective date of the cancellation is the date of his conviction or the date on which a sum is paid to compound proceedings: reg 206(2)(b).

6 Ie under the Value Added Tax Act 1994 s 60: see PARA 321 post.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 206(1)(c). The effective date of the cancellation is 30 days after the date when the assessment is notified: reg 206(2)(c).

8 Ibid reg 206(1)(d). The effective date of the cancellation is the date of the cessation of designated activities: reg 206(2)(d). For the meaning of 'designated activities' see PARAS 88 note 4, 89 ante.

9 Ibid reg 206(1)(e). The effective date of the cancellation is the date on which he died, became bankrupt or incapacitated: reg 206(2)(e). In relation to a company which is a certified person, the references to the certified person becoming bankrupt or incapacitated are to be construed as references to its going into liquidation or receivership or entering administration: reg 207(3) (amended by SI 2003/2096).

10 Ie under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended) (see PARA 64 et seq ante) or Sch 3 (as amended) (see PARA 72 et seq ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 206(1)(f).

11 Ibid reg 206(1)(f). The effective date of the cancellation is the effective date of registration: reg 206(2)(f).

12 Ibid reg 206(1)(g). The effective date of the cancellation is not less than one year after the effective date of his certificate, or such earlier date as the Commissioners may agree: reg 206(2)(g).

13 Ie an application for registration under the Value Added Tax Act 1994 Sch 1 (as amended) or Sch 3 (as amended), which is deemed to be an application for cancellation of his certificate: Value Added Tax Regulations 1995, SI 1995/2518, reg 206(1)(h).

14 Ibid reg 206(1)(h). The effective date of the cancellation is not less than one year after the effective date of his certificate or such earlier date as the Commissioners may agree: reg 206(2)(h).

15 Ibid reg 206(1)(i). The effective date of the cancellation is the date on which the Commissioners consider a risk to the revenue arises: reg 206(2)(i).

16 Ibid reg 206(1)(j). The effective date of the cancellation is the date mentioned in reg 206(2)(a)-(h) as appropriate: reg 206(2)(j).

17 See the Value Added Tax Act 1994 s 83(m); and PARA 346 et seq post.



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### **(3) VALUE OF GOODS OR SERVICES**

#### **(i) In general**

#### **94. The valuation of supplies of goods or services.**

The manner of determining the value of a supply of goods or services for the purposes of value added tax depends on the form of consideration given for the supply<sup>1</sup>. If the supply is for a consideration<sup>2</sup> in money its value is taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration<sup>3</sup>. If the supply is for a consideration not consisting, or not wholly consisting, of money, its value is taken to be such amount in money as, with the addition of the VAT chargeable, is equivalent to the consideration<sup>4</sup>. Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply is deemed to be for such part of the consideration as is properly attributable to it<sup>5</sup>.

1 See the text and notes 2-5 infra; and PARA 95 et seq post. For the meaning of 'supply' see PARA 27 ante.

2 For the meaning of 'consideration' see PARA 95 post.

3 Value Added Tax Act 1994 s 19(1), (2). Thus if goods whose supply attracts VAT at the standard rate of 17.5% (see PARA 5 ante) are sold for cash consideration of £117.50, the value of the supply is £100, on which VAT of £17.50 is chargeable. Where goods are purchased with vouchers which the customers have acquired from a third party, the value of the supply for VAT is the face value of the voucher and not the lesser amount eventually received by the trader from the third party: *Davies v Customs and Excise Comrs* [1975] 1 All ER 309, [1975] 1 WLR 204, DC. Correspondingly, where the issuer of the voucher redeems the voucher for less than its face value, the issuer provides the service of redemption for a consideration equal to the amount foregone by the retailer: *Customs and Excise Comrs v High Street Vouchers Ltd* [1990] STC 575, following *Customs and Excise Comrs v Diners Club Ltd* [1989] 2 All ER 385, [1989] STC 407, CA. The commission which is deducted by a credit card company in paying the retailer under a credit card transaction may not be deducted in arriving at the consideration for the supply by the retailer to his customer: Case C-18/92 *Chaussures Bally SA v Belgian State* [1993] ECR I-2871, [1997] STC 209, ECJ. Cf Case C-34/99 *Customs and Excise Comrs v Primback Ltd* [2001] All ER (EC) 714, [2001] 1 WLR 1693, ECJ (where goods are sold on terms allowing interest-free credit, financed by a third party, the amount on which the retailer is to account for VAT (as part of his daily gross takings under his retail scheme: see PARA 199 et seq post) is the amount paid by the consumer, and not the net amount received from the finance company). The general provisions of the Value Added Tax Act 1994 s 19(2)-(4) are subject to the specific provisions of s 19(1), Sch 6 (as amended) (see PARA 95 et seq post): s 19(1). In determining the value of a supply under s 19, one is not concerned with the motives of either the supplier or the recipient, so that, where the consideration is in money, the measure of the value of the supply is the money consideration, notwithstanding that the recipient understood that the payment was made out of a sense of public duty or included a large element of donation: *Customs and Excise Comrs v Battersea Leisure Ltd* [1992] STC 213; *Customs and Excise Comrs v Tron Theatre Ltd* [1994] STC 177 (Ct of Sess); *High Peak Theatre Trust Ltd v Customs and Excise Comrs* (1995) VAT Decision 13678, [1995] STI 2029. As to the exemption for supplies made by charities in the course of fund-raising events see PARA 171 post; and as to the valuation of acquisitions of goods from other member states see PARA 108 et seq post.

Regulations made by the Commissioners for Her Majesty's Revenue and Customs under the Value Added Tax Act 1994 may require that in prescribed circumstances there is to be taken into account, as constituting part of the consideration for the purpose of s 19(2) (where it would not otherwise be so taken into account), money paid in respect of the supply by persons other than those to whom the supply is made: Sch 6 para 12. For the meaning of 'money' see PARA 33 note 7 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 Ibid s 19(3). See further *Lex Services plc v Customs and Excise Comrs* [2003] UKHL 67, [2004] 1 All ER 434 (car purchase by way of part-exchange; taxpayer sometimes allowing customer an 'additional allowance' in

respect of existing car to ensure sale); and *Customs and Excise Comrs v Ping (Europe) Ltd* [2002] EWCA Civ 1115, [2002] STC 1186 (an unusual case where the non-monetary part of the consideration involved the trading-in of non-conforming, and therefore valueless, golf clubs).

5 Value Added Tax Act 1994 s 19(4). In Joined Cases C-308/96 and C-94/97 *Customs and Excise Comrs v Madgett and Baldwin (t/a Howden Court Hotel)*; *Madgett and Baldwin (t/a Howden Court Hotel) v Customs and Excise Comrs* [1998] STC 1189, [1999] 2 CMLR 392, ECJ, the Court declared that it is necessary to determine the unit of reference to be used as an alternative to the consideration in order to identify the part of the package which relates to the services in question: it identified two methods, one based on actual costs (as in the tour operators' margin scheme: see PARA 214 post), and the other based on market value and, on the facts before it, adopted the latter. In *Public and Commercial Services Union v Customs and Excise Comrs* [2003] EWHC 2845 (Ch), [2004] STC 376, Lindsay J held that there were a number of factors which might properly be taken into account in the selection of which attribution method was to be used in a given situation, that *Customs and Excise Comrs v Madgett and Baldwin* supra accordingly did not compel a market value method to be used for attribution in all cases, and that a cost-based method could therefore be used if more appropriate to the facts in hand. As to the circumstances in which a taxpayer (in this case a tour operator) might recalculate his taxable margin in accordance with the market value method see Case C-291/03 *MyTravel plc v Customs and Excise Comrs* [2005] STC 1617, [2005] All ER (D) 53 (Oct), ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(3) VALUE OF GOODS OR SERVICES/(i) In general/95. Meaning of 'consideration'.

## 95. Meaning of 'consideration'.

For the purposes of value added tax, 'consideration' does not bear the technical meaning given to that word by the English law of contract<sup>1</sup>; for something which is given to a supplier to constitute consideration for VAT purposes, it must be capable of being expressed in monetary terms and there must be a direct link between the service provided and the consideration received<sup>2</sup>. In determining the value of a supply for which consideration is given otherwise than in money, a subjective valuation must be ascribed to that which is received, and not a value estimated according to objective criteria<sup>3</sup>. The value of a supply paid for in foreign currency is taken as the sterling equivalent at the time of supply<sup>4</sup>.

The taxable amount (on which VAT is to be charged) includes everything<sup>5</sup> which constitutes the consideration which is obtained by the supplier from the purchaser, the customer or a third party<sup>6</sup> for such supplies including subsidies directly linked to the price of such supplies<sup>7</sup>. Since in order for there to be a taxable supply the consideration for the supply has to be capable of being expressed in money<sup>8</sup>, then where the consideration is so capable, the question to be considered is whether the parties have expressly or implicitly attributed a monetary value to the consideration: if they have, the consideration is that agreed monetary value<sup>9</sup>. However, one must exclude from the taxable amount: (1) price reductions by way of discount for early payment<sup>10</sup>; (2) price discounts and rebates allowed to the customer and accounted for at the time of supply<sup>11</sup>; and (3) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in a suspense account<sup>12</sup>. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount is reduced<sup>13</sup>.

1 As to that meaning see CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

2 See Case 154/80 *Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats GA* [1981] ECR 445, [1981] 3 CMLR 337, ECJ (a case under EC Council Directive 67/228 (OJ 71, 14.4.67, p 13) on the harmonisation of legislation of member states concerning turnover taxes, art 8(a) (repealed)) (where a potato growers' co-operative which ran a warehouse for the storage of its members' goods did not impose a storage charge for the service provided, as no charge was made, the service was not supplied against payment, so that there was no consideration for VAT purposes; a reduction in the value of the members' shares as a result of the failure to charge for storage involved no direct link between the so-called consideration and the service provided); Case 102/86 *Apple and Pear Development Council v Customs and Excise Comrs* [1988] ECR 1443, [1988] 2 All ER 922, ECJ (compulsory contributions imposed under power conferred by subordinate legislation did not constitute consideration because there was no relationship between the contribution made and the level of service received); *Institute of Leisure and Amenity Management v Customs and Excise Comrs* [1988] STC 602 (the institute was liable to account for VAT on voluntary contributions obtained from its members in return for which each member received various services); *Tamburello Ltd v Customs and Excise Comrs* [1996] V & DR 268 (interest-free loan was part of consideration for hiring of car); Case C-258/95 *Julius Fillibeck Söhne GmbH & Co KG v Finanzamt Neustadt* [1998] All ER (EC) 466, ECJ (work to be performed, and wages received, by employees provided by employer with free transport to workplace, not effected for consideration); and *Debenhams Retail plc v Revenue and Customs Comrs* [2005] EWCA Civ 892, [2005] STC 1155 (price of retail goods attributed partly to those goods and partly to the supply of card-handling services, retail supply of goods under these terms held to be a supply for a consideration consisting of 100% of the total paid by the customer). Where a trade development organisation was funded by contributions from its government and a percentage levy on imports and exports of goods, there was no direct link between the sums received and the services provided so that that organisation was not a taxable person making supplies for a consideration: Case 89/81 *Staatssecretaris van Financiën v Hong Kong Trade Development Council* [1982] ECR 1277, [1983] 1 CMLR 73, ECJ. Similarly, a local authority grant to fund a legal advice centre was not consideration for a supply for VAT purposes (*Hillingdon Legal Resources Centre Ltd v Customs and Excise Comrs* [1991] VATTR 39); nor a local

authority grant to a charity proving work experience (*Trustees of the Bowthorpe Community Trust v Customs and Excise Comrs* (1995) VAT Decision 12978, [1995] STI 649); cf *Netherlands Board of Tourism v Customs and Excise Comrs* (1995) VAT Decision 12935, [1995] STI 502 (the taxpayer made a taxable supply of services against consideration when it agreed to promote Dutch tourism in return for the Dutch Government agreeing to fund the cost of the services of promotion). The Arts Council does not make supplies for a consideration when it receives or distributes the yearly Parliamentary grant in aid: *Arts Council of Great Britain v Customs and Excise Comrs* (1994) VAT Decision 11991, [1994] STI 713; see also *Institute of Chartered Accountants in England and Wales v Customs and Excise Comrs* [1999] 2 All ER 449, [1999] STC 398, HL (where the institute licensed persons wishing to carry on investment business, or to act as auditors or insolvency practitioners, that activity was essentially regulatory in nature and was therefore not an economic activity, notwithstanding that fees were charged for the provision of the licence); *Customs and Excise Comrs v British Field Sports Society* [1998] 2 All ER 1003, [1998] 1 WLR 962, CA (political lobbying against legislation relating to field sports constituted a business activity, the consideration for which was the members' subscription to the society). Interest awarded by a court in proceedings to recover a debt for services supplied was not consideration for VAT purposes: Case 222/81 *BAZ Bausystem AG v Finanzamt München für Körperschaften* [1982] ECR 2527, [1982] 3 CMLR 688, ECJ. Where the appellant was a barrel-organ player who solicited voluntary donations from passers-by, there was no direct link between the provision of the music and the receipt of a donation, because the fact and size of each donation was determined by the passer-by and not by agreement between the parties: Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] ECR I-743, [1994] STC 509, ECJ. See also Case C-48/97 *Kuwait Petroleum (GB) Ltd v Customs and Excise Comrs* [1999] All ER (EC) 450, ECJ (supply of goods which were disposed of to persons in exchange for vouchers obtained following the purchase of fuel under a sales promotion scheme was to be treated, where the goods were not of small value, as a supply for consideration for VAT purposes); the subsequent related proceedings *Kuwait Petroleum (GB) Ltd v Customs and Excise Comrs* [2001] STC 62 (views of European Court of Justice as to facts were formidable indications; exchange of goods for vouchers was disposal free of charge); and *Customs and Excise Comrs v Littlewoods Organisation plc* [2001] EWCA Civ 1542, [2001] STC 1568; *Lex Services plc v Customs and Excise Comrs* [2003] UKHL 67, [2004] 1 All ER 434 (car purchase by way of part-exchange). See also, however (distinguishing *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* supra), *Stewart v Customs and Excise Comrs* [2001] EWCA Civ 1988, [2002] STC 255. See also *Customs and Excise Comrs v Euphony Communications Ltd* [2003] EWHC 3008 (Ch), [2004] STC 301. The monetary equivalent of vouchers must be taken into account when establishing whether they should be treated as consideration: *Hartwell plc v Customs and Excise Comrs* [2003] EWCA Civ 130, [2003] STC 396 (use of 'purchase plus' vouchers, with a monetary value, when buying and selling used and new cars, and use of MOT vouchers, with no monetary value, in same context). Consideration may exist for VAT purposes notwithstanding that it is difficult to calculate: Case C-172/96 *First National Bank of Chicago v Customs and Excise Comrs* [1998] All ER (EC) 744, ECJ (consideration received by bank in respect of foreign exchange services provided to customers free of any specific fee or commission, the bank choosing instead to make profit from the 'spread' between the buying and selling rates of exchange, calculated as being the net result of all the transactions carried out by the bank over a given period of time). Competition entry fees representing the consideration actually received by competition organiser constituted taxable amount: see Case C-498/99 *Town and Country Factors Ltd v Customs and Excise Comrs* [2003] All ER (EC) 33, ECJ. See also *Arsenal Football Club plc v Customs and Excise Comrs* (1996) VAT Decision 14011, [1996] STI 965 (where the link between the giving of a loan and the obtaining of a season ticket was held to be insufficiently direct to treat the making of the former as part of the consideration for the latter); cf *Telewest Communications Group Ltd v Customs and Excise Comrs* (1996) VAT Decision 14383, [1996] STI 1639 (where a customer obtained cable TV services from an operator both by entering into an agreement and by giving an undertaking to permit the operator to remove the customer's satellite dish, the latter undertaking was an ingredient in the taxable consideration provided by the customer). Where a company provided management services to its employees' pension fund under a contract which provided that the contributions it was obliged to make should be calculated on a basis which took account of the expenditure it incurred in the supply of the services, there was no supply by the company for consideration, liable to VAT: *National Coal Board v Customs and Excise Comrs* [1982] STC 863; but see *Eastbourne Town Radio Cars Association v Customs and Excise Comrs* [2001] UKHL 19, [2001] STC 606 (non-profit organisation which acted as agent for its members in return for contributions towards its running costs was making a taxable supply to its members). In Case C-215/94 *Mohr v Finanzamt Bad Segeberg* [1996] ECR I-959, [1996] STC 328, ECJ, it was held that an undertaking given by a farmer to discontinue milk production in consequence of which he obtained compensation was not a supply of services for consideration, liable to VAT, since there was an absence of 'consumption'; the Community, by compensating the farmer, was not obtaining a supply of goods or services, but acting in the common interest of promoting the proper functioning of the Community milk market. Quære whether this principle applies to all forms of statutory compensation. See also *Goodfellow v Customs and Excise Comrs* [1986] VATTR 119; and *Co-operative Insurance Society Ltd v Customs and Excise Comrs* [1992] 3 CMLR 10, [1992] VATTR 44; cf *Customs and Excise Comrs v High Street Vouchers Ltd* [1990] STC 575 (see PARA 94 note 3 ante).

3 Case 154/80 *Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats GA* [1981] ECR 445, [1981] 3 CMLR 337, ECJ (see note 2 supra); Case 230/87 *Naturally Yours Cosmetics Ltd v Customs and Excise Comrs* [1988] ECR 6365, [1988] STC 879, ECJ (the taxpayer was a cosmetics supplier which sold products wholesale to 'consultants' who persuaded 'hostesses' to hold parties at which the products would be sold retail. The consultants gave each hostess a 'gift' of a pot of cream as a reward for holding the party and were able to purchase items to be used as gifts for £1.50 instead of the usual wholesale price of £10.14. The consideration

for the pot of cream was held to be not merely the cash consideration but in addition the service provided by the consultant of procuring a hostess to arrange a sales party; and the value of that service was the subjective value of the service to the taxpayer, which could be identified as the reduction in the usual wholesale price to the consultant). See also Case C-33/93 *Empire Stores Ltd v Customs and Excise Comrs* [1994] 3 All ER 90, [1994] STC 623, ECJ; *Customs and Excise Comrs v Pippa-Dee Parties Ltd* [1981] STC 495 (where Ralph Gibson J did not consider the application of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') and applied an English law definition of 'consideration'); *Cumbernauld Development Corpn v Customs and Excise Comrs* (1996) VAT Decision 14630, [1997] STI 283 (subjective value of supply was the value attributed by the recipient to what was received, and the value of the consideration had therefore to be calculated by taking into account all relevant factors, including any matters having a negative effect); *North Anderson Cars Ltd v Customs and Excise Comrs* [1999] STC 902, IH (agreed value, even though false, required to secure loan from finance company constituted subjective consideration); cf Case 102/86 *Apple and Pear Development Council v Customs and Excise Comrs* [1988] ECR 1443, [1988] STC 221, ECJ; and *Rosgill Group Ltd v Customs and Excise Comrs* (1995) VAT Decision 13265, [1995] STI 1113. As to the Sixth Directive see PARA 1 note 1 ante.

4 See the Value Added Tax Act 1994 s 19(1), Sch 6 para 11; and see further PARA 112 post. Where an invoice is expressed in alternative currencies, of which sterling is one, the value of the supply is taken to be the value expressed in sterling: *Advansys plc v Customs and Excise Comrs* (1990) VAT Decision 4427, [1990] STI 161; and see Customs and Excise Public Notice 700 *The VAT Guide* (April 2002) PARAS 7.7, 16.4.

5 Where a supplier incurs expenditure in rendering a service to a customer, and a separate item is included in the bill for the 'disbursement', the disbursement forms part of the taxable amount on which VAT must be charged to the client. Thus where a solicitor incurred zero-rated expenditure on air and rail fares in rendering services to a client, VAT at the standard rate had to be accounted for when the item was charged as a disbursement in the client's bill: *Rowe & Maw (a firm) v Customs and Excise Comrs* [1975] 2 All ER 444, [1975] STC 340, DC. Cf disbursements made by a solicitor acting as agent for a client, eg stamp duty or Land Registry fees, where the supply is received by the client as principal, on which VAT need not be charged: see the text to note 10 infra. Similarly, where one company pays the salaries of employees of another company seconded to it, those payments are treated as consideration for the standard-rated supply of staff (*Customs and Excise Comrs v Tarmac Roadstone Holdings Ltd* [1987] STC 610, CA; cf *Durham Aged Mineworkers' Homes Association v Customs and Excise Comrs* [1994] STC 553); and where maintenance contributions were paid by tenants to trustees for the purpose of being expended on the upkeep of a block of flats, those payments were consideration for a supply of services by the trustees (*Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Comrs* [1999] 1 All ER 385, [1999] 1 WLR 174, HL). Where a landlord agreed to permit a tenant to occupy a building rent-free in return for carrying out works of repair, the benefit of rent-free occupation was consideration for the supply of building services: *Ridgeon's Bulk Ltd v Customs and Excise Comrs* [1992] VATTR 169; affd [1994] STC 427. See also Case C-38/93 *HJ Glawe Spiel-und Unterhaltungsgeräte Aufstellungsgesellschaft GmbH & Co KG v Finanzamt Hamburg-Barmbeck-Uhlenhorst* [1994] ECR I-1679, [1994] STC 543, ECJ (VAT is chargeable only on the amount which in accordance with local law is removable by the owner from a gaming machine and not on the amount which the players insert). Cf *Customs and Excise Comrs v Richmond Theatre Management Ltd* [1995] STC 257. A 'fine' imposed under the terms of a contract between a video store and the customer for the late return of the video is consideration and not compensation: *Leigh (t/a Moor Lane Video) v Customs and Excise Comrs* [1990] VATTR 59. Under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(2), the taxable amount is to include: (1) taxes, duties, levies and charges, excluding the VAT itself; and (2) incidental expenses, such as commission, packing, transport and insurance costs charged by the supplier to the purchaser or customer; and it is open to a member state to treat expenses covered by a separate agreement as incidental expenses: although this provision does not appear to have been expressly implemented by the United Kingdom, it was held in *Customs and Excise Comrs v British Telecommunications plc* [1999] 3 All ER 961, [1999] 1 WLR 1376, that 'consideration' includes 'all the incidental expenses incurred and paid for in return for the supply, just as it includes all taxes and duties' ([1999] 3 All ER 961 at 964, [1999] 1 WLR 1376 at 1379 per Lord Slynn of Hadley) (a separate delivery charge imposed by manufacturers on the sale of cars to the taxpayer was not consideration for a distinct supply: the fact that separate charges were identified in a contract or on an invoice did not prevent the various supplies constituting one single transaction where plainly from a commercial perspective they did).

6 Where a company held an annual dinner at which trophies were awarded to various categories of 'players of the year', and sold tickets for the event, it was held that payments for tickets were directly linked to the presentation of the trophies so that there was no supply of the trophies otherwise than for a consideration within the Value Added Tax Act 1994 s 5(1), Sch 4 para 5 (as amended) (see PARA 30 ante), Sch 6 para 6 (see PARA 100 post): *Customs and Excise Comrs v Professional Footballers' Association (Enterprises) Ltd* [1993] 1 WLR 153, [1993] STC 86, HL. Similarly, video tapes distributed free of charge to doctors containing advertisements, in accordance with the supplier's contracts with its advertisers, were not within the Value Added Tax Act 1994 Sch 4 para 5 (as amended): *Customs and Excise Comrs v Telemed Ltd* [1992] STC 89. Where B acquires title to vehicles by discharging A's outstanding debts under a hire-purchase agreement, A is to be taken to have supplied the vehicles to B for a consideration equal to the debt thus discharged: *Phillip Drakard Trading Ltd v Customs and Excise Comrs* [1992] STC 568.

7 EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(1)(a); and see *Trafalgar Tours Ltd v Customs and Excise Comrs* [1990] 3 CMLR 68, [1990] STC 127, CA (parent company which belonged outside the member states arranged for subsidiary companies in member states to organise tours for overseas customers; the relevant subsidiary would then receive a percentage of the price paid by the customers, the remainder being retained by the parent company; parent company held to be acting only as an agent for the subsidiary; and the consideration for the supply made by the subsidiary (on which VAT was chargeable) was the whole price paid by the customer, rather than the reduced amount received by the subsidiary); *Customs and Excise Comrs v Littlewoods Organisation plc* [2001] EWCA Civ 1542, [2001] STC 1568 (enhanced commission payments to agents working for mail order company, for supplying services to company, not part of consideration for agents' services); Case C-380/99 *Bertelsmann AG v Finanzamt Wiedenbrück* [2001] STC 1153, ECJ (company delivered bonuses, in the form of books, to customers in exchange for the introduction of new customers to the company; value of the consideration received by the company was the total of the expenses borne by the company in order to obtain the supply of the bonuses, including the cost of delivery); Case C-353/00 *Keeping Newcastle Warm Ltd v Customs and Excise Comrs* [2002] All ER (EC) 769, [2002] STC 943, ECJ (taxpayer received grants paid in respect of energy advice given to householders as consideration); Case C-398/99 *Yorkshire Co-operatives Ltd v Customs and Excise Comrs* [2003] 1 WLR 2821, [2003] 1 CMLR 655, ECJ (price reduction coupons issued by manufacturer in respect of taxpayer's goods included in taxable amount). An optional service charge does not form part of the consideration: *NDP Co Ltd v Customs and Excise Comrs* [1988] VATTR 40.

8 See the text and note 2 supra.

9 *Customs and Excise Comrs v Westmorland Motorway Services Ltd* [1998] STC 431, [1998] RTR 440, CA.

10 EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(3)(a); and see also the Value Added Tax Act 1994 Sch 6 para 4(1) (where goods or services are supplied for a consideration in money and on terms allowing a discount for prompt payment, the consideration is to be taken for the purposes of s 19 as reduced by the discount whether or not payment is made in accordance with those terms). Schedule 6 para 4(1) does not, however, apply where the terms include any provision for payment by instalment: Sch 6 para 4(2). For the meaning of 'money' see PARA 33 note 7 ante. Where a discount is offered for prompt payment, output tax must be accounted for on the full price, and an appropriate claim must be made by the supplier if the customer in fact qualifies for the discount: *Saga Holidays Ltd v Revenue and Customs Comrs* [2004] V & DR 94, [2004] STI 1563. It is difficult to see that the Value Added Tax Act 1994 Sch 6 para 4 is an accurate implementation of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(3)(a).

If the Commissioners for Her Majesty's Revenue and Customs serve a notice under the Value Added Tax Act 1994 Sch 6 para 3 on a taxable person, requiring him to account for VAT on the open market value of goods supplied to unregistered intermediaries (see PARA 98 post) it is unnecessary to consider whether any discount given to the intermediaries falls within Sch 6 para 4, since it must be ignored for VAT purposes: *Gold Star Publications Ltd v Customs and Excise Comrs* [1992] 3 CMLR 1, [1992] STC 365. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

11 EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(3)(b). This has no statutory equivalent in the United Kingdom legislation; but the provision has direct effect. As to the principle of direct effect see PARA 3 ante. In *Co-operative Retail Services Ltd v Customs and Excise Comrs* [1992] 3 CMLR 541, [1992] VATTR 60, the 'dividends' provided by the society and credited to members' share accounts on the purchase of goods were held to be a discount within EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(3)(b). In Case C-126/88 *Boots Co plc v Customs and Excise Comrs* [1990] ECR I-1235, [1990] STC 387, ECJ, it was held that, having regard to the juxtaposition of 'price discount' and 'price rebate', a restrictive meaning should not be given to either of them; and that they covered both the case in which part of the price indicated is not paid and that in which part of the price paid is returned to the customer at the time of purchase. So, where a customer who bought one item was given a voucher entitling him to a discount on a later purchase, the taxable amount of the latter supply was the sum in fact paid: the voucher itself was not part of the consideration for the second supply. Similarly, the payment of a percentage of the purchase price into an account maintained on behalf of the customer, on receipt of the full price, does not constitute a discount at the time of payment for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(3): Case C-86/99 *Freemans plc v Customs and Excise Comrs* [2001] 1 WLR 1713, [2001] STC 960, ECJ. See also *Customs and Excise Comrs v Euphony Communications Ltd* [2003] EWHC 3008 (Ch), [2004] STC 301. As to reductions occurring after the supply takes place see EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(C)(1); and note 13 infra. See also Case C-33/93 *Empire Stores Ltd v Customs and Excise Comrs* [1994] 3 All ER 90, [1994] STC 623, ECJ.

12 EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(A)(3)(c). Again, there is no statutory equivalent in the United Kingdom; but the provision has direct effect: see *Scally v Customs and Excise Comrs* [1989] VATTR 245.

13 EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(C)(1). The reduction is to be made under conditions to be determined by the member states; and in the case of total or partial non-payment, member states may derogate from the rule. The Commissioners have accepted that art 11(C)(1) has direct effect: cf *Mannesmann Demag Hamilton Ltd v Customs and Excise Comrs* [1983] VATTR 156. Nevertheless, they have

claimed, in argument before the VAT tribunal in *Goldsmiths (Jewellers) Ltd v Customs and Excise Comrs* (1994) VAT Decision 12694, [1994] STI 1374 (a case involving a barter agreement), that the United Kingdom has derogated from EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(C)(1) by implementing what is now the Value Added Tax Act 1994 s 36 (as amended) (bad debts: see PARA 307 post), which permits a refund of VAT only in a case where the consideration for the supply was a price in money. The VAT and duties tribunal has sought a preliminary ruling from the European Court whether the United Kingdom was empowered so to derogate from the Directive. However, there are other indications that the United Kingdom may not have derogated in the manner suggested by the Commissioners; the Value Added Tax Regulations 1995, SI 1995/2518, reg 38 (as amended) (see PARA 277 post) provides for an adjustment in a person's VAT account where there has been an increase or decrease in the consideration for a supply in a prescribed accounting period after that in which the original supply took place; and in *AEG (UK) Ltd v Customs and Excise Comrs* (1993) VAT Decision 10944, [1993] STI 1301, the tribunal held that where a washing machine repairer refunds the cost of the service if the customer subsequently purchases a new machine (from a third party), the refund falls to be treated as a discount from the cost of the service under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 11(C)(1) and VAT is to be recoverable accordingly. It would appear that the credit note procedure offered by the Commissioners is based on art 11(C)(1): see the Value Added Tax Regulations 1995, SI 1995/2518, reg 38 (as amended); and Customs and Excise Public Notice 700 *The VAT Guide* (April 2002) PARA 18.2.

## UPDATE

### 95 Meaning of 'consideration'

NOTES 3, 5, 7, 10-13--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 13--Deposits collected by a hotel and either deducted from the bill or retained in the event of cancellation constitute a fixed cancellation charge rather than a fee for a taxable service: Case C-277/05 *Société thermale d'Eugenie-les Bains v Ministere de L'Economie, des Finances et de L'Industrie* [2008] STC 2470, ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(3) VALUE OF GOODS OR SERVICES/(ii) Valuation in Special Cases/96. Consideration less than open market value.

## **(ii) Valuation in Special Cases**

### **96. Consideration less than open market value.**

For value added tax purposes the 'open market value' of a supply<sup>1</sup> of goods or services is taken to be the amount that would fall to be taken to be its value for VAT<sup>2</sup> if the supply were made for such consideration in money as would be payable by a person not standing in a relationship with any person which would affect that consideration<sup>3</sup>, and provision is accordingly made under which the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> may direct<sup>5</sup> that the value of a specified supply is to be taken to be its open market value<sup>6</sup>. The circumstances in which the Commissioners may make such a direction are where the value of a supply made by a taxable person<sup>7</sup> for a consideration<sup>8</sup> is less than its open market value<sup>9</sup> and either:

- 251 (1) the person making the supply and the person to whom it is made are connected<sup>10</sup>; and
- 252 (2) if the supply is a taxable supply<sup>11</sup>, the person to whom the supply is made is not entitled<sup>12</sup> to credit for all the value added tax on the supply<sup>13</sup>,

or, where these requirements are not satisfied<sup>14</sup> and the taxable person is a motor manufacturer<sup>15</sup> or motor dealer<sup>16</sup>, where:

- 253 (a) the person to whom the supply is made is either an employee of the taxable person<sup>17</sup>, a person who, under the terms of his employment, provides services to the taxable person<sup>18</sup>, or a relative<sup>19</sup> of any such person<sup>20</sup>;
- 254 (b) the supply is a supply of services for the purposes of the statutory provision relating to the putting of business goods to private use<sup>21</sup>; and
- 255 (c) the goods mentioned in that provision consist of a motor car (whether or not any particular motor car) that forms part of the stock in trade<sup>22</sup> of the taxable person<sup>23</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 I.e. under the Value Added Tax Act 1994 s 19(2): see PARA 94 ante.

3 Ibid s 19(5). In other words, if a registered trader sells to his son for £50 goods which ordinarily he would have sold for £117.50, the Commissioners may direct that the trader treat the value of the supply for VAT purposes as being £100 (provided that the son is not a fully-taxable trader buying for the purposes of his own VAT-registered business). For the meaning of 'consideration' see PARA 95 ante.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 Any such direction must be given by notice in writing to the person making the supply; but no direction may be given more than three years after the time of the supply: Value Added Tax Act 1994 s 19(1), Sch 6 paras 1(2), 1A(2) (Sch 6 para 1A added by the Finance Act 1994 s 22(1), (2)). A direction may be varied or withdrawn by a further direction given in writing: Value Added Tax Act 1994 Sch 6 para 13. An appeal lies to a VAT and duties tribunal against the making of such a direction: see s 83(v) (amended by the Finance Act 1994 s 22(3)); and PARA 346 et seq post.

6 Value Added Tax Act 1994 Sch 6 paras 1(1), 1A(1) (as added: see note 5 supra). A direction so given to a person in respect of a supply made by him may include a direction that the value of any supply: (1) which is



made by him after the giving of the notice, or after such later date as may be specified in the notice (Sch 6 paras 1(3)(a), 1A(3)(a) (as so added)); and (2) as to which the conditions specified in the text are satisfied (Sch 6 paras 1(3)(b), 1A(3)(b) (as so added)), is to be taken to be its open market value. Schedule 6 para 1(1) does not apply to a supply to which Sch 6 para 10 (see PARA 102 post) applies: Sch 6 para 1(5).

7 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

8 In general this means consideration in money, although consideration is not required to be in money for the purposes of the special provisions relating to stock-in-trade cars set out in the text and notes 15-23 infra: see the Value Added Tax Act 1994 Sch 6 paras 1(1)(a), 1A(1)(a) (as added: see note 5 supra). For the meaning of 'money' see PARA 33 note 7 ante.

9 Ibid Sch 6 paras 1(1)(a), 1A(1)(a) (as added: see note 5 supra).

10 Ibid Sch 6 para 1(1)(b). Any question whether one person is connected with another for these purposes is to be determined in accordance with the Income and Corporation Taxes Act 1988 s 839 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258): Value Added Tax Act 1994 Sch 6 para 1(4).

11 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

12 Ie under the Value Added Tax Act 1994 ss 25, 26: see PARAS 216-217 post.

13 Ibid Sch 6 para 1(1)(c).

14 Ibid Sch 6 para 1A(1)(f) (as added: see note 5 supra).

15 'Motor manufacturer' means a person whose business consists in whole or in part of producing motor cars including producing motor cars by conversion of a vehicle (whether a motor car or not): ibid Sch 6 para 1A(4) (as added: see note 5 supra); Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (definition added by SI 1999/2930)). For the meaning of 'motor car' see PARA 28 note 9 ante. The Treasury may by order amend any of the definitions in the Value Added Tax Act 1994 Sch 6 para 1A (as added): Sch 6 para 1A(7) (as so added). At the date at which this volume states the law no such order had been made. As to subordinate legislation generally see PARA 14 ante.

16 Ibid Sch 6 para 1A(1)(b) (as added: see note 5 supra). 'Motor dealer' means a person whose business consists in whole or in part of obtaining supplies of, or acquiring from another member state or importing, new or second-hand motor cars for resale with a view to making an overall profit on the sale of them (whether or not a profit is made on each sale): Sch 6 para 1A(4) (as so added); Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (definition added by SI 1999/2930)).

17 Value Added Tax Act 1994 Sch 6 para 1A(1)(c)(i) (as added: see note 5 supra).

18 Ibid Sch 6 para 1A(1)(c)(ii) (as added: see note 5 supra).

19 'Relative' means husband, wife, brother, sister, ancestor or lineal descendant: ibid Sch 6 para 1A(4) (as added: see note 5 supra).

20 Ibid Sch 6 para 1A(1)(c)(iii) (as added: see note 5 supra).

21 Ibid Sch 6 para 1A(1)(d) (as added: see note 5 supra). The statutory provision relating to the putting of business goods to private use is Sch 4 para 5(4) (see PARA 30 ante).

22 'Stock in trade' means new or second-hand motor cars (other than second-hand motor cars which either have never been supplied, acquired from another member state, or imported in circumstances in which the VAT on that supply, acquisition or importation was wholly excluded from credit as input tax by virtue of the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2A) (as added) (see PARA 223 post) (Value Added Tax Act 1994 Sch 6 para 1A(6)(a) (as added: see note 5 supra); Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (definition added by SI 1999/2930)), or in relation to which a taxable person has elected for it to be treated as such (Value Added Tax Act 1994 Sch 6 para 1A(6)(b) (as so added); Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (definition as so added)) which are: (1) produced by a motor manufacturer or, as the case may require, supplied to or acquired from another member state or imported by a motor dealer, for the purpose of resale; and (2) intended to be sold either by a motor manufacturer within 12 months of their production or by a motor dealer within 12 months of their supply, acquisition from another member state or importation, as the case may require; and such motor cars do not cease to be stock in trade where they are temporarily put to a use in the motor manufacturer's or, as the case may be, the motor dealer's business which involves making them available for private use (Value Added Tax Act 1994 Sch 6 para 1A(4) (as so added); Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (definition as so added)).

23 Value Added Tax Act 1994 Sch 6 para 1A(1)(e) (as added: see note 5 *supra*).

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## **97. Supply to non-taxable persons of goods to be sold retail.**

Where the whole or part of a business<sup>1</sup> carried on by a taxable person<sup>2</sup> consists in supplying to a number of persons goods to be sold<sup>3</sup>, whether by them or by others, by retail<sup>4</sup>, and those persons are not taxable persons<sup>5</sup>, the Commissioners for Her Majesty's Revenue and Customs may direct<sup>6</sup> that the value of any such supply by him is to be taken to be its open market value<sup>7</sup> on a sale by retail<sup>8</sup>.

1 For the meaning of 'business' see PARA 23 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 Where a registered trader sold goods to unregistered persons in circumstances where there was no condition for resale attached, but with the intention that some of the goods would be sold on, it would be unrealistic to hold that no part of the trader's business could be said to consist in supplying goods to be sold by retail: *Fine Art Developments plc v Customs and Excise Comrs* [1996] 1 All ER 888, [1996] STC 246, HL. The Value Added Tax Act 1994 s 19(1), Sch 6 para 2 involves an authorised derogation from the provisions of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 11(A)(1)(a) (see PARA 95 ante): see EC Council Decision 89/534 (OJ L280, 29.9.89, p 54). The decision as to what is the open market value is thus a matter for the national authorities and ultimately for the national court: *Fine Art Developments plc v Customs and Excise Comrs* supra. It is irrelevant that the trader carries on business as he does for commercial, rather than for tax-avoidance, reasons: *Joined Cases 138/86, 139/86 Direct Cosmetics Ltd v Customs and Excise Comrs, Laughtons Photographs Ltd v Customs and Excise Comrs* [1988] ECR 3937, [1988] STC 540, ECJ. Where the available evidence would not enable the taxable person to ascertain the open market value, the Commissioners for Her Majesty's Revenue and Customs may serve a notice under the Value Added Tax Act 1994 Sch 6 para 2: *Beckbell Ltd v Customs and Excise Comrs* [1993] VATTR 212. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. As to the Sixth Directive see PARA 1 note 1 ante.

4 Value Added Tax Act 1994 Sch 6 para 2(a).

5 Ibid Sch 6 para 2(b).

6 The direction must be made by notice in writing to the taxable person and can apply only to supplies made by him after the giving of such notice or after such later date as may be specified in the notice: *ibid* Sch 6 para 2. A direction may be varied or withdrawn by a further direction: Sch 6 para 13. An appeal lies to a VAT and duties tribunal against the making of such a direction: see s 83(v) (amended by the Finance Act 1994 s 22(3)); and PARA 346 et seq post.

7 For the meaning of 'open market value' see PARA 96 ante. In *Joined Cases 138/86, 139/86 Direct Cosmetics Ltd and Laughtons Photographs Ltd v Customs and Excise Comrs* [1988] ECR 3937, [1988] STC 540, ECJ, it was held that 'the open market value' must be understood as meaning the value that is closest to the commercial value on a sale by retail, ie the actual price paid by the final consumer; cf *Fine Art Developments plc v Customs and Excise Comrs* [1996] 1 All ER 888 at 899, [1996] STC 246 at 256, HL, per Lord Keith of Kinkel (the actual price referred to must be the actual price paid by the final consumer of similar goods, not of the particular goods in question, since if that were known there would be no question of taking the market value unless the parties were not at arm's length).

8 Value Added Tax Act 1994 Sch 6 para 2.

## **UPDATE**

## **97 Supply to non-taxable persons of goods to be sold retail**

NOTE 3--EC Council Directive 77/388: replaced by EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## **98. Goods removed to the United Kingdom.**

Where any goods whose supply<sup>1</sup> involves their removal to the United Kingdom<sup>2</sup> are charged, in connection with that removal, with a duty of excise<sup>3</sup> or are subject<sup>4</sup> to any Community customs duty or agricultural levy<sup>5</sup>, the value of the supply for the purposes of value added tax is taken to be the sum of its value on ordinary VAT principles<sup>6</sup> and the amount of the duty or agricultural levy which has been or is to be paid in respect of the goods<sup>7</sup>. Where the time of supply of any dutiable goods<sup>8</sup>, or of any goods which comprise a mixture of dutiable goods and other goods, is determined<sup>9</sup> to be the duty point<sup>10</sup>, the value of the supply is similarly determined<sup>11</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 Value Added Tax Act 1994 s 19(1), Sch 6 para 3(1)(a). An example of such a supply is where there has been an acquisition of goods from another member state: see ss 1(1)(a), 11; and PARAS 4, 19 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

3 Ibid Sch 6 para 3(1)(a)(i).

4 Ie in accordance with any provision for the time being having effect for transitional purposes in connection with the accession of any state to the European Community: ibid Sch 6 para 3(1)(a)(ii).

5 Ibid Sch 6 para 3(1)(a)(ii).

6 Ie apart from ibid Sch 6 para 3: Sch 6 para 3(1). As to the general principles of valuation see PARA 94 ante.

7 Ibid Sch 6 para 3(1). Any reference to the amount of any duty of excise on any goods is to be taken to be a reference to the amount of duty charged on those goods with any addition or deduction falling to be made under the Excise Duties (Surcharges or Rebates) Act 1979 s 1 (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 620): Value Added Tax Act 1994 s 96(5).

8 For these purposes, 'dutiable goods' means any goods which are subject: (1) to a duty of excise; or (2) in accordance with any provision for the time being having effect for transitional purposes in connection with the accession of any state to the European Community, to any Community customs duty or agricultural levy: ibid s 18(6), Sch 6 para 3(2).

9 Ie under ibid s 18 (as amended): see PARA 144 post.

10 For these purposes, 'the duty point', in relation to any goods, means: (1) in the case of goods which are subject to a duty of excise, the time when the requirement to pay the duty on those goods takes effect; and (2) in the case of goods which are not so subject, the time when any Community customs debt in respect of duty on the entry of the goods into the territory of the Community would be incurred or, as the case may be, the corresponding time in relation to any such duty or levy as is mentioned in note 8 head (2) supra: ibid s 18(6), Sch 6 para 3(2).

11 Ibid Sch 6 para 3(1)(b).

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## 99. Face-value vouchers.

A 'face-value voucher' is a token, stamp or voucher, whether in physical or electronic form, that represents a right to receive goods or services to the value of an amount stated on it or recorded in it<sup>1</sup>, and the issue of any such voucher, or any subsequent supply thereof, is a supply of services for value added tax purposes<sup>2</sup>. There are three principal types of face-value voucher: credit vouchers<sup>3</sup>, retailer vouchers<sup>4</sup>, and postage stamps<sup>5</sup>, although provision is also made in respect of face-value vouchers which fall into none of these categories<sup>6</sup>.

A 'credit voucher' is a face value voucher issued by a person who is not a person from whom goods or services may be obtained by the use thereof<sup>7</sup>, and who undertakes to give complete or partial reimbursement to any such person from whom goods or services are so obtained<sup>8</sup>; conversely, a 'retailer voucher' is a face-value voucher issued by a person who *is* a person from whom goods or services may be obtained by its use<sup>9</sup> and, if there are other such persons, undertakes to give complete or partial reimbursement to those from whom goods or services are so obtained<sup>10</sup>. In either case, and in the case of a postage stamp, the consideration for any supply of the voucher or stamp is disregarded for VAT purposes except to the extent (if any) that it exceeds the face value of the voucher or stamp<sup>11</sup>.

The supply of a face-value voucher that is not a credit voucher, a retailer voucher or a postage stamp is chargeable at the standard rate of VAT<sup>12</sup> unless:

- 256 (1) the voucher can be used only to obtain goods or services in one particular non-standard-rate category<sup>13</sup>, the supply of the voucher falls into that category<sup>14</sup>;
- 257 (2) where the voucher is used to obtain goods or services all of which fall in one particular non-standard-rate category, the supply of the voucher falls into that category<sup>15</sup>; or
- 258 (3) where the voucher is used to obtain goods or services in a number of different rate categories<sup>16</sup>, the supply of the voucher is treated as that many different supplies, each falling within the category in question<sup>17</sup>, and the value of each of those supplies is determined on a just and reasonable basis<sup>18</sup>.

Where a face-value voucher (other than a postage stamp) and other goods or services are supplied to the same person in a composite transaction<sup>19</sup>, and the total consideration for the supplies is no different, or not significantly different, from what it would be if the voucher were not supplied<sup>20</sup>, the supply of the voucher is treated as made for no consideration<sup>21</sup>.

1 Value Added Tax Act 1994 s 51B, Sch 10A paras 1(1), 8(1) (s 51B, Sch 10A added by the Finance Act 2003 s 19, Sch 1 paras 1, 2). References in the Value Added Tax Act 1994 Sch 10A (as added) to the 'face value' of a voucher are to that value: Sch 10A paras 1(2), 8(1) (as so added).

2 Ibid Sch 10A para 2 (as added: see note 1 supra).

3 See the text and notes 7-8 infra.

4 See the text and notes 9-10 infra.

5 See the text and note 11 infra.

6 See the text and notes 12-18 infra.

7 Value Added Tax Act 1994 Sch 10A paras 3(1)(a), 8(1) (as added: see note 1 supra). References in Sch 10A (as added) to a voucher being used to obtain goods or services includes a reference to the case where it is used as part-payment therefor: Sch 10A para 8(3) (as so added). 'Person' here means a legally independent person and not a VAT group: *R (on the application of IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2004] EWHC 3188 (Admin), [2005] STC 314.

8 Value Added Tax Act 1994 Sch 10A paras 3(1)(b), 8(1) (as added: see note 1 supra).

9 Ibid Sch 10A paras 4(1)(a), 8(1) (as added: see note 1 supra).

10 Ibid Sch 10A paras 4(1)(b), 8(1) (as added: see note 1 supra).

11 Ibid Sch 10A paras 3(2), 4(2), 5 (as added: see note 1 supra). This does not, however, apply if any of the persons from whom goods or services are obtained by the use of a credit voucher (Sch 10A para 3(3) (as so added)), or any person (other than the issuer) from whom goods or services are obtained by the use of a retailer voucher (Sch 10A para 4(3)(a) (as so added)), fails to account for any of the VAT due on the supply of those goods or services to the person using the voucher to obtain them (Sch 10A paras 3(3), 4(3)(b) (as so added)). Any supply of a retailer voucher subsequent to its issue is treated in the same way as a voucher to which Sch 10A para 6 (as added) (see the text and notes 12-18 infra) applies: Sch 10A para 4(4) (as so added). It is possible to determine whether a person has failed to account for any VAT due only once the place of supply is determined; and accordingly, where tax was not due on a supply made from a member state outside the United Kingdom, Sch 10A para 3(3) (as added) could not apply: *R (on the application of IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2004] EWHC 3188 (Admin), [2005] STC 314.

12 Value Added Tax Act 1994 Sch 10A para 6(1), (2) (as added: see note 1 supra). The 'standard rate' of VAT is the rate in force under s 2(1) (as amended) (see PARA 5 ante): Sch 10A para 6(2) (as so added).

13 The 'non-standard-rate categories' are: (1) supplies chargeable at the rate in force under ibid s 29A (as added) (see PARA 6 ante) (Sch 10A para 8(2)(a)(ii), (b) (as added: see note 1 supra)); (2) zero rated supplies (see PARA 174 et seq post) (Sch 10A para 8(2)(a)(iii), (b) (as so added)); and (3) exempt supplies (see PARA 155 et seq post) and other supplies that are not taxable supplies (Sch 10A para 8(2)(a)(iv), (b) (as so added)). For the meaning of 'taxable supply' see PARA 18 note 3 ante. Goods or services are in a particular rate category if a supply of those goods or services falls into that category: Sch 10A para 8(2)(c) (as so added).

14 Ibid Sch 10A para 6(3) (as added: see note 1 supra).

15 Ibid Sch 10A para 6(4) (as added: see note 1 supra).

16 'Rate categories' includes, in addition to the non-standard-rate categories (see note 13 supra) supplies chargeable at the standard rate (see note 12 supra): ibid Sch 10A para 8(2)(a)(i) (as added: see note 1 supra).

17 Ibid Sch 10A para 6(5)(a) (as added: see note 1 supra).

18 Ibid Sch 10A para 6(5)(b) (as added: see note 1 supra).

19 Ibid Sch 10A para 7(a) (as added: see note 1 supra).

20 Ibid Sch 10A para 7(b) (as added: see note 1 supra).

21 Ibid Sch 10A para 7 (as added: see note 1 supra).

## UPDATE

### 99 Face-value vouchers

NOTE 1--A face-value voucher must state or record the amount up to which the holder is entitled to receive goods or services and it must be possible for the user to run out of the money represented by the voucher: *Leisure Pass Group Ltd v Revenue and Customs Comrs* [2008] EWHC 2158 (Ch), [2008] STC 3340. See also *Leisure Pass Group Ltd v Revenue and Customs Comrs (No 2)* (2009) VAT Decision 20910, [2009] STI 450.

NOTES 7, 11--*IDT*, cited, reversed: [2006] EWCA Civ 29, [2006] STC 1252.

NOTE 11--The Treasury may by order specify other circumstances in which the Value Added Tax Act 1994 Sch 10A para 3(2) does not apply: Sch 10A para 3(4) (added by Finance Act 2006 s 22(3)). See also *Revenue and Customs Comrs v Arachchige* [2009] EWHC 1077 (Ch), [2009] STC 1729.



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### **100. Deemed supplies of goods or services.**

Specific provision is made for the value of certain deemed supplies of goods and services<sup>1</sup>. Where there is a deemed supply of goods by virtue of:

- 259 (1) a Treasury order relating to self-supply<sup>2</sup>;
- 260 (2) the statutory provisions relating to the transfer or disposal of assets<sup>3</sup> or the removal of goods to another member state<sup>4</sup> (but otherwise than for a consideration)<sup>5</sup>; or
- 261 (3) the statutory provisions relating to supplies by persons ceasing to be taxable persons<sup>6</sup>,

the value of the supply<sup>7</sup> is taken to be either:

- 262 (a) such consideration in money as would be payable<sup>8</sup> by the person making the supply if he were, at the time of the supply, to purchase goods identical in every respect (including age and condition) to the goods concerned<sup>9</sup>;
- 263 (b) where the value cannot be ascertained under head (a) above, such consideration in money as would be payable by that person if he were at that time to purchase goods similar to, and of the same age and condition as, the goods concerned<sup>10</sup>; or
- 264 (c) if the value cannot be ascertained under either head (a) or head (b) above, the cost of producing the goods concerned if they were produced at that time<sup>11</sup>.

Similarly, where there is a deemed supply of services by virtue of a Treasury order<sup>12</sup> or the statutory provisions relating to private use<sup>13</sup> (but otherwise than for a consideration)<sup>14</sup>, the value of the supply is taken to be the full cost to the taxable person of providing the services<sup>15</sup>. Where any supply of services or goods is treated<sup>16</sup> as made by the person by whom they are received, the value of the supply is taken to be:

- 265 (i) in a case where the consideration for which the services or goods were in fact supplied to him was a consideration in money, such amount as is equal to that consideration<sup>17</sup>; and
- 266 (ii) in a case where that consideration did not consist, or did not wholly consist, of money, such amount in money as is equivalent to that consideration<sup>18</sup>.

1 As to deemed supplies generally see PARA 30 ante.

2 Value Added Tax Act 1994 s 19(1), Sch 6 para 6(1)(a). The orders in question are those under s 5(5): see PARA 32 ante.

3 *Ibid* s 5(1), Sch 4 para 5(1): see PARA 30 ante.

4 *Ibid* Sch 4 para 6: see PARA 20 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

5 *Ibid* Sch 6 para 6(1)(b).

6 *Ibid* Sch 6 para 6(1)(c). For the statutory provisions relating to supplies by persons ceasing to be taxable persons see Sch 4 para 8; and PARA 30 ante. For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

7     Ie except any supply to which *ibid* Sch 6 para 10 applies: see PARA 102 post. For the meaning of 'supply' see PARA 27 ante. See Customs and Excise Notice 252 *Valuation of Imported Goods for Customs Purposes, VAT and Trade Statistics* (January 2002) for an explanation of the views of the Commissioners for Her Majesty's Revenue and Customs on the application of these valuation principles. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8     For these purposes, the amount of consideration in money that would be payable by any person if he were to purchase any goods is to be taken to be the amount that would be so payable after the deduction of any amount included in the purchase price in respect of VAT on the supply of the goods to that person: Value Added Tax Act 1994 Sch 6 para 6(3). For the meaning of 'consideration' generally see PARA 95 ante; and for the meaning of 'money' see PARA 33 note 7 ante.

9     *Ibid* Sch 6 para 6(1), (2)(a).

10    *Ibid* Sch 6 para 6(2)(b).

11    *Ibid* Sch 6 para 6(2)(c).

12    *Ibid* Sch 6 para 7(a). The order in question is an order under s 5(4): see PARA 30 ante.

13    Ie *ibid* Sch 4 para 5(4): see PARA 30 ante.

14    *Ibid* Sch 6 para 7(b) (amended by the Finance Act 1995 s 33(1), (3)(b)).

15    Value Added Tax Act 1994 Sch 6 para 7 (as amended: see note 14 supra). This provision does not apply to a supply to which Sch 6 para 10 applies: Sch 6 para 7 (as so amended). As to what constitutes the full cost of such a supply see *Customs and Excise Comrs v Teknequip Ltd* [1987] STC 664. The charge on the private use of goods is derived from EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 6(1), and arises only exceptionally, so that art 6(1) must be interpreted strictly. Accordingly, the charge is limited to the use of the goods themselves and does not extend to services supplied by third parties for the purposes of maintaining or using the goods, where the taxable person is unable to deduct the input tax paid: Case C-193/91 *Finanzamt München III v Möhsche* [1993] ECR I-2615, ECJ. When determining the taxable amount under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 6(1), the periods in which goods are at a taxable person's disposal in a way that he can actually use them at any time for private purposes must be taken into account: Case C-230/94 *Enkler v Finanzamt Homburg* [1996] STC 1316, ECJ. As to the Sixth Directive see PARA 1 note 1 ante.

16    Ie by virtue of the Value Added Tax Act 1994 s 8 (as amended) (in the case of a supply of services), s 9A (as added) (in the case of a supply of goods): see PARA 33 ante.

17    *Ibid* Sch 6 para 8(a) (amended by the Finance (No 2) Act 2005 s 5).

18    Value Added Tax Act 1994 Sch 6 para 8(b).

## UPDATE

### 100 Deemed supplies of goods or services

NOTES 12-15--Regulations may, in relation to a supply of services by virtue of the Value Added Tax Act 1994 Sch 4 para 5(4) (see PARA 30) (but otherwise than for a consideration) make provision for determining how the full cost to the taxable person of providing the services is to be calculated: Sch 6 para 7(2) (Sch 6 para 7(1) so numbered, Sch 6 para 7(2)-(4) added, by Finance Act 2007 s 99(4), (5)). Such regulations may, in particular, make provision for the calculation to be made by reference to any prescribed period, and may make different provision for different circumstances and such incidental, supplementary, consequential or transitional provision as the Commissioners think fit: 1994 Act Sch 7 para 7(3), (4).

NOTE 15--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

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### **101. Supply of services consisting of provision of accommodation.**

Where a supply<sup>1</sup> of services consists in the provision to an individual of accommodation in an hotel, inn or boarding house or other similar establishment<sup>2</sup> for a period exceeding four weeks<sup>3</sup>, and throughout that period the accommodation is provided for the use of the individual either alone or together with one or more other persons who occupy the accommodation with him otherwise than at their own expense, whether incurred directly or indirectly<sup>4</sup>, the value of so much of the supply as is in excess of four weeks is reduced to such part of it as is attributable to facilities other than the right to occupy the accommodation<sup>5</sup>. The part so attributable is not, however, to be taken to be less than 20 per cent<sup>6</sup>.

<sup>1</sup> For the meaning of 'supply' see PARA 27 ante.

<sup>2</sup> I.e accommodation falling within the Value Added Tax Act 1994 s 8, Sch 9 Pt II Group 1 (see PARA 156 post): s 19(1), Sch 6 para 9(1).

<sup>3</sup> Ibid Sch 6 para 9(1)(a). See *Elga and Askar Co Ltd v Customs and Excise Comrs* [1983] STC 628 (decided under the previous, more generous, rules) (reduction does not apply unless the room is supplied to the individual for continual occupation throughout the period in excess of four weeks). The Value Added Tax Act 1994 Sch 6 para 9 constitutes a derogation corresponding to an exemption for the letting of immovable property under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 13(B)(b)(1), and is permitted by an authorisation deemed to have been adopted on 10 December 1986. As to the Sixth Directive see PARA 1 note 1 ante.

<sup>4</sup> Value Added Tax Act 1994 Sch 6 para 9(1)(a).

<sup>5</sup> Ibid Sch 6 para 9(2)(a).

<sup>6</sup> Ibid Sch 6 para 9(2)(b).

### **UPDATE**

### **101 Supply of services consisting of provision of accommodation**

NOTE 3--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

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## **102. Supply of certain goods or services by employer.**

The value of a supply<sup>1</sup> of goods or services, whether or not for a consideration<sup>2</sup>, which is made by an employer and consists of:

- 267 (1) the provision of food or beverages to his employees<sup>3</sup>; or
- 268 (2) the provision of accommodation for his employees in an hotel, inn, boarding house or similar establishment<sup>4</sup>,

is taken to be nil unless the supply is for a consideration consisting wholly or partly of money<sup>5</sup>, in which case its value is determined without regard to any consideration other than money<sup>6</sup>.

These provisions do not have the effect of creating a supply where none otherwise exists<sup>7</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 For the meaning of 'consideration' see PARA 95 ante. The words 'whether or not for a consideration' are included so as to ensure that all relevant kinds of supplies are covered, and do not further extend the classes of transaction treated as supplies for these purposes: see *Co-operative Insurance Society Ltd v Customs and Excise Comrs* (1997) VAT Decision 14862, [1997] STI 1076.

3 Value Added Tax Act 1994 s 19(1), Sch 6 para 10(1)(a).

4 Ibid Sch 6 para 9(1)(b).

5 For the meaning of 'money' see PARA 33 note 7 ante.

6 Value Added Tax Act 1994 Sch 6 para 10(1), (2). See *Goodfellow v Customs and Excise Comrs* [1986] VATTR 119.

7 *Co-operative Insurance Society Ltd v Customs and Excise Comrs* (1997) VAT Decision 14862, [1997] STI 1076.

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### **103. Supply of goods or services whose value is not determined in sterling.**

Where there is a supply<sup>1</sup> of goods or services<sup>2</sup> and any sum relevant for determining the value of the supply is expressed in a currency other than sterling<sup>3</sup>, then, for the purpose of valuing the supply, that sum is to be converted into sterling at the market rate which would apply in the United Kingdom<sup>4</sup> on the relevant day<sup>5</sup> to a purchase with sterling by the person to whom they are supplied of that sum in the currency in question<sup>6</sup>. Where, however, the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup> have published a notice<sup>8</sup> which specifies rates of exchange for these purposes<sup>9</sup>, or methods of determining rates of exchange<sup>10</sup>, a rate specified in or determined in accordance with the notice applies<sup>11</sup> in the case of any supply by a person who opts, in such manner as may be allowed by the Commissioners, for the use of that rate in relation to that supply<sup>12</sup>. Such an option for the use of a particular rate or method of determining a rate may not be exercised by any person except in relation to all such supplies by him as are of a particular description or after a particular date<sup>13</sup>, and may not be withdrawn or varied except with the consent of the Commissioners and in such manner as they may require<sup>14</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 Value Added Tax Act 1994 s 19(1), Sch 6 para 11(1)(a).

3 Ibid Sch 6 para 11(1)(b).

4 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

5 The time by reference to which the appropriate rate of exchange is to be determined for the purpose of valuing any supply is the time when the supply takes place; and accordingly the day on which it takes place is the relevant day for these purposes: Value Added Tax Act 1994 Sch 6 para 11(7).

6 Ibid Sch 6 para 11(1). Where an invoice is expressed in alternative currencies, of which sterling is one, the value of the supply is taken to be the value expressed in sterling: see *Advansys plc v Customs and Excise Comrs* (1990) VAT Decision 4427, [1990] STI 161; and see Customs and Excise Public Notice 700 *The VAT Guide* (April 2002) PARAS 7.7, 16.4.

7 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 A notice published by the Commissioners for these purposes may be withdrawn or varied by a subsequent notice published by them: Value Added Tax Act 1994 Sch 6 para 11(6).

9 Ibid Sch 6 para 11(2)(a).

10 Ibid Sch 6 para 11(2)(b).

11 Ie instead of the rate for which ibid Sch 6 para 11(1) provides (see the text and notes 1-6 supra): Sch 6 para 11(2).

12 Ibid Sch 6 para 11(2). In specifying a method of determining a rate of exchange, a notice so published may allow a person to apply to the Commissioners for the use, for the purpose of valuing some or all of his supplies, of a rate of exchange which is different from any which would otherwise apply: Sch 6 para 11(4). On an application made in accordance with provision contained in such a notice, the Commissioners may authorise the use with respect to the applicant of such a rate of exchange, in such circumstances, in relation to such supplies and subject to such conditions as they think fit: Sch 6 para 11(5).

13 Ibid Sch 6 para 11(3)(a).

14 Ibid Sch 6 para 11(3)(b).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(3) VALUE OF GOODS OR SERVICES/(ii) Valuation in Special Cases/104. Fuel for private use.

#### **104. Fuel for private use.**

'Fuel for private use' means fuel which, having been supplied to or imported by a taxable person<sup>1</sup>, or manufactured by such a person, in the course of his business<sup>2</sup>, either:

- 269 (1) is provided, or to be provided, by the taxable person to an individual<sup>3</sup> for private use in his own vehicle<sup>4</sup> or a vehicle allocated to him<sup>5</sup> and is so provided by reason of that individual's employment<sup>6</sup>;
- 270 (2) is appropriated, or to be appropriated, by an individual who is the taxable person for private use in his own vehicle<sup>7</sup>; or
- 271 (3) is provided, or to be provided, to any of the individual partners in a partnership which is the taxable person for private use in the partner's own vehicle<sup>8</sup>,

although fuel is not to be regarded as provided to any person for his private use if it is supplied at a price which:

- 272 (a) in the case of fuel supplied to or imported by the taxable person, is not less than the price at which it was so supplied or imported<sup>9</sup>; and
- 273 (b) in the case of fuel manufactured by the taxable person, is not less than the aggregate of the cost of the raw material and of manufacturing together with any excise duty thereon<sup>10</sup>.

Provision is made whereby a trader is permitted to treat all fuel which he purchases as acquired for the purposes of his taxable business, while a scale charge is imposed on him in respect of each employee, or each car, which is supplied with fuel for private use during the course of a prescribed accounting period<sup>11</sup>. At the time at which fuel for private use is put into the fuel tank of an individual's own vehicle or that of a vehicle allocated to him, the fuel is treated for the purposes of value added tax as having been supplied to him by the taxable person in the course or furtherance of his business for a consideration<sup>12</sup>. Where the fuel is appropriated by the taxable person to his own private use, he is treated as supplying it to himself in his private capacity<sup>13</sup>. In any prescribed accounting period in which the taxable person is treated by virtue of these provisions as supplying fuel for private use to an individual, the consideration for all the supplies made to that individual in that period in respect of any one vehicle<sup>14</sup> is taken to be the appropriate amount for a vehicle of that description and to be inclusive of VAT<sup>15</sup>. What is the appropriate amount of consideration for a vehicle of any description depends upon the type of engine and cylinder capacity of the vehicle in question and the length of the prescribed accounting period<sup>16</sup> in which the taxable supply is made<sup>17</sup>.

By concession, where a registered person makes no claim for input tax<sup>18</sup> on purchases of road fuel, whether for business or private journeys, the VAT scale charge is not applied<sup>19</sup>.

1 For these purposes: (1) any reference to fuel supplied to a taxable person includes a reference to fuel acquired by a taxable person from another member state; and (2) any reference to fuel imported by a taxable person is confined to a reference to fuel imported by that person from a place outside the member states: Value Added Tax Act 1994 s 56(3)(b). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante. As to the territories deemed to be included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

2 For the meaning of 'business' see PARA 23 ante.

3 Where under the Value Added Tax Act 1994 s 43 (as amended) any bodies corporate are treated as members of a group (see PARAS 75 ante, 205 et seq post), any provision of fuel by a member of the group to an individual is treated for these purposes as provision by the representative member: s 56(4). For the meaning of 'the representative member' see PARA 75 ante.

4 For these purposes, any reference to an individual's own vehicle is to be construed as including any vehicle of which for the time being he has the use (other than a vehicle allocated to him, which falls under ibid s 56(3)(d): see note 5 infra): s 56(3)(c). 'Vehicle' means a mechanically propelled road vehicle other than a motor cycle or an invalid carriage as defined in the Road Traffic Act 1988 s 185(1): Value Added Tax Act 1994 s 56(10). As to classifications of vehicles see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 210 et seq.

5 A vehicle is treated as allocated to an individual at any time if at that time it is made available (without any transfer of the property in it) either to the individual himself or to any other person, and is so made available by reason of the individual's employment and for private use: ibid s 56(3)(d). A vehicle (ie a pool car) is not regarded as so allocated to an individual in any prescribed accounting period if: (1) in that period it was made available to, and actually used by, more than one of the employees of one or more employers and, in the case of each of them, was made available to him by reason of his employment but was not in that period ordinarily used by any one of them to the exclusion of the others (s 56(9)(a)); (2) in the case of each of the employees, any private use of the vehicle made by him in that period was merely incidental to his other use of it in that period (s 56(9)(b)); and (3) it was in that period not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the vehicle available to them (s 56(9)(c)). 'Employment' includes any office; and related expressions are to be construed accordingly: s 56(10). For the meaning of 'prescribed accounting period' see PARA 216 note 6 post.

6 Ibid s 56(1)(a), (3)(a). Fuel provided by an employer to an employee and fuel which is provided to any person for private use in a vehicle which, by virtue of s 56(3)(d) (see note 5 supra) is for the time being taken as allocated to the employee is taken to be provided to the employee by reason of his employment: s 56(3)(e).

7 Ibid s 56(1)(b).

8 Ibid s 56(1)(c).

9 Ibid s 56(2)(a).

10 Ibid s 56(2)(b).

11 See the text and notes 12-17 infra. These rules obviate the difficulties which would arise if a trader or the Commissioners for Her Majesty's Revenue and Customs were obliged to value the amount of fuel which a trader or his employees may use for private purposes. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

12 Value Added Tax Act 1994 s 56(6). For the meaning of 'consideration' generally see PARA 95 ante. The consideration is determined in accordance with s 56(7): see the text and notes 14-15 infra. As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

13 Ibid s 56(6).

14 In any case where: (1) in any prescribed accounting period, fuel for private use is, by virtue of ibid s 56(6), treated as supplied to an individual in respect of one vehicle for a part of the period and in respect of another vehicle for another part of the period (s 56(8)(a)); and (2) at the end of that period one of those vehicles neither belongs to him nor is allocated to him, this provision has effect as if the supplies made to the individual during those parts of the period were in respect of only one vehicle (s 56(8)(b)). For the purposes of determining the appropriate consideration in these circumstances, if each of the two or more vehicles falls within the same description of vehicle specified in s 57(3), Table A (as substituted) (see PARA 105 post), those provisions apply as if only one of the vehicles were to be considered throughout the whole period (s 57(5)(a)), and if one of those vehicles falls within a description of vehicle specified in s 57(3), Table A (as substituted) which is different from the other or others, the consideration is the aggregate of the relevant fractions of the consideration appropriate for each description of vehicle there specified (s 57(5)(b)). For these purposes the 'relevant fraction' in relation to any vehicle is that which the part of the prescribed accounting period in which fuel for private use was supplied in respect of that vehicle bears to the whole of that period: s 57(6). As from a day to be appointed s 57(5)(a), (b) are amended by the Finance (No 2) Act 2005 s 2(1), (3), consequentially upon the substantive amendments noted in PARA 105 note 4 post (although such amendments are technical and



do not affect the meaning of the Value Added Tax Act 1994 s 57(5)(a), (b) as noted above). At the date at which this volume states the law no such day had been appointed.

15 Value Added Tax Act 1994 s 56(7).

16 Ie the accounting period in respect of supplies in which the consideration is to be determined: *ibid* s 57(1).

17 For the detailed method for determining the appropriate amount of consideration for a particular vehicle see PARA 105 post.

18 As to the credit for input tax incurred on the purchase of fuel for private use see the Value Added Tax Act 1994 s 56(5); and PARA 215 post. For the meaning of 'input tax' see PARAS 4 ante, 215 post.

19 See Customs and Excise Public Notice 48 *Extra-Statutory Concessions* (March 2002) PARA 3.1.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(3) VALUE OF GOODS OR SERVICES/(ii) Valuation in Special Cases/105. Determination of consideration for fuel supplied for private use.

### **105. Determination of consideration for fuel supplied for private use.**

Where fuel is supplied to an individual for private use<sup>1</sup> the appropriate consideration depends on the length of the prescribed accounting period in respect of supplies in which the consideration is to be determined and the type and cylinder capacity of the engine of the vehicle in question, as specified, by way of a Table, by the Treasury<sup>2</sup>. The Treasury may by order substitute a different Table for these purposes<sup>3</sup>, and as from a day to be appointed<sup>4</sup> may, pursuant to this power, substitute a Table where any description of vehicle may be by reference to any one or more of the CO<sub>2</sub> emissions figure<sup>5</sup> for the vehicle<sup>6</sup>, the type or types of fuel or power by which the vehicle is, or is capable of being, propelled<sup>7</sup>, and the cylinder capacity of the engine in cubic centimetres<sup>8</sup>. As from a day to be appointed<sup>9</sup> the provision that may be included in any such a Table will include provision for the purpose of enabling the consideration to be determined by reference to the Table either by applying a percentage specified in the Table to a monetary amount specified in the Table<sup>10</sup> or by any other method<sup>11</sup>. Provision is also made, as from a day to be appointed<sup>12</sup>, for the Table, as from time to time substituted by virtue of these provisions, to be implemented or supplemented by either or both of provision in Rules inserted before the Table, prescribing how the consideration is to be determined by reference to the Table<sup>13</sup>, and provision in Notes inserted after the Table<sup>14</sup>.

1 For the meaning of 'fuel for private use' and connected expressions see PARA 104 ante.

2 See the Value Added Tax Act 1994 s 57(1A), (2), (3) (s 57(1A) added, s 57(2), (3) amended, by the Finance Act 1995 s 30; Value Added Tax Act 1994 s 57(3) further amended by the Value Added Tax (Consideration for Fuel Provided for Private Use) Order 2005, SI 2005/722, art 2 (made pursuant to the power of the Treasury under the Value Added Tax Act 1994 s 57(4) by order to substitute a different Table for these purposes, as to which see the text and notes 3-14 infra)), under which the following provision is made: where the prescribed accounting period is a period of 12 months, the appropriate consideration for a diesel-engined vehicle is either £945 (in respect of a vehicle whose cylinder capacity is 2,000 cc or less) or £1,200 (cylinder capacity of more than 2,000 cc), and the appropriate consideration for any other type of engine is either £985 (cylinder capacity of 1,400 cc or less), £1,245 (cylinder capacity of more than 1,400 cc but not more than 2,000 cc) or £1,830 (cylinder capacity of more than 2,000 cc); where the prescribed accounting period is a period of 3 months, the appropriate consideration for a diesel-engined vehicle is either £236 (cylinder capacity of 2,000 cc or less) or £300 (cylinder capacity of more than 2,000 cc), and the appropriate consideration for any other type of engine is either £246 (cylinder capacity of 1,400 cc or less), £311 (cylinder capacity of more than 1,400 cc but not more than 2,000 cc) or £457 (cylinder capacity of more than 2,000 cc); and where the prescribed accounting period is a period of one month, the appropriate consideration for a diesel-engined vehicle is either £78 (cylinder capacity of 2,000 cc or less) or £100 (cylinder capacity of more than 2,000 cc), and the appropriate consideration for any other type of engine is either £82 (cylinder capacity of 1,400 cc or less), £103 (cylinder capacity of more than 1,400 cc but not more than 2,000 cc) or £152 (cylinder capacity of more than 2,000 cc). These amounts have effect in relation to a taxable person from the beginning of his first prescribed accounting period beginning after 30 April 2005: Value Added Tax (Consideration for Fuel Provided for Private Use) Order 2005, SI 2005/722, art 1(2).

In the case of a vehicle having an internal combustion engine with one or more reciprocating pistons, its cubic capacity for these purposes is the capacity of its engine as calculated for the purposes of the Vehicle Excise and Registration Act 1994: Value Added Tax Act 1994 s 57(7) (prospectively amended: see note 4 infra). In the case of a vehicle not falling within s 57(7) (as prospectively amended), its cubic capacity is such as may be determined for these purposes by order by the Treasury: s 57(8) (prospectively amended: see note 4 infra).

3 Ibid s 57(4). Such order takes effect from the beginning of any prescribed accounting period beginning after the order is made: s 57(4). As to the making of orders generally see PARA 14 ante. As from a day to be appointed (see note 4 infra) the Treasury is also empowered, where it considers it necessary or expedient to do so in consequence of either the form or content of any Table substituted or to be substituted by virtue of s 57(4A) (as prospectively added), or any provision included or to be included in Rules or Notes (see the text and notes 13-14 infra), by order to amend, repeal or replace so much of s 57 as for the time being follows s 57(1)

and precedes the Table and relates to the use of that Table: s 57(10) (prospectively added: see note 4 infra). At the date at which this volume states the law no such day had been appointed.

4 The Value Added Tax Act 1994 s 57(4A)-(4G), (9), (10) are added, and s 57(7), (8) are amended, by the Finance (No 2) Act 2005 s 2(1), (2), (4)-(6), as from a day to be appointed under s 2(7). At the date at which this volume states the law no such day had been appointed.

5 'CO<sub>2</sub> emissions figure' means a CO<sub>2</sub> emissions figure expressed in grams per kilometre driven: Value Added Tax Act 1994 s 57(9) (prospectively added: see note 4 supra).

6 Ibid s 57(4A)(a) (prospectively added: see note 4 supra).

7 Ibid s 57(4A)(b) (prospectively added: see note 4 supra).

8 Ibid s 57(4A)(c) (prospectively added: see note 4 supra).

9 See note 4 supra.

10 Value Added Tax Act 1994 s 57(4B)(a) (prospectively added: see note 4 supra).

11 Ibid s 57(4B)(b) (prospectively added: see note 4 supra).

12 See note 4 supra.

13 Value Added Tax Act 1994 s 57(4C)(a) (prospectively added: see note 4 supra).

14 Ibid s 57(4C)(b) (prospectively added: see note 4 supra). As from a day to be appointed it is provided that the provision that may be made in Notes (ie notes inserted by virtue of s 57(4C)(b) (as prospectively added)) includes provision: (1) with respect to the interpretation or application of the Table or any Rules (ie Rules inserted by virtue of s 57(4C)(a) (as prospectively added)) or Notes (s 57(4D)(a), (9) (as so prospectively added)); (2) with respect to the figure that is to be regarded as the CO<sub>2</sub> emissions figure for any vehicle or any particular description of vehicle (s 57(4D)(b) (as so prospectively added)); (3) for treating a vehicle as a vehicle with a particular CO<sub>2</sub> emissions figure (s 57(4D)(c) (as so prospectively added)); (4) for treating a vehicle with a CO<sub>2</sub> emissions figure as a vehicle with a different CO<sub>2</sub> emissions figure (s 57(4D)(d) (as so prospectively added)); and (5) for or in connection with determining the consideration appropriate to vehicles of any particular description (in particular, vehicles capable of being propelled by any particular type or types of fuel or power (s 57(4D)(e), (4E)(a) (as so prospectively added)), vehicles first registered before 1 January 1998 (s 57(4E)(b) (as so prospectively added)), and vehicles first registered on or after that date which are not, when first registered, so registered on the basis of either an EC certificate of conformity that specifies a CO<sub>2</sub> emissions figure (s 57(4E)(c), (4F)(a) (as so prospectively added)) or a UK approval certificate that specifies such a figure (s 57(4F)(b) (as so prospectively added))). 'EC certificate of conformity' means a certificate of conformity issued by a manufacturer under any provision of the law of a member state implementing EC Council Directive 70/156 (OJ L42, 23.2.70, p 1) on the approximation of the laws of the member states relating to the type-approval of motor vehicles and their trailers, art 6, as from time to time amended; and 'UK approval certificate' means a certificate issued under either the Road Traffic Act 1988 s 58(1) or (4) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 706) or the Road Traffic (Northern Ireland) Order 1981 art 31A(4) or (5): Value Added Tax Act 1994 s 57(9) (as so prospectively added).

Any such Rules or Notes do not form part of the Table, but the Treasury, by order taking effect from the beginning of any prescribed accounting period beginning after the order is made, may insert Rules or Notes (s 57(4G)(a) (as so prospectively added)), vary or remove Rules or Notes (s 57(4G)(b) (as so prospectively added)), or substitute any or all Rules or Notes (s 57(4G)(c) (as so prospectively added)).

## UPDATE

### 105 Determination of consideration for fuel supplied for private use

NOTE 2--Value Added Tax Act 1994 s 57(3) further amended: SI 2010/919.

<i>Vehicle's CO<sub>2</sub> emissions figure</i>	<i>12 month period £</i>	<i>3 month period £</i>	<i>1 month period £</i>
120 or less	570	141	47
125	850	212	70
130	850	212	70
135	910	227	75

140	965	241	80
145	1,020	255	85
150	1,080	269	89
155	1,135	283	94
160	1,190	297	99
165	1,250	312	104
170	1,305	326	108
175	1,360	340	113
180	1,420	354	118
185	1,475	368	122
190	1,530	383	127
195	1,590	397	132
200	1,645	411	137
205	1,705	425	141
210	1,760	439	146
215	1,815	454	151
220	1,875	468	156
225	1,930	482	160
230 or more	1,985	496	165

NOTE 4--Day now appointed: SI 2007/946.

NOTE 14--If no EC certificate of conformity or UK approval certificate is issued in relation to a vehicle, or no emissions figure is specified in relation to it in any such certificate, the vehicle's CO<sub>2</sub> emissions figure is (1) 140 if its cylinder capacity is 1,400 cc or less; (2) 175 if its cylinder capacity exceeds 1,400 cc but does not exceed 2,000 cc; and (3) 235 or more (if its cylinder capacity exceeds 2,000 cc: Value Added Tax Act 1994 s 57(3) note 6 (amended by SI 2008/722, SI 2010/919).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(3) VALUE OF GOODS OR SERVICES/(ii) Valuation in Special Cases/106. Gaming machines.

## **106. Gaming machines.**

Where a person plays a game of chance<sup>1</sup> by means of a gaming machine<sup>2</sup>, then for the purposes of value added tax the amount paid by him to play<sup>3</sup> is treated as the consideration<sup>4</sup> for a supply<sup>5</sup> of services to him<sup>6</sup>. The value to be taken as the value of the supplies so made in any period<sup>7</sup> is determined<sup>8</sup> as if the consideration for the supplies were reduced by an amount equal to the amount (if any) received in that period by persons<sup>9</sup> playing successfully<sup>10</sup>.

1 For these purposes, 'game of chance' has the same meaning as in the Gaming Act 1968 (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 310): Value Added Tax Act 1994 s 23(4).

2 For these purposes, 'gaming machine' means a machine in respect of which the following conditions are satisfied: (1) it is constructed or adapted for playing a game of chance by means of it; (2) a player pays to play the machine (except where he may play payment-free as the result of having previously played successfully) either by inserting a coin, token or other thing into the machine or in some other way; and (3) the element of chance in the machine is provided by means of the machine: *ibid* s 23(4) (amended by the Finance Act 2003 s 10(4)). As to the general exemption from VAT for betting, gaming and lotteries see the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 4; and PARA 162 post. The exemption does not extend to the provision of a gaming machine: Sch 9 Pt II Group 4 note 1(d). The exclusion from exemption for gaming machines is not inconsistent with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 13(B)(f); and the phrase 'the provision of gaming machines' means the provision to players: *Feehan v Customs and Excise Comrs* [1995] STC 75. As to the Sixth Directive see PARA 1 note 1 ante.

3 The insertion of a token into a machine is treated for these purposes as the payment of an amount equal to that for which the token can be obtained: Value Added Tax Act 1994 s 23(3).

4 For the meaning of 'consideration' generally see PARA 95 ante.

5 For the meaning of 'supply' see PARA 27 ante.

6 Value Added Tax Act 1994 s 23(1). Section 23(1) is without prejudice to s 23(2) (see the text and notes 7-10 infra): s 23(1).

7 It is apprehended that 'period' refers to the machine owner's prescribed accounting period. For the meaning of 'prescribed accounting period' see PARA 216 note 6 post.

8 An authorised person may at any reasonable time require a person making a supply under the Value Added Tax Act 1994 s 23(1) or any person acting on his behalf: (1) to open any gaming machine (s 58, Sch 11 para 9(a)); and (2) to carry out any other operation to enable the authorised person to ascertain the amount which is to be taken as the value of supplies made in the circumstances mentioned in s 23(1) (Sch 11 para 9(b)). For the meaning of 'authorised person' see PARA 91 note 6 ante.

9 Ie other than the person making the supply or persons acting on his behalf: *ibid* s 23(2).

10 *Ibid* s 23(2). For these purposes, the receipt of a token by a person playing successfully is treated: (1) if the token is of a kind used to play the machine, as the receipt of an amount equal to that for which such a token can be exchanged (s 23(3)(a)); and (2) if it is not of such a kind but can be exchanged for money, as the receipt of an amount equal to that for which it can be exchanged (s 23(3)(b)). For the meaning of 'money' see PARA 33 note 7 ante.

## **UPDATE**

### **106 Gaming machines**

TEXT AND NOTES 1, 3--For 'plays a game of chance' read 'gambles'; 'to play' is omitted: Value Added Tax Act 1994 s 23(1)-(3) (amended by Finance Act 2006 s 16(2)).

'Gambling' means playing a game of chance for a prize, and betting: Value Added Tax Act 1994 s 23(6)(a) (s 23(4)-(7) substituted by Finance Act 2006 s 16(5); 1994 Act s 23(6) amended by SI 2006/2686). 'Prize', in relation to a machine, does not include the opportunity to play the machine again: Value Added Tax Act 1994 s 23(6)(h).

NOTE 2--Replaced. 'Gaming machine' means a machine which is designed or adapted for use by individuals to gamble (whether or not it can also be used for other purposes); but a machine is not a gaming machine to the extent that (1) it is designed or adapted for use to bet on future real events; (2) it is designed or adapted for the playing of bingo and bingo duty is charged under the Betting and Gaming Duties Act 1981 s 17 (see LICENSING AND GAMBLING vol 68 (2008) PARA 766) on the playing of that bingo, or would be charged but for Sch 3 paras 1-5 (see LICENSING AND GAMBLING vol 68 (2008) PARA 767); or (3) it is designed or adapted for the playing of a real game of chance the playing of which is dutiable gaming for the purposes of the Finance Act 1997 s 10 (see LICENSING AND GAMBLING vol 68 (2008) PARA 759), or would be so but for s 10(3), (4) (see LICENSING AND GAMBLING vol 68 (2008) PARA 759): Value Added Tax Act 1994 s 23(4). A 'machine' is any apparatus which uses or applies mechanical power, electrical power, or both; a reference to a machine being designed or adapted for a purpose includes a reference to a machine to which anything has been done as a result of which it can reasonably be expected to be used for that purpose; and a reference to a machine being adapted includes a reference to the installation on it of computer software: s 23(6)(b)-(d). 'Real' has the meaning given by the Gambling Act 2005 s 353(1): Value Added Tax Act 1994 s 23(6)(e). 'Game of chance' includes (a) a game that involves an element of chance and an element of skill; (b) a game that involves an element of chance that can be eliminated by superlative skill; and (c) any game that is presented as involving an element of change (but does not include a sport) and 'bingo' means any version of that game, however described: s 23(6)(f), (g). The Treasury may by order amend s 23(4)-(6): s 23(7).

EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

NOTE 10--For 'to play' read 'to use'; and for 'playing' read 'gambling': Value Added Tax Act 1994 s 23(3) (amended by Finance Act 2006 s 16(4)). A person plays a game of chance if he participates in such a game, whether or not there are other participants in the game, and whether or not a computer generates images or data taken to represent the actions of other participants in the game: Value Added Tax Act 1994 s 23(6)(i).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(3) VALUE OF GOODS OR SERVICES/(ii) Valuation in Special Cases/107. Adjustments to contracts on changes in value added tax.

### **107. Adjustments to contracts on changes in value added tax.**

Where, after the making of a contract for the supply<sup>1</sup> of goods or services and before the goods or services are supplied, there is a change in the value added tax charged on the supply<sup>2</sup>, then, unless the contract otherwise provides, there is added to or deducted from the consideration<sup>3</sup> for the supply an amount equal to the change<sup>4</sup>. This provision applies in relation to a tenancy or lease as it applies in relation to a contract, except that a term of a tenancy or lease is not to be taken to provide that the rule set out above is not to apply in the case of the tenancy or lease if the term does not specifically refer to VAT or to the statutory provision containing that rule<sup>5</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 For these purposes, references to a change in the VAT charged on a supply include references to a change to or from no VAT being charged on the supply (including a change attributable to the making of an election to waive exemption under the Value Added Tax Act 1994 s 51(1), Sch 10 para 2 (as amended) (see PARA 157 post): s 89(3). In *Jaymarke Development Ltd v Elinacre Ltd (in liquidation)* [1992] STC 575, the parties had contracted to sell and buy a parcel of land for a price which, the contract stated, was 'deemed to be inclusive of VAT'. The vendors did not elect to waive exemption, in consequence of which the sale was an exempt supply of land; it was held that the purchasers were not entitled to claim to recover an amount of the price equal to the VAT which would have been charged, had the election to waive exemption been made. Under the Value Added Tax Act 1994 s 88 (as amended), the supplier may elect that in specified circumstances the rate of VAT on supplies which span a change in the rate of VAT in force or in the description of exempt or zero-rated goods or acquisitions is to be determined without regard to those provisions of s 6 (as amended) (see PARAS 35, 37, 44 ante) which would affect the time at which the supply would otherwise be treated as taking place: see PARA 36 ante. In *BJ Rice & Associates v Customs and Excise Comrs* [1996] STC 581, CA, Staughton LJ indicated that it was open to question whether the Value Added Tax Act 1994 s 89 was applicable in a case where, between the time of contract and the time of supply, the supplier became registered for VAT. See also *Wynn Realisations Ltd (in administration) v Vogue Holdings Inc* [1999] STC 524, CA (words 'exclusive of VAT' in contract for sale of land to be given their usual meaning: if VAT is payable, the price provided by the contract is exclusive of it).

3 For the meaning of 'consideration' generally see PARA 95 ante.

4 Value Added Tax Act 1994 s 89(1).

5 Ibid s 89(2). If, therefore, a lease is granted at a rent of £10,000 per annum, and the landlord subsequently elects to waive exemption, the tenant will subsequently be obliged to pay rent of £10,000 plus VAT of £1,750 unless he can rely on a term of the lease which provides that the rent is inclusive of VAT (if any) or which specifically precludes an adjustment of consideration under s 89, whether on the landlord electing to waive exemption or otherwise.

## **UPDATE**

### **107 Adjustments to contracts on changes in value added tax**

NOTE 2--Reference to an election under the Value Added Tax Act 1994 Sch 10 para 2 is now to the option to tax any land under Sch 10 Pt 1 (paras 1-34): s 89(3) (amended by SI 2008/1146).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(3) VALUE OF GOODS OR SERVICES/(iii) Valuation of Acquisitions from Other Member States/108. In general.

### **(iii) Valuation of Acquisitions from Other Member States**

#### **108. In general.**

A reverse charge arises where there is a taxable acquisition of goods from another member state<sup>1</sup>. The value of any acquisition of goods from another member state is taken to be the value of the transaction in pursuance of which the goods are acquired<sup>2</sup>. If the goods are acquired from another member state otherwise than in pursuance of a taxable supply<sup>3</sup>, the usual rules which apply for determining the value of a supply of goods or services<sup>4</sup> do not apply in relation to the transaction<sup>5</sup> and its value is determined in accordance with provisions<sup>6</sup> directed specifically to the valuation of acquisitions<sup>7</sup>. As a general rule, if the transaction is for a consideration in money<sup>8</sup>, its value is taken to be such amount as is equal to the consideration<sup>9</sup>. If it is for a consideration not consisting, or not wholly consisting, of money, its value is taken to be such amount in money as is equivalent to the consideration<sup>10</sup>. Where the transaction in pursuance of which goods are acquired from another member state is not the only matter to which a consideration in money relates, the transaction is deemed to be for such part of the consideration as is properly attributable to it<sup>11</sup>.

1 See PARA 19 ante. For the meaning of 'taxable acquisition' see PARA 19 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

2 Value Added Tax Act 1994 s 20(1). This provision is subject to s 18C (as added: see PARA 154 post): s 20(1) (amended by the Finance Act 1996 s 26(1), Sch 3 para 6). As to acquisitions from another member state see PARA 19 ante.

3 I.e. in which case the acquisition may be a taxable acquisition: see PARA 19 ante. For the meaning of 'taxable supply' see PARA 18 note 3 ante.

4 I.e. the Value Added Tax Act 1994 s 19, Sch 6 (as amended): see PARA 95 et seq ante.

5 Ibid s 20(2)(b).

6 I.e. ibid s 20, Sch 7: see the text and notes 7-11 infra; and PARA 109 et seq post. It is fair to say that these rules are the mirror image of the ordinary rules of valuation of supplies, taking into account the expectation that VAT will not have been charged on the supply by the member state from which the goods were acquired.

7 See ibid s 20(2)(a).

8 For the meaning of 'consideration' generally see PARA 95 ante; and for the meaning of 'money' see PARA 33 note 7 ante.

9 Value Added Tax Act 1994 s 20(3). As to the procedure for determining the sterling equivalent of consideration in foreign currency see Sch 7 para 4; and PARA 112 post.

10 Ibid s 20(4).

11 Ibid s 20(5).



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### **109. Consideration in money less than market value.**

Where, in the case of the acquisition of any goods from another member state<sup>1</sup>:

- 274 (1) the relevant transaction<sup>2</sup> is for a consideration<sup>3</sup> in money<sup>4</sup>;
- 275 (2) the value of the relevant transaction is otherwise less than the transaction's open market value<sup>5</sup>;
- 276 (3) the supplier and the person who acquires the goods are connected<sup>6</sup>; and
- 277 (4) that person is not entitled<sup>7</sup> to credit for all the value added tax on the acquisition<sup>8</sup>,

the Commissioners for Her Majesty's Revenue and Customs<sup>9</sup> may direct<sup>10</sup> that the value of the relevant transaction is to be taken to be its open market value<sup>11</sup>. The direction must be given by notice in writing to the person by whom the acquisition is made; but no such direction may be given more than three years after the relevant time<sup>12</sup>.

1 For the meaning of 'another member state' see PARA 4 note 15 ante; and as to acquisitions from other member states see PARA 19 ante.

2 For these purposes, 'relevant transaction', in relation to any acquisition of goods from another member state, means the transaction in pursuance of which the goods are acquired: Value Added Tax Act 1994 s 20(2), Sch 7 para 5; Value Added Tax Regulations 1995, SI 1995/2518, reg 96.

3 For the meaning of 'consideration' generally see PARA 95 ante.

4 Value Added Tax Act 1994 Sch 7 para 1(1)(a). For the meaning of 'money' see PARA 33 note 7 ante.

5 Ibid Sch 7 para 1(1)(b). For the meaning of 'open market value' generally see PARA 96 ante. For these purposes, the open market value of a transaction in pursuance of which goods are acquired from another member state is taken to be the amount which would fall to be taken as its value under s 20(3) (see PARA 108 ante) if it were for such consideration in money as would be payable by a person standing in no such relationship with any person as would affect that consideration: Sch 7 para 1(4).

6 Ibid Sch 7 para 1(1)(c). Any question whether a person is connected with another is to be determined, for these purposes, in accordance with the Income and Corporation Taxes Act 1988 s 839 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258); Value Added Tax Act 1994 Sch 7 para 1(5).

7 Ie under ibid ss 25, 26: see PARAS 216-217 post.

8 Ibid Sch 7 para 1(1)(d).

9 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

10 Such a direction may be varied or withdrawn by the Commissioners by a further direction given by notice in writing: Value Added Tax Act 1994 Sch 7 para 1(6).

11 Ibid Sch 7 para 1(1). A direction so given to a person in respect of a transaction may include a direction that the value of any transaction: (1) in pursuance of which goods are acquired by him from another member state after the giving of the notice, or after such later date as may be specified in the notice (Sch 7 para 1(3) (a)); and (2) as to which the conditions in heads (1)-(4) in the text are satisfied (Sch 7 para 1(3)(b)), is to be taken to be its open market value (Sch 7 para 1(3)). An appeal lies to the VAT and duties tribunal against a direction under Sch 7 para 1: see s 83(w); and PARA 346 et seq post.

12 Ibid Sch 7 para 1(2). 'The relevant time', in relation to any acquisition of goods from another member state, means: (1) if the person by whom the goods are acquired is not a taxable person and the time of acquisition does not fall to be determined in accordance with regulations made under s 12(3) (see PARA 44 ante), the time of the event which, in relation to that acquisition, is the first relevant event for the purposes of taxing the acquisition; and (2) in any other case, the time of acquisition: Sch 7 para 5; Value Added Tax Regulations 1995, SI 1995/2518, reg 96.

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### **110. Goods charged with excise or customs duty or agricultural levy.**

Where, in such cases as the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by regulations prescribe<sup>2</sup>, goods acquired in the United Kingdom<sup>3</sup> from another member state<sup>4</sup> are charged in connection with their removal to the United Kingdom with a duty of excise<sup>5</sup>, or are subject<sup>6</sup> on that removal to any Community customs duty or agricultural levy<sup>7</sup>, then the value of the relevant transaction<sup>8</sup> must be taken to be the sum of its value as otherwise determined<sup>9</sup> and the amount, so far as not already included in that value, of the duty or agricultural levy which has been or is to be paid in respect of those goods<sup>10</sup>. This provision does not, however, require the inclusion of any amount of duty or agricultural levy in the value of a transaction in pursuance of which there is an acquisition of goods which is treated<sup>11</sup> as taking place before the time which is the duty point<sup>12</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Ie under the Value Added Tax Act 1994: s 96(1). As to the making of regulations generally see PARA 14 ante.

3 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4 For the meaning of 'another member state' see PARA 4 note 15 ante.

5 Value Added Tax Act 1994 s 20(2), Sch 7 para 2(1)(a); Value Added Tax Regulations 1995, SI 1995/2518, reg 97(1)(a).

6 Ie in accordance with any provision for the time being having effect for transitional purposes in connection with the accession of any state to the European Community: Value Added Tax Act 1994 Sch 7 para 2(1)(b); Value Added Tax Regulations 1995, SI 1995/2518, reg 97(1)(b).

7 Value Added Tax Act 1994 Sch 7 para 2(1)(b); Value Added Tax Regulations 1995, SI 1995/2518, reg 97(1)(b).

8 For the meaning of 'relevant transaction' see PARA 109 note 2 ante.

9 Ie as determined apart from the Value Added Tax Act 1994 Sch 7 para 2: Sch 7 para 2; Value Added Tax Regulations 1995, SI 1995/2518, reg 97(1).

10 Value Added Tax Act 1994 Sch 7 para 2(1); Value Added Tax Regulations 1995, SI 1995/2518, reg 97(1). As to the amount of any duty of excise see PARA 98 note 7 ante.

11 Ie under the Value Added Tax Act 1994 s 18(4): see PARA 144 post.

12 Ibid Sch 7 para 2(2); Value Added Tax Regulations 1995, SI 1995/2518, reg 97(2). The duty point referred to is the duty point within the meaning of the Value Added Tax Act 1994 s 18 (see PARAS 98 note 10 ante, 144 post): Value Added Tax Act 1994 Sch 7 para 2(2); Value Added Tax Regulations 1995, SI 1995/2518, reg 97(2).

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### **111. Goods acquired otherwise than for a consideration.**

Where goods are acquired from another member state<sup>1</sup> in pursuance of anything which is treated as a supply for value added tax purposes<sup>2</sup>, then in a case where there is no consideration<sup>3</sup> the value of the relevant transaction<sup>4</sup> is taken to be either:

- 278 (1) such consideration in money<sup>5</sup> as would be payable by the supplier if he were, at the time of the acquisition, to purchase goods identical in every respect, including age and condition, as the goods concerned<sup>6</sup>;
- 279 (2) where the value cannot be ascertained in accordance with head (1) above, such consideration in money as would be payable by the supplier if he were, at that time, to purchase goods similar to, and of the same age and condition as, the goods concerned<sup>7</sup>; or
- 280 (3) where the value cannot be ascertained in accordance with head (1) or head (2) above, the cost of producing the goods concerned if they were produced at that time<sup>8</sup>.

1 For the meaning of 'another member state' see PARA 4 note 15 ante.

2 I.e. by virtue of the Value Added Tax Act 1994 s 5(1), Sch 4 para 5(1) (where goods forming part of the assets of a business are transferred or disposed of so as no longer to form part of those assets: see PARA 30 ante) or Sch 4 para 6 (where goods forming part of the assets of a business are removed from any member state by or under the directions of the person carrying on the business, in the course or furtherance of the business, for the purpose of being taken to a place in a member state other than that from which they are removed: see PARA 20 ante): s 20(2), Sch 7 para 3(1). For the meaning of 'supply' see PARA 27 ante; and as to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

3 For the meaning of 'consideration' generally see PARA 95 ante.

4 For the meaning of 'relevant transaction' see PARA 109 note 2 ante. For an explanation of the views of the Commissioners for Her Majesty's Revenue and Customs on the application of these valuation principles see Customs and Excise Notice 252 *Valuation of Imported Goods for Customs Purposes, VAT and Trade Statistics* (January 2002). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 For these purposes, the amount of consideration in money that would be payable by any person if he were to purchase any goods is taken to be the amount that would be so payable after the deduction of any amount included in the purchase price in respect of VAT on the supply of goods to that person: Value Added Tax Act 1994 Sch 7 para 3(3). For the meaning of 'money' see PARA 33 note 7 ante.

6 Ibid Sch 7 para 3(1), (2)(a).

7 Ibid Sch 7 para 3(2)(b).

8 Ibid Sch 7 para 3(2)(c).

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## **112. Value of goods expressed in foreign currency.**

Where goods are acquired from another member state<sup>1</sup> and any sum relevant for determining the value of the relevant transaction<sup>2</sup> is expressed in a currency other than sterling<sup>3</sup>, then, for the purpose of valuing that transaction, that sum is to be converted into sterling at the market rate which would apply in the United Kingdom<sup>4</sup> on the relevant day<sup>5</sup> to a purchase with sterling, by the person making the acquisition, of that sum in the currency in question<sup>6</sup>. Where, however, the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup> have published a notice<sup>8</sup> which specifies for these purposes either rates of exchange<sup>9</sup> or methods of determining rates of exchange<sup>10</sup>, a rate specified in or determined in accordance with the notice as for the time being in force applies instead<sup>11</sup> in the case of any transaction in pursuance of which goods are acquired by a person who opts, in such manner as may be allowed by the Commissioners, for the use of that rate in relation to that transaction<sup>12</sup>. Such an option for the use of a particular rate or method of determining a rate may not be exercised by any person except in relation to all such transactions in pursuance of which goods are acquired by him from another member state as are of a particular description or after a particular date<sup>13</sup>, and may not be withdrawn or varied except with the consent of the Commissioners and in such manner as they may require<sup>14</sup>.

1 Value Added Tax Act 1994 s 20(2), Sch 7 para 4(1)(a). For the meaning of 'another member state' see PARA 4 note 15 ante.

2 For the meaning of 'relevant transaction' see PARA 109 note 2 ante.

3 Value Added Tax Act 1994 Sch 7 para 4(1)(b).

4 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

5 Where goods are acquired from another member state, the appropriate rate of exchange is to be determined for the purpose of valuing the relevant transaction by reference to the relevant time; and, accordingly, the day on which that time falls is the relevant day for these purposes: Value Added Tax Act 1994 Sch 7 para 4(7). For the meaning of 'the relevant time' see PARA 109 note 12 ante.

6 Ibid Sch 7 para 4(1).

7 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 A notice published by the Commissioners for these purposes may be withdrawn or varied by a subsequent notice so published: Value Added Tax Act 1994 Sch 7 para 4(6).

9 Ibid Sch 7 para 4(2)(a).

10 Ibid Sch 7 para 4(2)(b). In specifying a method of determining a rate of exchange, a notice published by the Commissioners may allow a person to apply to them for the use, for the purpose of valuing some or all of the transactions in pursuance of which goods are acquired by him from another member state, of a rate of exchange which is different from any which would otherwise apply: Sch 7 para 4(4). On an application made in accordance with provision contained in such a notice, the Commissioners may authorise the use with respect to the applicant of such a rate of exchange, in such circumstances, in relation to such transactions and subject to such conditions as they think fit: Sch 7 para 4(5).

11 Ie instead of the rate for which ibid Sch 7 para 4(1) provides: Sch 7 para 4(2).

12 Ibid Sch 7 para 4(2).

13 Ibid Sch 7 para 4(3)(a).

14 Ibid Sch 7 para 4(3)(b).

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## **(4) VALUE ADDED TAX ON THE IMPORTATION OF GOODS**

### **(i) In general**

#### **113. Charge on importation; in general.**

In addition to being charged on the supply of goods and services in the United Kingdom<sup>1</sup> and on the acquisition of goods in the United Kingdom from other member states<sup>2</sup>, value added tax is charged on the importation of goods from places outside the member states<sup>3</sup>. VAT on the importation of goods from places outside the member states is charged and payable as if it were a duty of customs<sup>4</sup>. Goods are treated for the purposes of VAT as imported no earlier than the time at which a Community customs debt in respect of duty on their entry into the Community would be incurred<sup>5</sup>; and the person who is treated as importing any goods from outside the member states is the person who would be liable to discharge any such Community customs debt<sup>6</sup>.

The question whether or not goods have entered the territory of the Community, the time when any Community customs debt in respect of duty on the entry of any goods into the territory would be incurred, and the person by whom any such debt would fall to be discharged, are to be determined<sup>7</sup> according to the Community legislation applicable to goods which are in fact subject to such duties, whether or not the goods in question are themselves so subject<sup>8</sup>.

1 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 The Commissioners for Her Majesty's Revenue and Customs have power to make provision for the territory of the Community, or for the member states, to be treated for any value added tax purposes as including or excluding prescribed territories: see the Value Added Tax Act 1994 s 93(1); and PARA 16 ante. In accordance with the policy on fiscal frontiers in the European Community, VAT ceased to be charged on importation of goods into the United Kingdom from other member states on 31 December 1992 (see PARA 1 note 1 ante); instead, it is charged on taxable acquisitions in the United Kingdom from other member states (see PARA 19 ante). Goods are imported from a place outside the member states where: (1) having been removed from a place outside the member states, they enter the territory of the Community (s 15(1)(a)); (2) they enter that territory by being removed to the United Kingdom or are removed to the United Kingdom after entering that territory (s 15(1)(b)); or (3) the circumstances are such that it is on their removal to the United Kingdom or subsequently while they are in the United Kingdom that any Community customs debt in respect of duty on their entry into the territory of the Community would be incurred (s 15(1)(c)). Section 15(1), (2) (see the text to notes 5-6 infra) does not, however, apply, except in so far as the context otherwise requires or provision to the contrary is contained in regulations under s 16(1) (see PARA 115 post), for construing any references to importation or to an importer in any enactment or subordinate legislation applied for the purposes of the Value Added Tax Act 1994 by s 16(1): s 15(3). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 See *ibid* s 1(1)(a)-(c); and PARA 4 ante. An importer is liable to pay tax on importation whether or not he is a taxable person. If he is a taxable person he will be entitled to claim tax paid on an importation of goods as deductible input tax provided the goods are used or are to be used for the purpose of a business carried on or to be carried on by him: see s 24(1)(c); and PARA 215 post. Where goods are imported by a taxable person from a place outside the member states and supplied by him as agent for a person who is not a taxable person, they must be treated as imported and supplied by the taxable person as principal: see s 47(1)(b) (amended by the Finance Act 1995 s 23(1), (4)); and PARA 209 post. For exceptions to the right to deduct as input tax the tax charged on importation see PARA 218 et seq post. For the penalties for evasion of import VAT see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1208 et seq.

VAT is not chargeable on the importation of goods in respect of which there is an absolute prohibition on importation or circulation within the Community: see Case 50/80 *Horvath v Hauptzollamt Hamburg-Jonas* [1981] ECR 385, [1982] 2 CMLR 522, ECJ; Case 221/81 *Wolf v Hauptzollamt Düsseldorf* [1982] ECR 3681, [1983] 2 CMLR 170, ECJ; Case 240/81 *Einberger v Hauptzollamt Freiburg* [1982] ECR 3699, [1983] 2 CMLR 170, ECJ; Case 294/82 *Einberger v Hauptzollamt Freiburg (No 2)* [1984] ECR 1177, [1985] 1 CMLR 765, ECJ (narcotics imported otherwise than through strictly controlled economic channels); Case C-343/89 *Witzemann v Hauptzollamt München-Mitte* [1990] ECR I-4477, [1993] STC 108, ECJ (counterfeit currency); Case C-3/97 *Criminal Proceedings against Goodwin* [1998] All ER (EC) 500, [1998] STC 699 (supply of counterfeit goods); see also Case 269/86 *Mol v Inspecteur der Invoerrechten en Accijnzen* [1988] ECR 3627, [1989] 3 CMLR 729, ECJ; Case 289/86 *Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting* [1988] ECR 3655, [1989] 3 CMLR 743, ECJ.

4 Value Added Tax Act 1994 s 1(4).

5 Ibid s 15(2)(a). See also note 2 supra. The time at which a customs debt is incurred is determined in accordance with EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) establishing the Community Customs Code, Title VII Ch 2 (arts 201-242) (as amended). The general rule is that a customs debt on importation is incurred through: (1) the release for free circulation of goods liable to import duties (art 201(1)(a)); or (2) the placing of such goods under the temporary importation procedure with partial relief from import duties (art 201(1)(b)). A customs debt is incurred at the time of acceptance of the customs declaration in question (art 201(2)) and is the liability of the declarant (see art 201(3)). The Code came into effect on 1 January 1993, replacing the domestic provisions of each member state which previously had governed the procedure for customs declarations and the payment of duties (in the United Kingdom implemented by the Customs and Excise Management Act 1979). See Case C-166/94 *Pezzullo Molini Pastifici Mangimifici SpA v Ministero delle Finanze* [1996] ECR I-331, [1996] STC 1236, ECJ (default interest on VAT chargeable on importation cannot begin to run before the tax becomes chargeable, ie on the goods ceasing to be covered by arrangements for transit or temporary importation). See also the Excise Duty Point (External and Internal Community Transit Procedure) Regulations 1998, SI 1998/202 (as amended); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 654 et seq.

6 Value Added Tax Act 1994 s 15(2)(b). See also note 2 supra.

7 Ie subject to ibid s 93: see PARA 16 ante.

8 Ibid s 96(3)(a)-(c).

## UPDATE

### 113 Charge on importation; in general

NOTE 5--Community Customs Code replaced: Community Customs Code (Modernised Customs Code) found in European Parliament and EC Council Regulation 450/2008 (OJ L145, 4.6.2008, p 1), see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 20-345.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(4) VALUE ADDED TAX ON THE IMPORTATION OF GOODS/(i) In general/114. Goods entering the United Kingdom from prescribed territories.

#### **114. Goods entering the United Kingdom from prescribed territories.**

Where goods enter the United Kingdom<sup>1</sup> from the prescribed territories which are treated as excluded from the territory of the European Community<sup>2</sup>, or are exported from the United Kingdom to those territories, the formalities relating to the entry of goods into the customs territory of the Community<sup>3</sup> or the export of goods to a place outside that customs territory<sup>4</sup> must be completed<sup>5</sup>.

Where goods enter the United Kingdom from the prescribed territories<sup>6</sup> and those goods are intended for another member state<sup>7</sup>, or other destination outside the United Kingdom transport of the goods to which destination involves their passage through another member state, the internal Community transit procedure<sup>8</sup> applies<sup>9</sup>.

1 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 Ie the territories prescribed in the Value Added Tax Regulations 1995, SI 1995/2518, reg 136 or reg 137: see PARA 16 ante.

3 Ie the formalities contained in EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) establishing the Community Customs Code; EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) laying down provisions for the implementation of EC Council Regulation 2913/92 (as amended); and the Customs Controls on Importation of Goods Regulations 1991, SI 1991/2724 (as amended): see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 76 et seq; CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 934 et seq.

4 Ie the formalities contained in EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1); and EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) (as amended): see CUSTOMS AND EXCISE.

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 140(1), (2).

6 See note 2 supra.

7 For the meaning of 'another member state' see PARA 4 note 15 ante.

8 Ie the procedure described in EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1); and EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) (as amended): see CUSTOMS AND EXCISE.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 141.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(4) VALUE ADDED TAX ON THE IMPORTATION OF GOODS/(i) In general/115. Application of customs enactments.

### **115. Application of customs enactments.**

As a general rule<sup>1</sup> the provision made by or under the principal legislation governing customs and excise duties and the administration thereof<sup>2</sup> apply, so far as relevant, in relation to any value added tax chargeable on the importation of goods from places outside the member states as they apply in relation to any such duty of customs or excise or Community customs duties<sup>3</sup>.

Goods imported by post from places outside the member states, other than by datapost packet<sup>4</sup>, not exceeding £2,000 in value, or such greater sum as is determined for the time being by the Commissioners for Her Majesty's Revenue and Customs, by a registered person<sup>5</sup> in the course of a business<sup>6</sup> carried on by him may<sup>7</sup> be delivered without payment of VAT if he has given such security as the Commissioners may require<sup>8</sup> and his registration number<sup>9</sup> is shown on the customs declaration attached to or accompanying the package<sup>10</sup>. The registered person must account for VAT chargeable on the goods on their importation, together with any VAT chargeable on the supply<sup>11</sup> of goods or services by him or on the acquisition of goods by him from another member state<sup>12</sup> in a return<sup>13</sup> furnished by him<sup>14</sup> for the prescribed accounting period<sup>15</sup> during which the goods were imported<sup>16</sup>.

Regulations may make special provision for VAT purposes concerning the application of customs enactments to postal packets<sup>17</sup>.

1    le subject to such exceptions and adaptations as the Commissioners for Her Majesty's Revenue and Customs may by regulations prescribe and except where the contrary intention appears: Value Added Tax Act 1994 s 16(1). As to the exceptions and adaptations so prescribed see note 2 infra. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2    le the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom (Value Added Tax Act 1994 s 16(1)(a)), together with the Community legislation for the time being having effect in relation to Community customs duties charged on goods entering the territory of the Community (s 16(1)(b)). 'The Customs and Excise Acts 1979' means: (1) the Customs and Excise Management Act 1979; (2) the Customs and Excise Duties (General Reliefs) Act 1979 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 857 et seq); (3) the Alcoholic Liquor Duties Act 1979 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 398 et seq); (4) the Hydrocarbon Oil Duties Act 1979 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 508 et seq); and (5) the Tobacco Products Duty Act 1979 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 585 et seq): see the Customs and Excise Management Act 1979 s 1(1) (definition amended by the Finance (No 2) Act 1992 s 1, Sch 1 para 1); and CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 398.

Regarding the Customs and Excise Acts 1979, the following provisions of those Acts do not, however, apply for VAT purposes:

- 57   (a)   the Customs and Excise Management Act 1979 s 43(5) (provisions as to duty on reimported goods); s 125(1), (2) (valuation of goods for the purpose of ad valorem duties); s 126 (charge of excise duty on manufactured or composite imported articles); and s 127(1)(b) (determination of disputes as to duties on imported goods) (Value Added Tax Regulations 1995, SI 1995/2518, reg 118(c)) (and see also reg 121(1), (2) (reg 121 substituted by the Value Added Tax (Amendment) (No 2) Regulations 2000, SI 2000/634, regs 2, 6), modifying the Customs and Excise Management Act 1979 s 125(3) in its application by virtue of the Value Added Tax Act 1994 s 16(1));
- 58   (b)   the Customs and Excise Duties (General Reliefs) Act 1979 other than ss 8, 9(b) (Value Added Tax Regulations 1995, SI 1995/2518, reg 118(d); but see the Customs and Excise

(Personal Relief for Goods Permanently Imported) Order 1992, SI 1992/3193; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 879 et seq);

- 59 (c) the Alcoholic Liquor Duties Act 1979 s 7 (exemption from duty on spirits in articles used for medical purposes); s 8 (repayment of duty on spirits for medical or scientific purposes); s 9 (remission of duty on spirits for methylation); s 10 (remission of duty on spirits for use in art or manufacture); s 22(4) (drawback on exportation of tinctures or spirits of wine); and ss 42, 43 (drawback on exportation and warehousing of beer) (Value Added Tax Regulations 1995, SI 1995/2518, reg 118(a));
- 60 (d) the Hydrocarbon Oil Duties Act 1979 s 9 (relief for certain industrial uses); s 15 (drawback of duty on exportation etc of certain goods); s 16 (drawback of duty on exportation etc of power methylated spirits); s 17 (repayment of duty on heavy oil used by horticultural producers); s 18 (repayment of duty on fuel for ships in home waters); s 19 (repayment of duty on fuel used in fishing boats etc); s 20 (relief from duty on oil contaminated or accidentally mixed in warehouse); and s 20AA (as added) (power to allow reliefs) (Value Added Tax Regulations 1995, SI 1995/2518, reg 118(b)); and
- 61 (e) the Tobacco Products Duty Act 1979 s 2(2) (remission or repayment of duty on tobacco products) (Value Added Tax Regulations 1995, SI 1995/2518, reg 118(f)).

The Isle of Man Act 1979 ss 8, 9 (removal of goods from Isle of Man to United Kingdom) (Value Added Tax Regulations 1995, SI 1995/2518, reg 118(e)) or the Finance Act 1999 ss 126, 127 (interest on unpaid customs debts and on certain repayments relating to customs duty) (Value Added Tax Regulations 1995, SI 1995/2518, reg 118(g) (added by SI 2000/634) also do not so apply. The Finance Act 1999 s 129 (recovery of certain amounts by Commissioners) is regarded as providing for the recovery of a repayment of any relevant VAT: Value Added Tax Regulations 1995, SI 1995/2518, reg 121(3) (as so substituted).

Where goods are imported into the United Kingdom from the territories prescribed in reg 136 or reg 137 (see PARA 16 ante), customs and excise legislation applies, so far as relevant, in relation to any VAT chargeable upon such importation with the same exceptions and adaptations as are prescribed in regs 118-121 (as amended) in relation to the application of the Value Added Tax Act 1994 s 16(1): Value Added Tax Regulations 1995, SI 1995/2518, reg 142. Where goods are imported into the United Kingdom from the territories prescribed in reg 137, the Finance (No 2) Act 1992 s 4 (enforcement powers: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1174) applies in relation to any VAT chargeable upon such importation as if references therein to 'member states' excluded the territories so prescribed: Value Added Tax Regulations 1995, SI 1995/2518, reg 143. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

Regarding the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom, there are excepted from the subordinate legislation which is so to apply the Excise Warehousing (Etc) Regulations 1988, SI 1988/809, regs 16(4), (5), 19(1)(b) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 677, 680) (Value Added Tax Regulations 1995, SI 1995/2518, reg 119(a) (reg 119 substituted by SI 2000/634)), and any regulations made under the Finance Act 1996 s 197(2)(f) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 827) (Value Added Tax Regulations 1995, SI 1995/2518, reg 119(b) (as so substituted)). The Customs Duties (Deferred Payment) Regulations 1976, SI 1976/1223 (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 976-984) are applied with specified modifications: Value Added Tax Regulations 1995, SI 1995/2518, reg 121A (regs 121A-121C added by SI 2003/2318).

For the applicable Community legislation for these purpose see EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) establishing the Community Customs Code and EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) laying down provisions for the implementation of EC Council Regulation 2913/92 (amended by EC Commission Regulation 3665/93 (OJ L335, 31.12.93, p 13)). EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) arts 218(1) (single entry in accounts), 225 (deferment of payment conditional on security) and EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) arts 244, 248(1), 257(3), (4), 258, 262(1), 876a(1) (art 876a(1) added by EC Commission Regulation 12/97 (OJ L9, 13.1.97, p 1)) (circumstances in which duties have to be or are taken as having to be secured), have effect subject to specified modifications (Value Added Tax Regulations 1995, SI 1995/2518, regs 121B, 121C (as so added)), and the following Community legislation is excepted:

- 62 (i) EC Council Regulation 918/83 (OJ L105, 23.4.83, p 1) on conditional reliefs from duty on the final importation of goods, and any implementing regulations made thereunder (Value Added Tax Regulations 1995, SI 1995/2518, reg 120(1));
- 63 (ii) EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) arts 126-128 (art 128 amended by EC Council Regulation 82/97 (OJ L17, 21.1.97, p 1)) (drawback system of inward processing relief); EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) art 137 so far as it relates to partial relief on temporary importation, and art 142 (substituted by EC Council Regulation 2700/2000 (OJ L311, 12.12.2000, p 17)); EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) arts 145-160 (art 153 amended by EC Council Regulation 2700/2000 (OJ L311, 12.12.2000, p 17))

(outward processing); EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) arts 185-187 (returned goods); art 229(b) (interest payable on a customs debt); arts 232(1)(b), (2), (3) (interest on arrears of duty); and art 241 (second and third sentences only) (interest on certain repayments by authorities) (Value Added Tax Regulations 1995, SI 1995/2518, reg 120(2)(a)(i), (iii)-(viii) (reg 120(2)(a)(v) amended, reg 120(2)(a)(vii), (viii) added, by SI 2000/634));

- 64 (iii) EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) arts 496-523 (substituted by EC Commission Regulation 993/2001 (OJ L141, 28.5.2001, p 1); and amended by EC Commission Regulation 2286/2003 (OJ L343, 31.12.2003, p 1)); EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) arts 536-544, 550 (substituted by EC Commission Regulation 993/2001 (OJ L141, 28.5.2001, p 1)) (but only to the extent that they apply to the drawback system of inward processing relief); EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) arts 585-592 (substituted by EC Commission Regulation 993/2001 (OJ L141, 28.5.2001, p 1)) (outward processing) and EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) arts 496-523 (as so substituted) to the extent that they are relevant to outward processing); and arts 844-856 (amended by EC Commission Regulation 1677/98 (OJ L212, 30.7.98, p 18)), and EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) art 882 (returned goods) (Value Added Tax Regulations 1995, SI 1995/2518, reg 120(2)(b) (substituted by SI 2003/2318));
- 65 (iv) EC Council Regulation 2658/87 (OJ L256, 7.9.87, p 1) on the tariff and statistical nomenclature and on the Common Customs Tariff (as amended) and implementing regulations made thereunder (end use relief), save and in so far as those regulations apply to goods admitted into territorial waters either in order to be incorporated into drilling or production platforms, for purposes of the construction, repair, maintenance, alteration or fitting-out of such platforms, or to link such drilling or production platforms to the mainland of the United Kingdom (Value Added Tax Regulations 1995, SI 1995/2518, reg 120(3)(a)) or for the fuelling and provisioning of drilling or production platforms (reg 120(3)(b)).

3 Value Added Tax Act 1994 s 16(1).

4 'Datapost packet' means a postal packet containing goods which is posted in the United Kingdom as a datapost packet for transmission to a place outside the United Kingdom in accordance with the terms of a contract entered into between the Post Office company and the sender of the packet, or which is received at a post office of the Post Office company in the United Kingdom from a place outside the United Kingdom for transmission and delivery in the United Kingdom by that company as if it were a datapost packet: Value Added Tax Regulations 1995, SI 1995/2518, reg 2(1) (amended by the Postal Services Act 2000 s 127(4), Sch 8 para 23). As to Post Office companies see POST OFFICE.

5 'Registered person' means a person registered by the Commissioners under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended), Sch 2, Sch 3 (as amended) or Sch 3A (as added) (see PARA 64 et seq ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 2(1).

6 For the meaning of 'business' see PARA 23 ante.

7 Ie with the authority of the proper officer: Value Added Tax Regulations 1995, SI 1995/2518, reg 122. 'Proper officer' means the person appointed or authorised by the Commissioners to act in respect of any matter in the course of his duties: reg 2(1).

8 Ibid reg 122(a).

9 For the meaning of 'registration number' see PARA 22 note 14 ante.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 122(b).

11 For the meaning of 'supply' see PARA 27 ante.

12 For the meaning of 'acquisition from another member state' see PARA 19 ante.

13 'Return' means a return which is required to be made in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 25 (see PARAS 247-248 post): reg 2(1).

14 Ie in accordance with the Value Added Tax Regulations 1995, SI 1995/2518 (see PARA 247 et seq post): reg 122.

15 'Prescribed accounting period' means, subject to ibid reg 99(1) (see PARA 224 post), a period such as is referred to in reg 25: reg 2(1).

16 Ibid reg 122.

17 Value Added Tax Act 1994 s 16(2). See the Postal Services Act 2000 s 105; and POST OFFICE vol 36(2) (Reissue) PARAS 164-165.

## **UPDATE**

### **115 Application of customs enactments**

NOTE 2--Community Customs Code replaced: Community Customs Code (Modernised Customs Code) found in European Parliament and EC Council Regulation 450/2008 (OJ L145, 4.6.2008, p 1), see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 20-345. For adaptations to, and exceptions from, EC Council Regulations 2913/92 and 2454/93 as they apply to returned goods relief, see SI 1995/2518 reg 121D (added by SI 2006/587). In head (ii) reference to EC Council Regulation 2913/92 arts 185-187 omitted, and in head (iii) reference to EC Council Regulation 2454/93 arts 844-856 omitted: reg 120 (amended by SI 2006/587).

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### **116. Value of imported goods.**

The value of goods imported from a place outside the member states<sup>1</sup> is determined<sup>2</sup> for the purposes of value added tax according to the rules applicable in the case of Community customs duties, whether or not the goods are subject to any such duties<sup>3</sup>. This value is, however, taken to include<sup>4</sup>:

- 281 (1) all taxes, duties and other charges levied either outside or, by reason of importation, within the United Kingdom<sup>5</sup> (other than VAT)<sup>6</sup>;
- 282 (2) all incidental expenses, such as commission, packing, transport and insurance costs up to the goods' first destination<sup>7</sup> in the United Kingdom<sup>8</sup>; and
- 283 (3) if at the time of the importation of the goods from a place outside the member states a further destination for the goods is known, and that destination is within the United Kingdom or another member state<sup>9</sup>, all such incidental expenses in so far as they result from the transport of the goods to that other destination<sup>10</sup>.
- 284 Subject to these provisions:
- 285 (a) where goods are imported from a place outside the member states for a consideration<sup>11</sup> which is or includes a price in money<sup>12</sup> payable as on the transfer of property<sup>13</sup>;
- 286 (b) the terms on which the goods are so imported allow a discount for prompt payment of that price<sup>14</sup> but do not include provision for payment of that price by instalments<sup>15</sup>; and
- 287 (c) payment of that price is made in accordance with those terms, so that the discount falls to be allowed<sup>16</sup>,

the value of the goods is taken to be reduced by the amount of the discount<sup>17</sup>.

The value of an otherwise legal transaction cannot be adjusted to take account of a subsequently discovered fraud<sup>18</sup>.

1 For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

2 I.e. subject to the Value Added Tax Act 1994 s 21(2)-(4) (as amended): see the text and notes 4-17 infra; and PARA 117 post.

3 Ibid s 21(1) (amended by the Finance Act 1995 s 22). As to Community valuation rules see EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) establishing the Community Customs Code arts 28-36 (art 31 amended by EC Council Regulation 82/97 (OJ L17, 21.1.97, p 1); EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) art 35 (amended by EC Council Regulation 2700/2000 (OJ L311, 12.12.2000, p 17)); and EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 211) arts 141-162, Annexes 23, 24 (amended by EC Commission Regulation 1762/95 (OJ L171, 21.7.95, p 8); EC Commission Regulation 1676/96 (OJ L218, 28.8.96, p 1); EC Commission Regulation 46/99 (OJ L10, 15.1.99, p 1); EC Commission Regulation 444/2002 (OJ L68, 12.3.2002, p 11); and by the Act of Accession 1994 art 29 Annex I (OJ L1, 1.1.95, p 213)).

4 I.e. in so far as they are not already included in that value in accordance with the rules mentioned in the Value Added Tax Act 1994 s 21(1): see the text and notes 1-3 supra.

5 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

6 Value Added Tax Act 1994 s 21(2)(a) (s 21(2) amended, s 21(2)(b) substituted, and s 21(2)(c) added, by the Finance Act 1996 ss 27(1), (3), 205(1), Sch 41 Pt IV).

7 For these purposes, 'the goods' first destination' means the place mentioned on the consignment note or any other document by means of which the goods are imported into the United Kingdom, or in the absence of such documentation it means the place of the first transfer of cargo in the United Kingdom: Value Added Tax Act 1994 s 21(2) (as amended: see note 6 supra). For the meaning of 'document' see PARA 17 note 9 ante.

8 Ibid s 21(2)(b) (as substituted: see note 6 supra).

9 For the meaning of 'another member state' see PARA 4 note 15 ante.

10 Value Added Tax Act 1994 s 21(2)(c) (as added: see note 6 supra).

11 For the meaning of 'consideration' generally see PARA 95 ante.

12 For the meaning of 'money' see PARA 33 note 7 ante.

13 Value Added Tax Act 1994 s 21(3)(a).

14 Ibid s 21(3)(b).

15 Ibid s 21(3)(c).

16 Ibid s 21(3)(d).

17 Ibid s 21(3).

18 See *Maden v Customs and Excise Comrs* (1996) VAT Decision 14603, [1997] STI 243 (importer could not recover VAT paid on the fraudulently inflated invoice value of gem stones).

## **UPDATE**

### **116 Value of imported goods**

NOTE 3--Community Customs Code replaced: Community Customs Code (Modernised Customs Code) found in European Parliament and EC Council Regulation 450/2008 (OJ L145, 4.6.2008, p 1), see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 20-345.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(4) VALUE ADDED TAX ON THE IMPORTATION OF GOODS/(i) In general/117. Valuation of certain imported works of art.

### **117. Valuation of certain imported works of art.**

The value of any works of art<sup>1</sup>, antiques<sup>2</sup> or collections or collectors' pieces<sup>3</sup> which are imported from a place outside the member states<sup>4</sup> is taken for the purposes of value added tax, unless either the whole of the VAT chargeable on their importation falls to be relieved pursuant to international agreements or arrangements<sup>5</sup> or they were exported from the United Kingdom<sup>6</sup> during the period of twelve months ending with the date of their importation<sup>7</sup>, to be an amount equal to 28.58 per cent of the amount which otherwise would be taken to be their value<sup>8</sup>.

1 A 'work of art' is:

- 66 (1) any mounted or unmounted painting, drawing, collage, decorative plaque or similar picture that was executed by hand (Value Added Tax Act 1994 s 21(6)(a) (s 21(4)-(7) added by the Finance Act 1995 s 22; Value Added Tax Act 1994 s 21(5), (6) (as so added) substituted, s 21(6A)-(6D) added, by the Finance Act 1999 s 12(2)), not including any technical drawing, map or plan (Value Added Tax Act 1994 s 21(6A)(a) (as so added)), any picture comprised in a manufactured article that has been hand-decorated (s 21(6A)(b) (as so added)), or anything in the nature of scenery, including a backcloth (s 21(6A)(c) (as so added));
- 67 (2) any original engraving, lithograph or other print which was produced from one or more plates executed by hand by an individual who executed them without using any mechanical or photomechanical process (s 21(6)(b)(i) (as so added and substituted)) and either is the only one produced from the plate or plates or is comprised in a limited edition (s 21(6)(b)(ii) (as so added and substituted));
- 68 (3) any original sculpture or statuary, in any material (s 21(6)(c) (as so added and substituted));
- 69 (4) any sculpture cast which was produced by or under the supervision of the individual who made the mould or became entitled to it by succession on the death of that individual (s 21(6)(d)(i) (as so added and substituted)) and either is the only cast produced from the mould or is comprised in a limited edition (s 21(6)(d)(ii) (as so added and substituted)) (a sculpture cast is taken to be comprised in a limited edition only if either the edition is limited so that the number produced from the same mould does not exceed eight (s 21(6B)(a)(i) (as so added)) or the edition comprises a limited edition of nine or more casts made before 1 January 1989 which the Commissioners for Her Majesty's Revenue and Customs have directed should be treated, in the exceptional circumstances of the case, as a limited edition for these purposes (s 21(6B)(a)(ii) (as so added)));
- 70 (5) any tapestry or other hanging which was made by hand from an original design (s 21(6)(d)(i) (as so added and substituted)) and either is the only one made from the design or is comprised in a limited edition (s 21(6)(d)(ii) (as so added and substituted)) (a tapestry or hanging is taken to be comprised in a limited edition only if the edition is limited so that the number produced from the same design does not exceed eight (s 21(6B)(b) (as so added)));
- 71 (6) any ceramic executed by an individual and signed by him (s 21(6)(e) (as so added and substituted));
- 72 (7) any enamel on copper which was executed by hand (s 21(6)(g)(i) (as so added and substituted)), is signed either by the person who executed it or by someone on behalf of the studio where it was executed (s 21(6)(g)(ii) (as so added and substituted)), either is the only one made from the design in question or is comprised in a limited edition (s 21(6)(g)(iii) (as so added and substituted)), and is not comprised in an article of jewellery or an article of a kind produced by goldsmiths or silversmiths (s 21(6)(g)(iv) (as so added and substituted)) (an enamel on copper is taken to be comprised in a limited edition only if the edition is limited so that the number produced from the same design does not exceed eight (s 21(6B)(c)(i) (as so added)) and each of



the enamels in the edition is numbered and is signed either by the person who executed it or by someone on behalf of the studio where it was executed (s 21(6B)(c)(ii) (as so added)); and

- 73 (8) any mounted or unmounted photograph which was printed by or under the supervision of the photographer (s 21(6)(h)(i) (as so added and substituted)), is signed by him (s 21(6)(h)(ii) (as so added and substituted)), and either is the only print made from the exposure in question or is comprised in a limited edition (s 21(6)(h)(iii) (as so added and substituted)) (a photograph is taken to be comprised in a limited edition only if the edition is limited so that the number produced from the same exposure does not exceed thirty (s 21(6B)(d)(i) (as so added)) and each of the prints in the edition is numbered and is signed by the photographer (s 21(6B)(d)(ii) (as so added))).

As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. In connection with works of art see also Customs and Excise Public Notice 48 *Extra-Statutory Concessions* (March 2002) PARA 3.2.6; and Customs and Excise Public Notice 718 *Margin Schemes for Second-hand Goods, Works of Art, Antiques and Collectors' Items* (May 2003) PARA 25.

2 le any antique more than 100 years old, being neither a work of art (see note 1 supra) nor a collection or collector's piece (see note 3 infra): Value Added Tax Act 1994 s 21(5)(b) (as added and substituted: see note 1 supra).

3 le a collection or collectors' piece that is of zoological, botanical, mineralogical, anatomical, historical, archaeological, paleontological, ethnographic, numismatic or philatelic interest: ibid s 21(5)(c) (as added and substituted: see note 1 supra). For these purposes, a collector's piece is of philatelic interest if it is a postage or revenue stamp, a postmark, a first-day cover or an item of pre-stamped stationery (s 21(6C)(a) (as added: see note 1 supra)) and it is franked or (if unfranked) it is not legal tender and is not intended for use as such (s 21(6C)(b) (as so added)).

4 For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante.

5 Value Added Tax Act 1994 s 21(6D)(a) (as added: see note 1 supra). As to the circumstances in which VAT chargeable on importation falls to be relieved pursuant to international agreements or arrangements see s 37(1); and PARA 119 post.

6 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

7 Value Added Tax Act 1994 s 21(6D)(b) (as added: see note 1 supra).

8 Ibid s 21(4), (5)(a)-(c) (s 21(4) as added (see note 1 supra) and amended by the Finance Act 1999 s 12(1); Value Added Tax Act 1994 s 21(5) as added and substituted (see note 1 supra)). An order under s 2(2) (increase or decrease in rate of VAT: see PARA 5 ante) may contain provision making such alteration of the percentage specified as the Treasury considers appropriate in consequence of any increase or decrease by that order of the rate of VAT: s 21(7) (as so added).

## UPDATE

### 117 Valuation of certain imported works of art

TEXT AND NOTES--Where any goods falling within the Value Added Tax Act 1994 s 21(5) are sold by auction at a time when they are subject to the customs procedure for temporary importation with total relief for import duties provided for in Council Regulation 2913/92 arts 137-141; and arrangements made by or on behalf of the purchaser of the goods following the sale by auction result in the importation of the goods from a place outside the member States, the value of the goods is not taken for the purposes of the Value Added Tax Act 1994 to include, in relation to the importation, any commission or premium payable to the auctioneer in connection with the sale of the goods: s 21(2A), (2B) (added by Finance Act 2006 s 18). The Value Added Tax Act 1994 s 21(4) does not apply in circumstances where the exportation and subsequent importation were effected to obtain the benefit of that provision: s 21(6D)(b) (amended by SI 2009/730).

Following the reduction in the standard rate to 15% from 1 December 2008 to 30 November 2009 (see PARA 5) for '28•58%' read '33•34%': Value Added Tax (Change of Rate) Order 2008, SI 2008/3020.

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**118. Goods imported for private purposes; avoidance of double charge.**

Where goods are imported by a taxable person<sup>1</sup> from a place outside the member states<sup>2</sup> and:

288 (1) at the time of importation they belong wholly or partly to another person<sup>3</sup>; and

289 (2) the purposes for which they are to be used include private purposes<sup>4</sup> either of himself or of the other<sup>5</sup>,

value added tax paid or payable by the taxable person on the importation of the goods is not regarded as input tax<sup>6</sup> to be deducted or credited<sup>7</sup> but he may make a separate claim to the Commissioners for Her Majesty's Revenue and Customs<sup>8</sup> for it to be repaid<sup>9</sup>. The Commissioners must allow the claim if they are satisfied that to disallow it would result, in effect, in a double charge to VAT; and where they do allow it they may do so only to the extent necessary to avoid the double charge<sup>10</sup>.

Any amount allowed by the Commissioners on the claim must be paid by them to the taxable person<sup>11</sup>. An appeal lies to the VAT and duties tribunal against any decision of the Commissioners relating to such a claim<sup>12</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 As to goods imported from a place outside the member states see PARA 113 note 2 ante; and as to the territories included in, or excluded from, the member states for value added tax purposes see PARA 16 ante.

3 Value Added Tax Act 1994 s 27(1)(a).

4 This reference to a person's private purposes is to purposes which are not those of any business carried on by him: *ibid* s 27(5). For the meaning of 'business' see PARA 23 ante.

5 *Ibid* s 27(1)(b).

6 For the meaning of 'input tax' see PARAS 4 ante, 215 post.

7 *Ie* under the Value Added Tax Act 1994 s 25: see PARA 216 post.

8 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

9 Value Added Tax Act 1994 s 27(1).

10 *Ibid* s 27(2). In considering such a claim, the Commissioners must have regard to the circumstances of the importation and, so far as appearing to them to be relevant, things done with, or occurring in relation to, the goods at any subsequent time: s 27(3).

11 *Ibid* s 27(4).

12 See *ibid* s 83(f); and PARA 346 et seq post.

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## **(ii) Relief from Value Added Tax on Importation**

### **119. Relief on imported goods.**

The Treasury may by order make provision:

- 290 (1) for giving relief from the whole or part of the value added tax chargeable on the importation of goods from places outside the member states<sup>1</sup> as may be imposed by or under the order, if and so far as the relief appears to the Treasury to be necessary or expedient having regard to any international agreements or arrangements<sup>2</sup>; and
- 291 (2) for relieving from VAT the acquisition from another member state<sup>3</sup> of any goods<sup>4</sup> if, or to the extent that, relief from VAT would be given by an order under head (1) above if the acquisition were an importation from a place outside the member states<sup>5</sup>.

Pursuant to these powers, orders have been made giving relief from the payment of VAT on the importation from outside the member states<sup>6</sup>, or the acquisition from another member state<sup>7</sup>, of United Nations goods<sup>8</sup>, capital goods and equipment on transfers of activities<sup>9</sup>, goods for the promotion of trade<sup>10</sup>, goods for testing<sup>11</sup>, goods relating to health<sup>12</sup>, charitable goods<sup>13</sup>, printed matter<sup>14</sup>, articles sent for miscellaneous purposes<sup>15</sup>, works of art and collector's pieces<sup>16</sup>, transport<sup>17</sup> and goods relating to war graves and funerals<sup>18</sup>. In all cases other than that of the importation or acquisition of United Nations goods it is a condition of the relief that the goods are put to the requisite use, or that the purpose by reference to which the relief is afforded is fulfilled, in the member states<sup>19</sup>. The Treasury has also ordered that VAT is not chargeable (or, as the case may be, payable) on the importation from outside the member states of goods forming part of a small consignment of a non-commercial character<sup>20</sup>, certain consignments of gold<sup>21</sup>, or gas and electricity<sup>22</sup>.

1 As to importation of goods from other member states see PARA 113 note 2 ante. Any relief so given may be subject to such conditions (including the conditions prohibiting or restricting the disposal of, or dealing with, the goods): Value Added Tax Act 1994 s 37(1).

2 Ibid s 37(1). In any case where: (1) it is proposed that goods which have been imported from a place outside the member states by any person ('the original importer') with the benefit of such relief are to be transferred to another person ('the transferee') (s 37(2)(a)); and (2) on an application made by the transferee, the Commissioners for Her Majesty's Revenue and Customs so direct (s 37(2)(b)), the Value Added Tax Act 1994 has effect as if, on the date of the transfer of the goods (and in place of the transfer), the goods were exported by the original importer and imported by the transferee, and, accordingly, where appropriate, provision made under s 37(1) has effect in relation to the VAT chargeable on the importation of the goods by the transferee: s 37(2). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 For the meaning of 'another member state' see PARA 4 note 15 ante.

4 As to the acquisition of goods from another member state see PARA 19 ante.

5 Value Added Tax Act 1994 s 36A(1) (s 36A added by the Finance Act 2002 s 25). Such an order may provide for relief to be subject to such conditions as appear to the Treasury to be necessary or expedient; and such conditions may: (1) include conditions prohibiting or restricting the disposal of or dealing with the goods concerned (Value Added Tax Act 1994 s 36A(2)(a) (as so added)); and (2) be framed by reference to the

conditions to which, by virtue of any order under s 37 in force at the time of the acquisition, relief under such an order would be subject in the case of an importation of the goods concerned (s 36A(2)(b) (as so added)). Where relief from VAT given by an order under this provision was subject to a condition that has been breached or not complied with, the VAT becomes payable at the time of the breach or, as the case may be, at the latest time allowed for compliance: s 36A(3) (as so added).

6 In exercise of the power conferred by *ibid* s 37(1) or its predecessor provisions (see the text and notes 1-2 *supra*) the Treasury has made the Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746 (amended by SI 1987/2108; SI 1988/2212; SI 1992/3120; SI 1995/3222), which applies without prejudice to relief from tax on the importation of goods afforded under or by virtue of any other enactment (Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 3(1)). Nothing in the order is to be construed as authorising a person to import anything from a place outside or within the member states in contravention of any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment: art 3(2) (substituted by SI 1992/3120).

7 In exercise of the power conferred by the Value Added Tax Act 1994 s 36A (as added) (see the text and notes 3-5 *supra*) the Treasury has made the Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, which provides that no VAT is payable on any acquisition from another member state of any goods where, if they were imported from a place outside the member states, relief from payment of VAT would be given by the Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/1935 (as amended) (Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2), subject to the proviso that the relief so given in respect of the acquisition of any goods must be subject to the same conditions as those to which, by virtue of the Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/1935 (as amended), relief under that Order would be subject in the case of an importation of those goods (Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 3).

8 See PARA 124 post.

9 See PARA 125 post.

10 See PARA 126 post.

11 See PARA 127 post.

12 See PARA 128 post.

13 See PARA 129 post.

14 See PARA 130 post.

15 See PARA 131 post.

16 See PARA 132 post.

17 See PARA 133 post.

18 See PARA 134 post.

19 See the Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 6(1) (amended by virtue of art 2(5) (added by SI 1992/3120)).

20 See PARA 135 post.

21 See PARA 136 post.

22 See PARA 137 post.

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## **120. Relief on goods imported by taxable persons.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by regulations make provision for enabling goods imported from a place outside the member states by a taxable person<sup>2</sup> in the course or furtherance of any business<sup>3</sup> carried on by him to be delivered or removed, subject to such conditions or restrictions as the Commissioners may impose for the protection of the revenue, without payment of the value added tax chargeable on the importation, and for that VAT to be accounted for together with the VAT chargeable on the supply of goods or services by him or on the acquisition of goods by him from other member states<sup>4</sup>, pursuant to which it is provided that the VAT chargeable on the importation of goods from a place outside the member states which have previously been exported from the member states is not payable<sup>5</sup> if the Commissioners are satisfied that:

- 292 (1) the importer is a taxable person importing the goods in the course of his business<sup>6</sup>;
- 293 (2) the goods were last exported from the member states by him or on his behalf<sup>7</sup>;
- 294 (3) the goods have not been subject to process or repair outside the member states other than necessary running repairs which did not increase their value<sup>8</sup>;
- 295 (4) the goods either were owned by him at the time of exportation and have remained his property<sup>9</sup>, were owned by him at the time of exportation and have been returned after rejection by a customer outside the member states (or because it was not possible to deliver them to such a customer)<sup>10</sup>, or have been returned from the continental shelf<sup>11</sup>; and
- 296 (5) if the goods were supplied in, acquired in or imported into a member state before their export, any VAT or other tax chargeable on that supply, acquisition or importation was accounted for or paid and neither has been, nor will be, refunded<sup>12</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 For the meaning of 'business' see PARA 23 ante. As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

4 Value Added Tax Act 1994 s 38.

5 The subject to such conditions as the Commissioners may impose: Value Added Tax Regulations 1995, SI 1995/2518, reg 125.

6 Ibid reg 125(a).

7 Ibid reg 125(b).

8 Ibid reg 125(c).

9 Ibid reg 125(d)(i).

10 Ibid reg 125(d)(ii).

11 Ibid reg 125(d)(iii). As to the continental shelf see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 163 et seq.

12 Ibid reg 125(e).

## **UPDATE**

### **120 Relief on goods imported by taxable persons**

TEXT AND NOTES 5-12--SI 1995/2518 reg 125 revoked: SI 2006/587.

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## 121. Relief on reimported goods.

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by regulations make provision for remitting or repaying, if they think fit, the whole or part of the value added tax chargeable on the importation of any goods from places outside the member states which are shown to their satisfaction to have been previously exported from the United Kingdom<sup>2</sup> or removed from any member state<sup>3</sup>, and pursuant to this power have provided that the VAT chargeable on the importation of goods from a place outside the member states which have been previously exported from the member states is not payable<sup>4</sup> if the Commissioners are satisfied that:

- 297 (1) the importer is not a taxable person<sup>5</sup>, or, if he is, the goods are imported otherwise than in the course of his business<sup>6</sup>;
- 298 (2) the goods were last exported from the member states by him or on his behalf<sup>7</sup>;
- 299 (3) either the goods were supplied, acquired in or imported into a member state before their export, and any VAT or other tax due on that supply<sup>8</sup>, acquisition or importation was paid and neither has been, nor will be, refunded<sup>9</sup>, or the goods are imported by the person who made them<sup>10</sup>;
- 300 (4) the goods were not exported free of VAT by reason of the zero-rating provisions<sup>11</sup> or under any regulations made thereunder or by reason of the provisions of the law of another member state<sup>12</sup> corresponding, in relation to that state, to those provisions<sup>13</sup>;
- 301 (5) the goods have not been subject to process or repair outside the member states other than necessary running repairs which did not result in any increase in their value<sup>14</sup>; and
- 302 (6) the goods either were at the time of exportation intended to be reimported<sup>15</sup>, have been returned for repair or replacement or after rejection by a customer outside the member states (or because it was not possible to deliver them to such a customer)<sup>16</sup>, or were prior to the time of exportation in private use and possession in the member states<sup>17</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

3 Value Added Tax Act 1994 s 37(3).

4 The subject to such conditions as the Commissioners may impose: Value Added Tax Regulations 1995, SI 1995/2518, reg 124.

5 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 124(a). For the meaning of 'business' see PARA 23 ante.

7 Ibid reg 124(b).

8 For the meaning of 'supply' see PARA 27 ante.



9 Value Added Tax Regulations 1995, SI 1995/2518, reg 124(c)(i).

10 Ibid reg 124(c)(ii).

11 Ie under the Value Added Tax Act 1994 s 30(6), (8): see PARA 192 post.

12 As to references to the law of another member state see PARA 17 note 2 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 124(d).

14 Ibid reg 124(e).

15 Ibid reg 124(f)(i).

16 Ibid reg 124(f)(ii).

17 Ibid reg 124(f)(iii).

## **UPDATE**

### **121 Relief on reimported goods**

TEXT AND NOTES 4-17--SI 1995/2548 reg 124 revoked: SI 2006/587.

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## **122. Temporary exportations.**

Where goods which have been temporarily exported from the member states are reimported after having undergone repair, process or adaptation, or after having been made up or reworked, outside the member states, the value added tax chargeable on the importation of goods from a place outside the member states is payable as if the treatment or process had been carried out in the United Kingdom<sup>1</sup>, provided the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> are satisfied that at the time of exportation the goods were intended to be reimported after completion of the treatment or process outside the member states<sup>3</sup> and that the ownership in the goods was not transferred to any other person at exportation or during the time they were abroad<sup>4</sup>.

1 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 126(a).

4 Ibid reg 126(b). It seems that the effect of this provision is to restrict the charge to VAT to the value of the work done, together with ancillary costs.

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### **123. Temporary importations.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by regulations make provision for remitting or repaying the whole or part of the value added tax chargeable on the importation of any goods from places outside the member states<sup>2</sup> if they are satisfied that the goods have been or are to be re-exported or otherwise removed from the United Kingdom<sup>3</sup> and they think fit to do so in all the circumstances and having regard to the tax chargeable on the supply<sup>4</sup> of like goods in the United Kingdom<sup>5</sup> and to any VAT which may have become chargeable in another member state<sup>6</sup> in respect of the goods<sup>7</sup>, pursuant to which it is provided that VAT chargeable on the importation of goods from a place outside the member states is not payable<sup>8</sup> where:

- 303 (1) a taxable person<sup>9</sup> makes a supply of goods which is to be zero-rated<sup>10</sup>;
- 304 (2) the goods so imported are the subject of that supply<sup>11</sup>; and
- 305 (3) the Commissioners are satisfied that the importer intends to remove the goods to another member state<sup>12</sup> and is importing the goods in the course of a supply by him of those goods in accordance with the relevant statutory provisions<sup>13</sup>.

The Commissioners may require the deposit of security<sup>14</sup> as a condition of granting the relief afforded by these provisions<sup>15</sup>. The relief continues to apply provided that the importer removes the goods to another member state within one month of the date of importation, or within such longer period as the Commissioners may allow<sup>16</sup> and provided that he supplies the goods in accordance with the relevant statutory provisions<sup>17</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante.

3 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4 For the meaning of 'supply' see PARA 27 ante.

5 Value Added Tax Act 1994 s 37(4)(a).

6 For the meaning of 'another member state' see PARA 4 note 15 ante.

7 Value Added Tax Act 1994 s 37(4)(b).

8 The subject to such conditions as the Commissioners may impose: Value Added Tax Regulations 1995, SI 1995/2518, reg 123(1).

9 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 123(1)(a). A supply of goods is zero-rated in accordance with the Value Added Tax Act 1994 s 30(8)(a)(i), (ii), (b): see PARA 192 post.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 123(1)(b).

12 Ibid reg 123(1)(c)(i).

13 Ibid reg 123(1)(c)(ii). The relevant statutory provisions are the provisions of the Value Added Tax Act 1994 s 30(8)(a)(i), (ii), (b); and any regulations made thereunder: see PARA 192 post.

14 The amount of the security must not exceed the amount of VAT chargeable on the importation: Value Added Tax Regulations 1995, SI 1995/2518, reg 123(2).

15 Ibid reg 123(2).

16 Ibid reg 123(3)(a).

17 Ibid reg 123(3)(b). As to the relevant statutory provisions see note 13 *supra*.

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#### **124. Relief for United Nations goods.**

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, for whatever purpose, of goods produced by the United Nations or by a United Nations organisation which are:

- 306 (1) holograms for laser projection<sup>2</sup>;
- 307 (2) multi-media kits<sup>3</sup>;
- 308 (3) materials for programmed instruction, including materials in kit form, with the corresponding printed materials<sup>4</sup>; or
- 309 (4) specified films, newsreels or other information storage media of an educational, scientific or cultural character<sup>5</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 4 (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 4(a), Sch 1 Pt I para 1.

3 Ibid Sch 1 Pt I para 2.

4 Ibid Sch 1 Pt I para 3.

5 Ibid art 4(b). These goods are classified under specified headings or sub-headings (see Sch 1 Pt II col 1 (Sch 1 Pt II substituted by SI 1987/2108)) of the Combined Nomenclature of the European Community (Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 2(2) (amended by SI 1987/2108)) and include: (1) films of an educational, scientific or cultural character; (2) newsreels, with or without soundtrack, depicting events of current news value at the time of importation and, in the case of each importer, not exceeding two copies of each subject for copying; (3) certain archival film material; (4) certain recreational film particularly suited for children and young persons; (5) certain microcards or other information storage media required in computerised information and documentation services of an educational, scientific or cultural character and wall charts designed solely for demonstration and education; (6) certain patterns, models and wall charts of an educational, scientific or cultural character, designed solely for demonstration and education; and (7) certain mock-ups or visualisations of abstract concepts such as molecular structures or mathematical formulae (Sch 1 Pt II (as so substituted)).

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## 125. Relief for capital goods and equipment on transfer of activities.

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of capital goods and equipment<sup>2</sup> (including livestock, other than livestock in the possession of dealers) imported by a person for the purposes of a business<sup>3</sup> he has ceased to carry on abroad<sup>4</sup> and which he has notified the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup> is to be carried on by him in the member states<sup>6</sup> and concerned exclusively with making taxable supplies<sup>7</sup>. This relief applies only where the goods:

- 310 (1) have been used in the course of the business for at least 12 months before it ceased to be carried on abroad<sup>8</sup>;
- 311 (2) are imported within 12 months of the date on which that business ceased to be carried on abroad, or within such longer period as the Commissioners allow<sup>9</sup>;
- and
- 312 (3) are appropriate both to the nature and size of the business to be carried on in the member states<sup>10</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 For these purposes, 'capital goods and equipment' does not include food of a kind used for human consumption or animal feeding stuffs, fuel, stocks of raw materials and finished or semi-finished products, or any motor vehicle in respect of which deduction of input tax was disallowed by the Value Added Tax (Cars) Order 1980, SI 1980/442, art 4 (revoked) (see now the Value Added Tax (Cars) Order 1992, SI 1992/3122 (as amended)): Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 5(2), Sch 2 Group 1 note (1).

3 For the meaning of 'business' see PARA 23 ante.

4 'Abroad' means a place outside the member states: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 2(1) (definition substituted by SI 1992/3120). As to the territories deemed to be included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

5 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 For these purposes, a person is not treated as intending to carry on a business in the member states if that business is to be merged with, or absorbed by, another business already carried on there: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 1 note (2) (Sch 2 Group 1 amended by virtue of art 2(5) (added by SI 1992/3120)).

7 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 1 item 1 (as amended: see note 6 supra). For the meaning of 'taxable supplies' see PARA 18 note 3 ante.

8 Ibid Sch 2 Group 1 note (3)(a).

9 Ibid Sch 2 Group 1 note (3)(b).

10 Ibid Sch 2 Group 1 note (3)(c) (as amended: see note 6 supra).

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## **126. Relief for the promotion of trade.**

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of:

- 313 (1) articles of no intrinsic commercial value sent<sup>2</sup> free of charge by suppliers of goods and services for the sole purpose of advertising<sup>3</sup>;
- 314 (2) samples of negligible value of a kind and in quantities capable of being used solely for soliciting orders for goods of the same kind<sup>4</sup>;
- 315 (3) printed advertising matter, including catalogues, price lists, directions for use or brochures, which relates to goods for sale or hire by a person established outside the member states<sup>5</sup>, or to transport, commercial or banking services offered by a person established in a third country<sup>6</sup>, and which clearly displays the name of the person by whom such goods or services are offered<sup>7</sup>;
- 316 (4) goods to be distributed free of charge at an event<sup>8</sup>, as small representative samples<sup>9</sup>, for use or consumption by the public<sup>10</sup>;
- 317 (5) goods imported solely for the purpose of being demonstrated at an event<sup>11</sup>;
- 318 (6) goods imported solely for the purpose of being used in the demonstration of any machine or apparatus displayed at an event<sup>12</sup>;
- 319 (7) paints, varnishes, wallpaper and other materials of low value to be used in the building, fitting-out and decoration of a temporary stand at an event<sup>13</sup>; and
- 320 (8) catalogues, prospectuses, price lists, advertising posters, calendars (whether or not illustrated), unframed photographs and other printed matter or articles advertising goods displayed at an event, supplied without charge for the purpose of distribution free of charge to the public at that event<sup>14</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 'Sent' means sent from a place outside the member states: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 2(1) (definition added by SI 1992/3120).

3 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 5(1), Sch 2 Group 3 item 1.

4 Ibid Sch 2 Group 3 item 2. Where the Commissioners for Her Majesty's Revenue and Customs so require, Sch 2 Group 3 item 2 applies only to goods which are rendered permanently unusable, except as samples, by being torn, perforated, clearly and indelibly marked, or by any other process: art 5(2), Sch 2 Group 3 note (1). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 As to where a person is established for VAT purposes cf para 62 note 2 ante; and as to the territories deemed to be included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

6 'Third country' means a place outside the member states: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 2(1) (definition added by SI 1992/3120).

7 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 3 item 3 (substituted by SI 1988/2212; and amended by virtue of the Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 2(5) (added by SI 1992/3120); and by SI 1992/3120). Save in the case of imported printed matter intended for distribution free of charge and relating to either goods for sale or hire, Sch 2 Group 3 item 3 (as substituted and amended) does not apply to any consignment containing two or more copies of different documents, any

consignment containing two or more copies of the same document, unless the total gross weight of that consignment does not exceed 1 kg, or any goods which are the subject of grouped consignments from the same consignor to the same consignee: Sch 2 Group 3 note (2) (amended by SI 1988/2212; SI 1992/3120).

8 'Event' means any of: (1) any trade, industrial, agricultural or craft exhibition, fair or similar show or display, not being an exhibition, fair, show or display organised for private purposes in a shop or on business premises with a view to the sale of the goods displayed (Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 3 note (3)(a)); (2) any exhibition or meeting which is primarily organised for a charitable purpose or to promote any branch of learning, art, craft, sport or scientific, technical, educational, cultural or trade union activity, tourism, friendship between peoples, religious knowledge or worship (Sch 2 Group 3 note (3)(b)); (3) any meeting of representatives of any international organisation or international group of organisations (Sch 2 Group 3 note (3)(c)); and (4) any representative meeting or ceremony of an official or commemorative character (Sch 2 Group 3 note (3)(d)).

9 For these purposes, 'representative samples' means goods which are: (1) imported free of charge or obtained at such event from goods imported in bulk (ibid Sch 2 Group 3 note (4)(a)); (2) identifiable as advertising samples of low value (Sch 2 Group 3 note (4)(b)); (3) not easily marketable and, where appropriate, packaged in quantities which are less than the lowest quantity of the same goods as marketed (Sch 2 Group 3 note (4)(c)); and (4) intended to be consumed at such event, where the goods comprise foodstuffs or beverages not packaged as described in head (3) supra (Sch 2 Group 3 note (4)(d)).

10 Ibid Sch 2 Group 3 item 4. Sch 2 Group 3 items 4-6 (see the text and notes 11-12 *infra*) do not apply to fuels, alcoholic beverages or tobacco products (Sch 2 Group 3 note (5)); and Sch 2 Group 3 items 4-8 (see the text and notes 11-14 *infra*) apply only where the aggregate value and quantity of the goods is appropriate to the nature of the event, the number of visitors and the extent of the exhibitor's participation in it (Sch 2 Group 3 note (6)). 'Alcoholic beverages' means beverages falling within the Combined Nomenclature of the European Community headings 22.03-22.08: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 2(1), (2) (definition amended by SI 1987/2108; SI 1988/1193). For the meaning of 'tobacco products' see the Tobacco Products Duty Act 1979 s 1(1) (as amended); and CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 589 (definition applied by the Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 2(1)).

11 Ibid Sch 2 Group 3 item 5. For exclusions and limitations attached to this relief see note 10 *supra*. Where relief has been afforded by virtue of Sch 2 Group 3 item 5, item 6 or item 7 (see the text and notes 12-13 *infra*) in respect of goods for demonstration or use, it is a condition of the relief that in the course of, or as a result of, that demonstration or use, the goods are consumed or destroyed or rendered incapable of being used again for the same purpose: art 6(2).

12 Ibid Sch 2 Group 3 item 6. For exclusions and limitations attached to this relief see note 10 *supra*; and for conditions see note 11 *supra*.

13 Ibid Sch 2 Group 3 item 7. For limitations attached to this relief see note 10 *supra*; and for conditions see note 11 *supra*.

14 Ibid Sch 2 Group 3 item 8. For limitations attached to this relief see note 10 *supra*.



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### **127. Goods for testing.**

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of goods for the purpose of examination, analysis or testing to determine their composition, quality or other technical characteristics, to provide information or for industrial or commercial research<sup>2</sup>, except for goods exceeding the quantities necessary for these purposes or where the examination, analysis or testing itself constitutes a sales promotion<sup>3</sup>. Where the relief has been afforded in respect of goods for examination, analysis or testing, the relief is also subject to the following conditions:

- 321 (1) the examination, analysis or testing must be completed within such time as the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> may require<sup>5</sup>; and
- 322 (2) any goods not completely used up or destroyed in the course of, or as a result of, such examination, analysis or testing, and any products resulting therefrom, must forthwith be destroyed or rendered commercially worthless, or exported<sup>6</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/786, art 5(1), Sch 2 Group 4 item 1.

3 Ibid art 5(2), Sch 2 Group 4 note.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/786, art 6(3)(a).

6 Ibid art 6(3)(b).

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### **128. Goods relating to health.**

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of:

- 323 (1) animals specially prepared for laboratory use and sent free of charge to a relevant establishment<sup>2</sup>;
- 324 (2) biological or chemical substances sent to a relevant establishment from a place outside the member states<sup>3</sup>;
- 325 (3) human blood<sup>4</sup>;
- 326 (4) products for therapeutic purposes derived from human blood<sup>5</sup>;
- 327 (5) human (including foetal) organs or tissue for diagnostic or therapeutic purposes or medical research<sup>6</sup>;
- 328 (6) reagents<sup>7</sup> for use in blood type grouping, or for the detection of blood grouping incompatibilities, by approved institutions or laboratories, exclusively for non-commercial medical or scientific purposes<sup>8</sup>;
- 329 (7) reagents for use in the determination of human tissue types by approved institutions or laboratories, exclusively for non-commercial medical or scientific purposes<sup>9</sup>;
- 330 (8) pharmaceutical products imported by or on behalf of persons or animals for their use while visiting the member states to participate in an international sporting event<sup>10</sup>;
- 331 (9) samples of reference substances approved by the World Health Organisation for the quality control of materials used in the manufacture of medicinal products<sup>11</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 5(1), Sch 2 Group 5 item 1. 'Relevant establishment' means either a public establishment, or a department of such establishment, principally engaged in education or scientific research, or a private establishment so engaged, which is approved by the Secretary of State: arts 2(1), 5(2), Sch 2 Group 5 note (1) (amended by SI 1992/3120).

3 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 5 item 3 (amended by SI 1992/3120). The relief applies only where the goods fulfil the conditions laid down under or by virtue of EC Council Regulation 918/83 (OJ L105, 23.4.83, p 1) on conditional reliefs from duty on the final importation of goods, art 60 (substituted by EC Council Regulation 1315/88 (OJ L123, 17.5.88, p 2)): Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 5 note (2) (amended by SI 1988/2212).

4 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 5 item 4. Sch 2 Group 5 items 4-8 (see the text and notes 5-9 infra) include special packaging essential for transport of the goods and any solvents or accessories necessary for their use: Sch 2 Group 5 note (3).

5 Ibid Sch 2 Group 5 item 5. Packaging is included: see note 4 supra.

6 Ibid Sch 2 Group 5 item 6. Packaging is included: see note 4 supra.

7 'Reagents' means all reagents, whether of human, animal, plant, or other, origin: ibid Sch 2 Group 5 note (4).

8 Ibid Sch 2 Group 5 item 7. Packaging is included: see note 4 supra.

9 Ibid Sch 2 Group 5 item 8. Packaging is included: see note 4 supra.

10 Ibid Sch 2 Group 5 item 9 (amended by virtue of art 2(5) (added by SI 1992/3120)).

11 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 5 item 10 (Sch 2 Group 5 item 10 note (5) added by SI 1988/2212). This relief applies only to samples addressed to consignees authorised to receive them free of tax: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 5 note (5) (as so added).

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### 129. Charitable goods.

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of:

- 332 (1) basic necessities<sup>2</sup> obtained without charge for distribution free of charge to the needy by a state organisation or other charitable or philanthropic organisation approved by the Secretary of State ('a relevant organisation')<sup>3</sup>;
- 333 (2) goods donated by a person established abroad<sup>4</sup> to a relevant organisation for use to raise funds at occasional charity events for the benefit of the needy<sup>5</sup>;
- 334 (3) equipment and office materials donated by a person established abroad to a relevant organisation for meeting its operating needs or carrying out its charitable aims<sup>6</sup>;
- 335 (4) goods imported by a relevant organisation for distribution or loan, free of charge, to victims of a disaster affecting the territory of one or more member states<sup>7</sup>;
- 336 (5) goods imported by a relevant organisation for meeting its operating needs in the relief of a disaster affecting the territory of one or more member states<sup>8</sup>;
- 337 (6) articles donated to, and imported by, an organisation approved by the Secretary of State which is principally engaged in the education of, or the provision of assistance to, blind or other physically or mentally handicapped persons and which are for supply<sup>9</sup> to such persons and specially designed for the education, employment or social advancement of such persons<sup>10</sup>; and
- 338 (7) spare parts, components or accessories for any article of a kind mentioned in head (6) above, including tools for its maintenance, checking, calibration or repair<sup>11</sup>.

Where relief is afforded in respect of any such goods, it is a condition of the relief that the goods are not lent, hired out or transferred, except in accordance with these provisions<sup>12</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 'Basic necessities' means food, medicines, clothing, blankets, orthopaedic equipment and crutches, required to meet a person's immediate needs: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 5(2), Sch 2 Group 6 note (2). See, however, the text to note 12 infra. Sch 2 Group 6 items 1-3 (see the text and notes 3-6 infra) do not, however, include alcoholic beverages or tobacco products, coffee, tea, or motor vehicles other than ambulances: Sch 2 Group 6 note (3). For the meanings of 'alcoholic beverages' and 'tobacco products' see PARA 126 note 10 ante.

3 Ibid arts 2(1), 5(1), Sch 2 Group 6 item 1 note (1). Where any goods in respect of which relief has been afforded remain in the possession of an organisation which has ceased to fulfil any condition subject to which it is approved, and written notification of this is given to the Commissioners for Her Majesty's Revenue and Customs, the VAT payable on the goods is to be determined as if the goods had been imported on the date when it becomes due, provided that where the amount of the VAT first relieved is less, that lesser amount becomes payable: art 8(b). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 For the meaning of 'abroad' see PARA 125 note 4 ante.

5 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 6 item 2. Sch 2 Group 6 items 2, 3, 6 (see the text and notes 6, 9-10 *infra*) do not apply where there is any commercial intent on the part of the donor: Sch 2 Group 6 note (4). For excluded goods see note 2 *supra*.

6 *Ibid* Sch 2 Group 6 item 3. For excluded goods see note 2 *supra*; and as to commercial transactions see note 5 *supra*.

7 *Ibid* Sch 2 Group 6 item 4. Sch 2 Group 6 items 4, 5 (see the text and note 8 *infra*) apply only where the EC Commission has made a decision authorising importation of the goods: Sch 2 Group 6 note (5).

8 *Ibid* Sch 2 Group 6 item 5. See also note 7 *supra*.

9 For these purposes, 'supply' means any loan, hiring out or transfer, for consideration or free of charge, other than on a profit-making basis: *ibid* Sch 2 Group 6 note (7).

10 *Ibid* art 2(1), Sch 2 Group 6 item 6 note (6). As to commercial transactions see note 5 *supra*.

11 *Ibid* Sch 2 Group 6 item 7. This relief applies only where the goods are imported with an article of a kind mentioned in Sch 2 Group 6 item 6 (see the text and notes 9-10 *supra*) to which they relate, or, if imported subsequently, are identifiable as being intended for that article, where relief from VAT on that article has been afforded by virtue of that head or would have been so afforded if such article were imported with the goods which relate to it: Sch 2 Group 6 note (8).

12 *Ibid* art 7(1). This does not, however, apply, and relief continues to be afforded, where goods are lent, hired out or transferred to an organisation which would be entitled to relief by virtue of Sch 2 Group 6 if importing the goods on that date, on condition that: (1) prior notification in writing is received by the Commissioners (art 7(2)(a)); and (2) the goods are used solely in accordance with the provisions of Sch 2 Group 6 relating to them (art 7(2)(b)). Where any goods in respect of which relief has been afforded are to be lent, hired out, transferred or used except in accordance with these provisions, and written notification of this is given to the Commissioners, the VAT payable on the goods is to be determined as if the goods had been imported on the date when it becomes due, provided that where the amount of the VAT first relieved is less, that lesser amount becomes payable: art 8(a).

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### **130. Printed matter etc.**

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of:

- 339 (1) documents sent<sup>2</sup> free of charge to public services in the member states<sup>3</sup>;
- 340 (2) foreign<sup>4</sup> government publications and publications of official international bodies intended for free distribution<sup>5</sup>;
- 341 (3) ballot papers for elections organised by bodies abroad<sup>6</sup>;
- 342 (4) specimen signatures and printed circulars concerning signatures, forming part of exchanges of information between bankers or public services<sup>7</sup>;
- 343 (5) official printed matter sent to a central bank in the member states<sup>8</sup>;
- 344 (6) documents sent by companies incorporated abroad to bearers of, or subscribers to, securities issued by such companies<sup>9</sup>;
- 345 (7) files, archives and other documents for use at international meetings, conferences or congresses and reports of such gatherings<sup>10</sup>;
- 346 (8) plans, technical drawings, traced designs and other documents sent by any person for the purpose of participating in a competition in the member states or to obtain or fulfil an order executed abroad<sup>11</sup>;
- 347 (9) documents to be used in examinations held in the member states on behalf of institutions established abroad<sup>12</sup>;
- 348 (10) printed forms to be used as official documents in the international movement of vehicles or goods pursuant to international conventions<sup>13</sup>;
- 349 (11) printed forms, labels, tickets and similar documents sent to travel agents<sup>14</sup> in the member states by transport and tourist undertakings abroad<sup>15</sup>;
- 350 (12) used commercial documents<sup>16</sup>;
- 351 (13) official printed forms from national or international authorities<sup>17</sup>;
- 352 (14) printed matter conforming to international standards, for distribution by an association in the member states and sent by a corresponding association abroad<sup>18</sup>;
- 353 (15) documents sent for the purpose of free distribution to encourage persons to visit foreign countries, in particular to attend cultural, tourist, sporting, religious, trade or professional meetings or events<sup>19</sup>;
- 354 (16) foreign hotel lists and yearbooks published by or on behalf of official tourist agencies and timetables for foreign transport services, for free distribution<sup>20</sup>;
- 355 (17) yearbooks, lists of telephone and telex numbers, hotel lists, catalogues for fairs, specimens of craft goods of negligible value and literature on museums, universities, spas or other similar establishments, supplied as reference material to accredited representatives or correspondents appointed by official national tourist agencies and not intended for distribution<sup>21</sup>;
- 356 (18) official publications issued under the authority of the country of exportation, international institutions, regional or local authorities and bodies governed by public law established in the country of exportation<sup>22</sup>; and
- 357 (19) printed matter distributed by foreign political organisations<sup>23</sup> on the occasion of elections to the European Parliament or national elections in the country in which the printed matter originates<sup>24</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119

ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 For the meaning of 'sent' see PARA 126 note 2 ante.

3 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 5(1), Sch 2 Group 7 item 1 (Sch 2 Group 7 amended by virtue of art 2(5) (added by SI 1992/3120)).

4 'Foreign' means a country other than the member states: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 5(2), Sch 2 Group 7 note (5) (as amended: see note 3 supra).

5 Ibid Sch 2 Group 7 item 2.

6 Ibid Sch 2 Group 7 item 3.

7 Ibid Sch 2 Group 7 item 4.

8 Ibid Sch 2 Group 7 item 5 (as amended: see note 3 supra).

9 Ibid Sch 2 Group 7 item 6.

10 Ibid Sch 2 Group 7 item 7.

11 Ibid Sch 2 Group 7 item 8 (as amended: see note 3 supra).

12 Ibid Sch 2 Group 7 item 9 (as amended: see note 3 supra).

13 Ibid Sch 2 Group 7 item 10.

14 'Travel agent' includes airlines, national railway undertakings, ferry operators and similar organisations: ibid Sch 2 Group 7 note (4) (added by SI 1992/3120).

15 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 7 item 11 (as amended: see note 3 supra).

16 Ibid Sch 2 Group 7 item 12.

17 Ibid Sch 2 Group 7 item 13.

18 Ibid Sch 2 Group 7 item 14 (as amended: see note 3 supra).

19 Ibid Sch 2 Group 7 item 15. Sch 2 Group 7 items 15, 16 (see the text and note 20 infra) do not apply where the goods contain more than 25% of private commercial advertising: Sch 2 Group 7 note (1) (substituted by SI 1988/2212).

20 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 7 item 16. See note 19 supra.

21 Ibid Sch 2 Group 7 item 17.

22 Ibid Sch 2 Group 7 item 18 (added by SI 1988/2212). The Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 7 items 18, 19 (as added) (see the text and notes 23-24 infra) apply only to publications or printed matter on which VAT or any other tax has been paid in the third country from which they have been exported and which have not benefited, by virtue of their exportation, from any relief from payment thereof: Sch 2 Group 7 note (2) (substituted by SI 1992/3120). For the meaning of 'third country' see PARA 126 note 6 ante.

23 'Foreign political organisations' means those which are officially recognised as such in the United Kingdom: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 7 note (3) (substituted by SI 1988/2212). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

24 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 7 item 19 (added by SI 1988/2212). See note 22 infra.

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### **131. Articles sent for miscellaneous purposes.**

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of:

- 358 (1) material relating to trademarks, patterns or designs and supporting documents and applications for patents, imported for the purpose of being submitted to bodies competent to deal with protection of copyright or industrial or commercial patent rights<sup>2</sup>;
- 359 (2) objects imported for the purpose of being submitted as evidence, or for a like purpose, to a court or other official body in the member states<sup>3</sup>;
- 360 (3) photographs, slides and stereotype mats for photographs, whether or not captioned, sent<sup>4</sup> to press agencies and publishers of newspapers and magazines<sup>5</sup>;
- 361 (4) recorded media, including punched cards, sound recordings and microfilm, sent free of charge for the transmission of information<sup>6</sup>;
- 362 (5) any honorary decoration conferred by a government or head of state abroad<sup>7</sup> on a person resident in the member states and imported on his behalf<sup>8</sup>;
- 363 (6) any cup, medal or similar article of an essentially symbolic nature, intended as a tribute to activities in the arts, sciences, sport, or the public service, or in recognition of merit at a particular event, which is either donated by an authority established abroad for the purpose of being presented in the member states<sup>9</sup> or awarded abroad to a person resident in the member states and imported on his behalf<sup>10</sup>;
- 364 (7) goods (other than alcoholic beverages or tobacco products<sup>11</sup>) sent on an occasional basis as gifts in token of friendship or goodwill between bodies, public authorities or groups carrying on an activity in the public interest<sup>12</sup>;
- 365 (8) any consignment of goods, other than alcoholic beverages, tobacco products, perfumes or toilet waters, not exceeding £18 in value<sup>13</sup>; and
- 366 (9) awards, trophies and souvenirs of a symbolic nature and of limited value intended for distribution free of charge at business conferences or similar events to persons normally resident in a country other than the member states<sup>14</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/786, art 5(1), Sch 2 Group 8 item 1.

3 Ibid Sch 2 Group 8 item 2 (Sch 2 Group 8 amended by virtue of art 2(5) (added by SI 1992/3120)).

4 For the meaning of 'sent' see PARA 126 note 2 ante.

5 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/786, Sch 2 Group 8 item 3.

6 Ibid Sch 2 Group 8 item 4.

7 For the meaning of 'abroad' see PARA 125 note 4 ante.



8 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/786, Sch 2 Group 8 item 5 (as amended: see note 3 supra). Sch 2 Group 8 items 5-7, 9 (see the text and notes 9-12, 14 infra) do not apply to any importation of a commercial character: Sch 2 Group 8 note (substituted by SI 1988/2212).

9 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/786, Sch 2 Group 8 item 6(a) (as amended: see note 3 supra). For an exclusion relating to commercial importations see note 8 supra.

10 Ibid Sch 2 Group 8 item 6(b) (as amended: see note 3 supra). For an exclusion relating to commercial importations see note 8 supra.

11 For the meanings of 'alcoholic beverages' and 'tobacco products' see PARA 126 note 10 ante.

12 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 8 item 7. For an exclusion relating to commercial importations see note 8 supra.

13 Ibid Sch 2 Group 8 item 8 (amended by SI 1988/2212; SI 1995/3222).

14 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 8 item 9 (added by SI 1988/2212; amended by virtue of art 2(5) (added by SI 1992/3120)). For an exclusion relating to commercial importations see note 8 supra.

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### **132. Works of arts and collectors' pieces.**

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of works of art and collectors' pieces imported for a purpose other than sale by museums, galleries or other institutions approved by the Secretary of State<sup>2</sup>, where such goods are of an educational, scientific or cultural character<sup>3</sup> and are imported free of charge or, if for a consideration, are not supplied to the importer in the course or furtherance of any business<sup>4</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 2(1), Sch 2 Group 9 item 1.

3 Ibid Sch 2 Group 9 note (a).

4 Ibid Sch 2 Group 9 note (b). As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

### **UPDATE**

### **132 Works of arts and collectors' pieces**

NOTE 2--See Case C-305/03 *European Commission v United Kingdom* [2007] STC 1211, ECJ.

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### 133. Transport.

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of:

- 367 (1) fuel contained in the standard tanks<sup>2</sup> of a vehicle or of a special container for use exclusively by that vehicle or container<sup>3</sup>;
- 368 (2) fuel, not exceeding 10 litres for each vehicle, contained in portable tanks carried by a vehicle for use exclusively by that vehicle<sup>4</sup>;
- 369 (3) lubricants contained in a vehicle for use exclusively by that vehicle<sup>5</sup>;
- 370 (4) litter, fodder and feeding stuffs contained in any means of transport carrying animals for the use of such animals during their journey<sup>6</sup>; and
- 371 (5) disposable packings for the stowage and protection of goods during their transportation to the member states<sup>7</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 'Standard tanks' means any of: (1) tanks permanently fitted to a vehicle and which are fitted to all vehicles of that type by the manufacturer, to supply directly fuel for the purpose of propulsion and, where appropriate, for the operation, during transport, of refrigeration systems and other systems (Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, art 5(1), Sch 2 Group 10 note 1(a) (Sch 2 Group 10 substituted by SI 1988/2212)); (2) gas tanks fitted to vehicles designed for the direct use of gas as a fuel (Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 10 note 1(b) (as so substituted)); (3) tanks fitted to ancillary systems with which a vehicle is equipped (Sch 2 Group 10 note 1(c) (as so substituted)); and (4) tanks permanently fitted to a special container and which are fitted to all special containers of that type by the manufacturer, to supply directly fuel for the operation, during transport, of refrigeration systems and other systems with which special containers are equipped (Sch 2 Group 10 note 1(d) (as so substituted)). 'Vehicle' means any motor road vehicle: Sch 2 Group 10 note (2) (as so substituted). 'Special container' means any container fitted with specially designed apparatus for refrigeration systems, oxygenation systems, thermal insulation systems and other systems: Sch 2 Group 10 note (3) (as so substituted).

3 Ibid Sch 2 Group 10 item 1 (as substituted: see note 2 supra).

4 Ibid Sch 2 Group 10 item 2 (as substituted: see note 2 supra). This relief does not apply in the case of any special purpose vehicle or a vehicle which, by its type of construction and equipment, is designed for and capable of transporting goods or more than nine persons including the driver: Sch 2 Group 10 note (4) (as so substituted).

5 Ibid Sch 2 Group 10 item 3 (as substituted: see note 2 supra). This relief applies only to lubricants necessary for the normal operation of the vehicle during its journey: Sch 2 Group 10 note (5) (as so substituted).

6 Ibid Sch 2 Group 10 item 4 (as substituted: see note 2 supra).

7 Ibid Sch 2 Group 10 item 5 (as substituted (see note 2 supra); and amended by virtue of art 2(5) (added by SI 1992/3120)). This relief applies only where the cost of the packings is included in the consideration for the goods transported: Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 10 note (6) (as so substituted).

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**134. Goods relating to war graves, funerals etc.**

No value added tax is payable on the importation from a place outside the member states, or the acquisition from another member state<sup>1</sup>, of:

- 372 (1) goods imported by an organisation approved by the Secretary of State for use in the construction, upkeep or ornamentation of cemeteries, tombs and memorials in the member states which commemorate war victims of other countries<sup>2</sup>;
- 373 (2) coffins containing human remains<sup>3</sup>;
- 374 (3) urns containing human ashes<sup>4</sup>;
- 375 (4) flowers, wreaths and other ornamental objects accompanying such coffins or urns<sup>5</sup>;
- 376 (5) flowers, wreaths and other ornamental objects imported without any commercial intent by a person resident abroad<sup>6</sup> for use at a funeral or to decorate a grave<sup>7</sup>.

1 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(4), 5(1) (art 2(4) added by SI 1992/3120); Value Added Tax (Acquisitions) Relief Order 2002, SI 2002/1935, art 2; and see further PARA 119 ante. For the meaning of 'goods imported from a place outside the member states' see PARA 113 note 2 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

2 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, arts 2(1), 5(1), Sch 2 Group 11 item 1.

3 Ibid Sch 2 Group 11 item 2.

4 Ibid Sch 2 Group 11 item 3.

5 Ibid Sch 2 Group 11 item 4.

6 For the meaning of 'abroad' see PARA 125 note 4 ante.

7 Value Added Tax (Imported Goods) Relief Order 1984, SI 1984/746, Sch 2 Group 11 item 5.

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### **135. Small non-commercial consignments of goods.**

No value added tax is payable on the importation from a place outside the member states<sup>1</sup> of goods forming part of a small consignment<sup>2</sup> of a non-commercial character<sup>3</sup>. A consignment is of a non-commercial character for these purposes only if:

- 377 (1) it is consigned by one private individual to another<sup>4</sup>;
- 378 (2) it is not imported for any consideration<sup>5</sup> in money<sup>6</sup> or money's worth<sup>7</sup>; and
- 379 (3) it is intended for the personal use of the consignee or that of his family and not for any commercial purpose<sup>8</sup>.

No relief may be given under these provisions unless the consignment is of an occasional nature<sup>9</sup>. Nor may relief be given in respect of any tobacco products<sup>10</sup>, alcohol and alcoholic beverages<sup>11</sup>, tafia and saké<sup>12</sup>, or perfumes or toilet waters<sup>13</sup>, where a small consignment of a non-commercial character contains such goods in excess of the specified<sup>14</sup> quantity<sup>15</sup>.

This relief does not apply to goods contained in the baggage of a person entering the United Kingdom or carried with such a person<sup>16</sup>.

1 As to when goods are imported from a place outside the member states see PARA 113 note 2 ante.

2 For these purposes, 'small consignment' means a consignment, not forming part of a larger consignment, containing goods with a value for customs purposes not exceeding £36: Value Added Tax (Small Non-commercial Consignments) Relief Order 1986, SI 1986/939, art 3(2) (art 3(1), (2) amended, art 4 substituted, by SI 1992/3118).

3 Value Added Tax (Small Non-commercial Consignments) Relief Order 1986, SI 1986/939, art 3(1) (as amended: see note 2 supra).

4 Ibid art 3(3)(a).

5 For the meaning of 'consideration' see PARA 95 ante.

6 For the meaning of 'money' see PARA 33 note 7 ante.

7 Value Added Tax (Small Non-commercial Consignments) Relief Order 1986, SI 1986/939, art 3(3)(b).

8 Ibid art 3(3)(c).

9 Ibid art 4 (as substituted: see note 2 supra).

10 Ibid art 5(a). Tobacco products for these purposes are cigarettes, cigars or smoking tobacco: art 5(a).

11 I.e. spirits or wine: ibid art 5(b).

12 Ibid art 5(b).

13 Ibid art 5(c).

14 For the specified quantities see ibid art 5, Schedule.

15 Ibid art 5.

16 Ibid art 6. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

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### **136. Gold.**

The value added tax chargeable upon the importation of gold, including gold coins, from a place outside the member states<sup>1</sup> is not payable where the importation is by a central bank<sup>2</sup>, and VAT is not chargeable at all on the importation of investment gold<sup>3</sup> from places outside the member states<sup>4</sup>.

1 As to when goods are imported from a place outside the member states see PARA 113 note 2 ante.

2 Value Added Tax (Imported Gold) Relief Order 1992, SI 1992/3124, art 2.

3 'Investment gold' has the same meaning for these purposes as it has for the purposes of the Value Added Tax Act 1994 s 8, Sch 9 Pt II Group 15 (see PARA 164 post): Value Added Tax (Importation of Investment Gold) Relief Order 1999, SI 1999/3115, art 2.

4 Ibid art 3. The Value Added Tax (Importation of Investment Gold) Relief Order 1999, SI 1999/3115 is made pursuant to the Value Added Tax Act 1994 s 37(1) (see PARA 119 ante) and also under the Finance Act 1999 s 13(3), (4), which provide that an order under the Value Added Tax Act 1994 s 37(1) which gives relief from VAT on certain importations of gold may make provision by reference to notices to be published by the Commissioners (Finance Act 1999 s 13(3)), and may be expressed to apply only in specified circumstances or subject to compliance with specified conditions (which may include conditions relating to general or specific approval of the Commissioners for Her Majesty's Revenue and Customs) (s 13(4)). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

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**137. Gas and electricity.**

The value added tax chargeable on the importation from a place outside the member states<sup>1</sup> of gas through the natural gas distribution network, or electricity, is not payable<sup>2</sup>.

<sup>1</sup> As to goods imported from outside the member states see PARA 113 note 2 ante.

<sup>2</sup> Value Added Tax (Imported Gas and Electricity) Relief Order 2004, SI 2004/3147, art 2 (made pursuant to the Value Added Tax Act 1994 s 37(1) (see PARA 119 ante)).



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### **(iii) Free Zones**

#### **138. In general.**

Where the Treasury has designated an area in the United Kingdom<sup>1</sup> as a free zone<sup>2</sup>, goods imported from outside the member states which are chargeable with value added tax may (subject to any contrary provision made by any directly applicable Community provision<sup>3</sup>) be moved into such a zone and remain as free zone goods<sup>4</sup> without payment of VAT<sup>5</sup>. The Commissioners for Her Majesty's Revenue and Customs<sup>6</sup> may by regulations make provision with respect to the movement of goods into, and the removal of goods from, any free zone and with respect to the keeping, securing and treatment of goods which are within a free zone<sup>7</sup>. Without prejudice to the generality of this power, free zone regulations may make provision:

- 380 (1) for enabling the Commissioners to allow goods to be removed from a free zone without payment of VAT in such circumstances and subject to such conditions as they may determine<sup>8</sup>;
- 381 (2) for determining, where any VAT becomes payable in respect of goods which cease to be free zone goods, the rates of any VAT applicable<sup>9</sup> and the time at which those goods cease to be free zone goods<sup>10</sup>;
- 382 (3) for determining for the purpose of enabling VAT to be charged in respect of free zone goods in a case where a person wishes to pay that VAT notwithstanding that the goods will continue to be free zone goods, the rate of VAT to be applied<sup>11</sup>; and
- 383 (4) permitting free zone goods to be destroyed without payment of VAT in such circumstances and subject to such conditions as the Commissioners may determine<sup>12</sup>.

With respect to free zone goods or the movement of goods into any free zone, the Commissioners may make provision by regulations:

- 384 (a) for relief from the whole or part of any VAT chargeable on the importation of goods into the United Kingdom in such circumstances as they may determine<sup>13</sup>;
- 385 (b) in place of, or in addition to, any provision made<sup>14</sup> for determining the time when a supply<sup>15</sup> of goods which are or have been free zone goods is to be treated as taking place for the purposes of the charge to VAT<sup>16</sup>; and
- 386 (c) as to the treatment, for the purposes of VAT, of goods which are manufactured or produced within a free zone from other goods or which have other goods incorporated in them while they are free zone goods<sup>17</sup>.

1 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 I.e. a special area for customs purposes: see the Customs and Excise Management Act 1979 s 100A(1) (s 100A added by the Finance Act 1984 s 8, Sch 4 Pt I); and the Value Added Tax Act 1994 s 17(1). As to the designation of free zones, and for the areas so designated, see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1043.

3 As to the meaning of 'directly applicable Community provision' see PARA 3 ante.

4 Subject to the provisions of the free zone regulations (see the text and notes 5-9 *infra*), 'free zone goods' means goods which are within a free zone: Value Added Tax Act 1994 s 17(3).

5 *Ibid* s 17(1), (2).

6 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see *PARA 13 ante*.

7 Value Added Tax Act 1994 s 17(3). Such regulations are known as 'free zone regulations': s 17(3). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Free Zone Regulations 1984, SI 1984/1177 (as amended) have effect as if so made. See *PARA 139 et seq post*. As to the making of regulations generally see *PARA 14 ante*.

The general administration of free zones is now governed by EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) establishing the Community Customs Code (as amended); EC Commission Regulation 2454/93 (OJ L253, 11.10.93, p 1) laying down provisions for the implementation of EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) (as amended); and the Free Zone Regulations 1984, SI 1984/1177 (as amended) have therefore lapsed except in relation to VAT. See further *CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1043 et seq*.

8 Value Added Tax Act 1994 s 17(4)(a).

9 *Ibid* s 17(4)(b)(i).

10 *Ibid* s 17(4)(b)(ii).

11 *Ibid* s 17(4)(c).

12 *Ibid* s 17(4)(d).

13 *Ibid* s 17(5)(a).

14 *Ie* by *ibid* s 6 (as amended) (see *PARAS 35, 37, 44 ante*) or any other enactment: s 17(5)(b).

15 For the meaning of 'supply' see *PARA 27 ante*.

16 Value Added Tax Act 1994 s 17(5)(b).

17 *Ibid* s 17(5)(c).

## **UPDATE**

### **138 In general**

NOTE 7--Community Customs Code replaced: Community Customs Code (Modernised Customs Code) found in European Parliament and EC Council Regulation 450/2008 (OJ L145, 4.6.2008, p 1), see *CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 20-345*.

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### **139. Security and controls.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by direction impose obligations on the responsible authority for a free zone<sup>2</sup> to ensure the security of that zone<sup>3</sup>. Officers of the Commissioners also have statutory powers to enter and inspect free zones and all buildings and goods therein, and to question and search persons and vehicles entering and leaving free zones<sup>4</sup>, while the responsible authority is required not to permit any person to take up residence within a free zone<sup>5</sup>.

Goods in a free zone must be produced to the proper officer<sup>6</sup> for examination on request<sup>7</sup>. The proper officer may require any such goods to be segregated and marked or otherwise identified<sup>8</sup>.

The occupier of any premises upon which free zone goods are kept or, where the Commissioners so direct, the responsible authority on his behalf, must keep such records relating to the goods as the Commissioners may direct<sup>9</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'free zone' see PARA 138 ante. The responsible authority for a free zone is appointed by Treasury order: see the Customs and Excise Management Act 1979 s 100A(3)(c) (ss 100A, 100F added by the Finance Act 1984 s 8, Sch 4 Pt I); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1043.

3 Free Zone Regulations 1984, SI 1984/1177, reg 3. Where the responsible authority fails to comply with the direction and the Commissioners thereby incur any expenditure, that expenditure is recoverable on demand by the Commissioners as a civil debt from that responsible authority: reg 3.

4 See the Customs and Excise Management Act 1979 s 100F (as added: see note 2 supra); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1044.

5 Free Zone Regulations 1984, SI 1984/1177, reg 4.

6 It is presumed that references to a 'proper officer' in the Free Zone Regulations 1984, SI 1984/1177 (as amended) are references to a person who is such an officer for the purposes of the Value Added Tax Regulations 1995, SI 1995/2518 (ie a person appointed or authorised by the Commissioners to act in respect of any matter in the course of his duties: reg 2(1)).

7 Free Zone Regulations 1984, SI 1984/1177, reg 22.

8 Ibid reg 23.

9 Ibid reg 24(1). The records must be kept in the free zone or such other place as the Commissioners may allow and must be in such form, and be preserved for such term not exceeding three years from the date the goods are removed from the free zone, as they may direct: reg 24(2). The person keeping the record must furnish to the Commissioners, within such time and in such form as they may require, such information relating to the goods as the Commissioners may direct (reg 24(3)(a)), and upon demand made by the proper officer produce to him any records and any document relating to the goods for inspection by the proper officer and permit him to take copies of or to make extracts from them or remove them at a reasonable time and for a reasonable purpose (provided that if the information that would otherwise be contained in any record or document is not made or preserved in a form which is easily readable or which is not readable without the aid of equipment, the person keeping the record or document, must, at the request of the proper officer, produce the information contained in the record or document in the form of a transcript or other permanent legible reproduction (reg 24(3)(b))).

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**140. Excise goods which may become free zone goods without payment of duty.**

Goods chargeable with excise duty may be moved into a free zone<sup>1</sup> in accordance with the free zone regulations<sup>2</sup> without payment of that duty and remain as free zone goods<sup>3</sup>, provided that they are goods which, by or under the Customs and Excise Acts<sup>4</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup> may allow to be removed or delivered without payment of excise duty and which have been allowed to be so removed or delivered<sup>6</sup>.

1 For the meaning of 'free zone' see PARA 138 ante.

2 Ie the Free Zone Regulations 1984, SI 1984/1177 (as amended): see PARAS 139 ante, 141 et seq post.

3 For the meaning of 'free zone goods' see PARA 138 note 4 ante.

4 As to the Customs and Excise Acts see PARA 115 note 2 ante.

5 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 Free Zone Regulations 1984, SI 1984/1177, reg 5.

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#### **141. Movement of goods into free zone.**

Goods moved into a free zone<sup>1</sup> are not free zone goods<sup>2</sup> unless, within such time as the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> may direct, such particulars as they may direct have been entered into a record to be kept by the occupier of the premises at which the goods are received or, if the Commissioners so direct, by the responsible authority<sup>4</sup>. Where the proprietor of free zone goods wishes to obtain an acknowledgement that the goods are Community goods<sup>5</sup> he must deliver to the proper officer<sup>6</sup>, within the relevant period<sup>7</sup>, a document in such form and containing such particulars as the Commissioners may direct, together with such supporting evidence as will enable the officer to establish to his satisfaction that they are Community goods<sup>8</sup>. If so satisfied, the proper officer must provide a written acknowledgement<sup>9</sup> of such Community status<sup>10</sup>.

Goods moved into a free zone which are subject to another customs procedure are not free zone goods until the proprietor of the goods has presented them to the proper officer and that procedure has been discharged<sup>11</sup>.

1 For the meaning of 'free zone' see PARA 138 ante.

2 For the meaning of 'free zone goods' see PARA 138 note 4 ante.

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 Free Zone Regulations 1984, SI 1984/1177, reg 6(1) (amended by SI 1988/710). As to the responsible authority for a free zone see PARA 139 note 2 ante.

5 'Community goods' means goods which fulfil the conditions of the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 9(2), which are in free circulation in the Community in accordance therewith: Free Zone Regulations 1984, SI 1984/1177, reg 2.

6 As to the proper officer see PARA 139 note 6 ante.

7 'The relevant period' means a period not exceeding seven days from the time the goods become free zone goods or from the time an entry for free circulation under the Free Zone Regulations 1984, SI 1984/117, reg 17(2) (see PARA 142 post) is accepted: reg 7(3).

8 Ibid reg 7(1).

9 The written acknowledgement must consist of a copy of the document containing particulars of the goods indorsed by the proper officer: ibid reg 7(2).

10 Ibid reg 7(1).

11 Ibid reg 8.

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#### **142. Entry and removal of free zone goods.**

Before any free zone goods<sup>1</sup> are removed from a free zone<sup>2</sup> for home use<sup>3</sup> or transfer to another customs procedure providing for suspension of, or relief from customs duty or agricultural levy<sup>4</sup>, the goods must be entered<sup>5</sup> for that purpose<sup>6</sup>. The Commissioners for Her Majesty's Revenue and Customs may, however, allow the goods to be removed from the free zone for such a purpose, on the application of their proprietor, without the goods being entered if such particulars as the Commissioners may direct are entered in a record to be kept by the proprietor of the goods<sup>7</sup>. Where goods are allowed to be removed from the free zone in this way, the proprietor of the goods must comply with any conditions that the Commissioners may impose<sup>8</sup>.

Free zone goods which have been entered<sup>9</sup>, or in respect of which the required particulars<sup>10</sup> have been entered in the record, must be removed forthwith from the free zone<sup>11</sup>. No goods may, however, be removed from a free zone except with the authority of, and in accordance with any requirement made by, the proper officer<sup>12</sup>.

Where the proprietor of free zone goods wishes to pay any customs duty or agricultural levy chargeable on the goods and for the goods to remain as free zone goods, the goods must be entered for free circulation<sup>13</sup>. Where the goods are so entered, value added tax on importation is not to be paid at the time customs duty is paid<sup>14</sup>.

Where free zone goods have been supplied whilst in the free zone to a person who is neither registered or liable to be registered for VAT<sup>15</sup> and he enters the goods for home use, the amount of VAT payable is reduced by the amount of tax paid on the supply<sup>16</sup>.

1 For the meaning of 'free zone goods' see PARA 138 note 4 ante.

2 For the meaning of 'free zone' see PARA 138 ante.

3 Free Zone Regulations 1984, SI 1984/1177, reg 11(a).

4 Ibid reg 11(b). The expression 'transfer to another customs procedure providing for suspension of, or relief from, customs duty or agricultural levy' in reg 11 is not to be taken to include the removal of free zone goods from one free zone to another or from a free zone to a place for the clearance out of charge of imported goods: reg 2(1).

5 The goods are entered by the proprietor of the goods delivering to the proper officer an entry of them in such form and manner, containing such particulars and accompanied by such documents as the Commissioners for Her Majesty's Revenue and Customs may direct: *ibid* reg 10(1). As to the proper officer see PARA 139 note 6 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. Acceptance of an entry by the proper officer must be signified in such manner as the Commissioners may direct: reg 10(2). Where free zone goods are required to be entered under reg 17, the Commissioners may direct that if the proprietor of the goods: (1) enters such particulars as they may direct in a record to be kept by him (reg 10(3)(a)); and (2) furnishes a schedule to the proper officer at such place and at such intervals as they may direct (reg 10(3)(b)), an entry of the goods is to be taken to have been delivered and accepted when the particulars are entered in the record (reg 10(3)).

6 Ibid reg 11.

7 Ibid reg 12(1).

8 Ibid reg 12(2).

- 9    Ie under ibid reg 11: see the text and notes 1-6 supra.
- 10   Ie under ibid reg 12: see the text and notes 7-8 supra.
- 11   Ibid reg 13.
- 12   Ibid reg 15.
- 13   Ibid reg 17(2).
- 14   Ibid reg 18(2).
- 15   As to registration see PARA 64 et seq ante.
- 16   Free Zone Regulations 1984, SI 1984/1177, reg 27.

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### **143. Offences, penalties and forfeiture.**

In the event of any contravention of or failure to comply with:

- 387 (1) any relevant Community provision<sup>1</sup>;
- 388 (2) any requirement or condition imposed by or under any such provision<sup>2</sup>;
- 389 (3) any undertaking given pursuant to any such provision or requirement<sup>3</sup>; or
- 390 (4) any free zone regulation<sup>4</sup>,

the person responsible for the contravention or failure is guilty of an offence<sup>5</sup>, and any goods in respect of which the offence was committed are liable to forfeiture<sup>6</sup>.

1 Free Zone Regulations 1991, SI 1991/2727 reg 6(a). The relevant Community provisions are: (1) EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) establishing the Community Customs Code, arts 167(4), 172, 176(1), (2); and (2) EC Commission Regulation 2454/93 (OJ L 253, 11.10.93, p 1) laying down provisions for the implementation of EC Council Regulation 2913/92, arts 805, 807, 811 (substituted by EC Commission Regulation 993/2001 (OJ L141, 28.5.2001, p 1)); Free Zone Regulations 1991, SI 1991/2727, reg 2, Schedule (substituted by SI 1993/3014).

2 Ibid reg 6(b).

3 Ibid reg 6(c).

4 Ibid reg 6(d), (e). 'Free zone regulations' for these purposes are any regulations made under the Value Added Tax Act 1994 s 17(3), (5): see PARA 138 ante.

5 Free Zone Regulations 1991, SI 1991/2727, reg 6. A person guilty of such an offence is liable on summary conviction to a penalty of level 3 on the standard scale, together with a penalty of £40 for each day on which the contravention or failure continues: reg 6. 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142; MAGISTRATES vol 29(2) (Reissue) PARA 804. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and MAGISTRATES vol 29(2) (Reissue) PARA 807.

6 Free Zone Regulations 1991, SI 1991/2727, reg 6; Interpretation Act 1978 s 17(2)(b). The Customs and Excise Management Act 1979 s 139, Sch 3 (as amended) (detention, seizure and condemnation of goods) and ss 144-148, 150-155 (as amended) (proceedings for offences, mitigation of penalties, proof and other matters) apply for these purposes: see the Free Zone Regulations 1991, SI 1991/2727, reg 7; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 1155 et seq, 1166.

### **UPDATE**

### **143 Offences, penalties and forfeiture**

NOTE 1--Community Customs Code replaced: Community Customs Code (Modernised Customs Code) found in European Parliament and EC Council Regulation 450/2008 (OJ L145, 4.6.2008, p 1), see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 20-345.



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#### **(iv) Warehousing Regimes**

### ***A. GOODS SUBJECT TO WAREHOUSING REGIMES; IN GENERAL***

#### **144. Goods subject to a warehousing regime.**

The acquisition of goods from another member state<sup>1</sup>, or the supply<sup>2</sup> of those goods, is treated for the purposes of value added tax as taking place outside the United Kingdom<sup>3</sup> where:

- 391 (1) they have been removed from a place outside the member states and have entered the territory of the Community<sup>4</sup>;
- 392 (2) the material time<sup>5</sup> for any acquisition of those goods from another member state or for any supply of those goods is while they are subject to a warehousing regime<sup>6</sup> and before the duty point<sup>7</sup>; and
- 393 (3) those goods are not mixed with any dutiable goods<sup>8</sup> which were produced or manufactured in the United Kingdom or acquired from another member state<sup>9</sup>,

although these provisions do not apply if:

- 394 (a) there is a supply of goods that would otherwise<sup>10</sup> be treated for VAT purposes as taking place outside the United Kingdom by virtue of the above provisions<sup>11</sup>;
- 395 (b) the whole or part of the business<sup>12</sup> carried on by the supplier of those goods consists in supplying to a number of persons goods to be sold, by them or others, by retail<sup>13</sup>;
- 396 (c) that supplier is, or would be<sup>14</sup>, a taxable person<sup>15</sup>; and
- 397 (d) that supply is to a person who is not a taxable person and either consists in a supply of goods to that person to be sold, by that person, by retail<sup>16</sup>, or consists in a supply of goods to that person by retail<sup>17</sup>.

Similarly, where any dutiable goods are acquired from another member state<sup>18</sup> or any person makes a supply of either any dutiable goods which were produced or manufactured in the United Kingdom or so acquired<sup>19</sup>, or any goods comprising a mixture of such goods and other goods<sup>20</sup>, and the material time for the acquisition or supply is while the goods in question are subject to a warehousing regime and before the duty point, that acquisition or supply is treated as taking place outside the United Kingdom if the material time for any subsequent supply of those goods is also while the goods are subject to the warehousing regime and before the duty point<sup>21</sup>. Where the material time for any acquisition or supply of goods in relation to which this provision applies is while the goods are subject to a warehousing regime and before the duty point, but the acquisition or supply nevertheless falls to be treated for VAT purposes as taking place in the United Kingdom<sup>22</sup>, then:

- 398 (i) that acquisition or supply is treated as taking place at the earlier of the time when the goods are removed from the warehousing regime and the duty point<sup>23</sup>; and
- 399 (ii) in the case of a supply, any VAT payable on the supply must be paid<sup>24</sup> at the time when the supply is so treated as taking place<sup>25</sup> and either by the person by

whom the goods are so removed, or by the person who is required to pay the duty or agricultural levy and together with that duty or levy<sup>26</sup>.

Where the time of supply or acquisition precedes the duty point in relation to either any supply by a taxable person of dutiable goods<sup>27</sup> or an acquisition by any person from another member state of dutiable goods<sup>28</sup>, the VAT in respect of that supply or acquisition must be accounted for<sup>29</sup> and paid, and any question as to the inclusion of any duty in the value of the supply or acquisition must be determined, by reference to the duty point or by reference to such later time as the Commissioners for Her Majesty's Revenue and Customs may determine<sup>30</sup>.

1 For the meaning of 'acquisition of goods from another member state' see PARA 19 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 I.e. and thus as outside the scope of United Kingdom VAT. For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4 Value Added Tax Act 1994 s 18(1)(a). As to the territory of the Community for the purposes of VAT see PARA 16 ante.

5 For these purposes, 'material time' means: (1) in relation to any acquisition or supply the time of which is determined in accordance with regulations under *ibid* s 6(14) (see PARA 37 ante) or s 12(3) (see PARA 44 ante), such time as may be prescribed for these purposes by those regulations; (2) in relation to any other acquisition, the time of the event which, in relation to the acquisition, is the first relevant event for the purpose of taxing it; and (3) in relation to any other supply, the time when the supply would be treated as taking place in accordance with s 6(2) if s 6(2)(c) (see PARA 35 ante) were omitted: s 18(6).

6 For these purposes, references to goods being subject to a warehousing regime are references to goods being kept in a warehouse or being transported between warehouses, whether in the same or different member states, without the payment in a member state of any duty, levy or VAT, and references to the removal of goods from a warehousing regime are to be construed accordingly: *ibid* s 18(7). 'Warehouse' means any warehouse where goods may be stored in any member state without payment of any one or more of: (1) Community customs duty; (2) any agricultural levy of the European Community; (3) VAT on the importation of the goods into any member state; (4) any duty of excise or any duty which is equivalent in another member state to a duty of excise: s 18(6).

7 *Ibid* s 18(1)(b). For the meaning of 'the duty point' see PARA 98 note 10 ante.

8 For the meaning of 'dutiable goods' see PARA 98 note 8 ante.

9 Value Added Tax Act 1994 s 18(1)(c).

10 I.e. but for the Value Added Tax Regulations 1995, SI 1995/2518, reg 145K (as added) (see the text and notes 11-17 *infra*).

11 *Ibid* reg 145K(1), (2)(a) (reg 145K added by SI 2005/2231, pursuant to the Value Added Tax Act 1994 s 18(1A) (added by the Finance (No 2) Act 2005 s 1) which empowers the Commissioners for Her Majesty's Revenue and Customs by regulations to prescribe circumstances in which the Value Added Tax Act 1994 s 18(1) does not apply). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

12 For the meaning of 'business' see PARA 23 ante.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 145K(2)(b) (as added: see note 11 *supra*).

14 I.e. would be but for the Value Added Tax Act 1994 s 18(1) (see the text and notes 1-9 *supra*).

15 Value Added Tax Regulations 1995, SI 1995/2518, reg 145K(2)(c) (as added: see note 11 *supra*).

16 *Ibid* reg 145K(2)(d)(i) (as added: see note 11 *supra*).

17 *Ibid* reg 145K(2)(d)(ii) (as added: see note 11 *supra*).

18 Value Added Tax Act 1994 s 18(2)(a).

19 Ibid s 18(2)(b)(i).

20 Ibid s 18(2)(b)(ii).

21 Ibid s 18(3). The effect of this is that VAT is only leviable on the last supply or acquisition of goods occurring whilst they are subject to the warehousing regime and before the duty point. The last such supply or acquisition is therefore treated as taking place in the United Kingdom: see the text and notes 22-26 *infra*.

22 Ie by virtue of *ibid* s 18(2), (3): see the text and notes 18-21 *supra*.

23 Ibid s 18(4)(a).

24 Ie subject to any regulations made under s 18(5) (as substituted): see *PARA 145 post*.

25 Ibid s 18(4)(b)(i).

26 Ibid s 18(4)(b)(ii).

27 Value Added Tax Regulations 1995, SI 1995/2518, reg 41(1)(a).

28 Ibid reg 41(1)(b).

29 As to accounting for VAT generally see *PARA 245 et seq post*.

30 Value Added Tax Regulations 1995, SI 1995/2518, reg 41(1).

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#### **145. Deferred payment of value added tax.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by regulations make provision for enabling a taxable person<sup>2</sup> to pay any value added tax he is required to pay on the last supply of goods which have been subject to a warehousing regime<sup>3</sup> at a later time than that provided for by statute<sup>4</sup>. Such regulations may in particular make provision for either or both of the following:

- 400 (1) for the taxable person to pay the VAT together with the VAT chargeable on other supplies by him of goods and services<sup>5</sup>; and
- 401 (2) for the taxable person to pay the VAT together with any duty of excise deferment of which has been granted<sup>6</sup> to him<sup>7</sup>,

and they may make different provision for different descriptions of taxable person and for different descriptions of goods<sup>8</sup>.

A person registered for VAT<sup>9</sup> who is an approved person for the purposes of deferred payment of excise duties<sup>10</sup> in respect of goods which are at a specified warehouse and who is liable to pay VAT<sup>11</sup> either on a supply of goods while the goods are subject to a warehousing regime<sup>12</sup> or on a supply of specified services performed on or in relation to goods which are subject to a warehousing regime<sup>13</sup>, may pay that VAT at or before the relevant time<sup>14</sup> instead of at the time provided for<sup>15</sup> by statute<sup>16</sup>. Where any goods of a kind chargeable to a duty of excise qualify for any relief of that duty, that relief is disregarded for the purposes of determining the relevant time<sup>17</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 I.e. any VAT he is required to pay by virtue of the Value Added Tax Act 1994 s 18(4)(b): see PARA 144 ante. For the meaning of 'supply' see PARA 27 ante; and for the meaning of 'subject to a warehousing regime' see PARA 144 note 6 ante.

4 Ibid s 18(5) (s 18(5) substituted, s 18(5A) added, by the Finance Act 1995 s 29).

5 Value Added Tax Act 1994 s 18(5A)(a) (as added: see note 4 supra).

6 I.e. under the Customs and Excise Management Act 1979 s 127A (as added): see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1102.

7 Value Added Tax Act 1994 s 18(5A)(b) (as added: see note 4 supra).

8 Ibid s 18(5A) (as added: see note 4 supra).

9 For the meaning of 'registered person' see PARA 115 note 5 ante.

10 I.e. an approved person within the meaning of the Excise Duties (Deferred Payment) Regulations 1992, SI 1992/3152 (as amended) (which allow for deferred payment of excise duty in certain circumstances on wine, made-wine, cider, spirits, hydrocarbon oils and on beer imported by a registered excise dealer and shipper: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 976-984): Value Added Tax Regulations 1995, SI 1995/2518, reg 43(1). The Customs Duties (Deferred Payment) Regulations 1976, SI 1976/1223 (as amended) are applied

with specified modifications: see the Value Added Tax Regulations 1995, SI 1995/2518, reg 121A (as added); and PARA 115 note 2 ante.

11     Ie liable under the Value Added Tax Act 1994 s 18(4)(b): see PARA 144 ante.

12     Value Added Tax Regulations 1995, SI 1995/2518, reg 43(2)(a) (reg 43(2) substituted by SI 1996/1250).

13     Value Added Tax Regulations 1995, SI 1995/2518, reg 43(2)(b) (as substituted: see note 12 supra). The specified services referred to in the text are services to which the Value Added Tax Act 1994 s 18C(3) (as added) applies (see PARA 154 post), and the liability arises under the Value Added Tax Act 1994 s 18D(2) (as added) (see PARA 154 post).

14     'The relevant time' means: (1) in relation to hydrocarbon oils, the 15th day of the month immediately following the month on which those oils were removed from the warehousing regime (Value Added Tax Regulations 1995, SI 1995/2518, reg 43(3)(a)); and (2) in relation to any other goods subject to a duty of excise, the day ('payment day') on which the registered person is required to pay the excise duty on the goods in accordance with the Excise Duties (Deferred Payment) Regulations 1992, SI 1992/3152, reg 5 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 982) (Value Added Tax Regulations 1995, SI 1995/2518, reg 43(3)(b)).

15     Ie provided for by the Value Added Tax Act 1994 s 18(4)(b) (see PARA 144 ante) or s 18D(2)(a) (as added) (see PARA 154 post): Value Added Tax Regulations 1995, SI 1995/2518, reg 43(2) (as substituted: see note 12 supra).

16     Ibid reg 43(2) (as substituted: see note 12 supra).

17     Ibid reg 43(4).

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## **B. FISCAL WAREHOUSING**

### **146. In general.**

Various commodities ('eligible goods')<sup>1</sup> may be traded free from VAT within the regime of a fiscal warehouse<sup>2</sup>. The value of supplies and acquisitions<sup>3</sup> made within a fiscal warehouse are disregarded in determining whether the supplier is obliged to register for VAT<sup>4</sup>, but the supplier, or acquirer, as the case may be, is nevertheless liable to account for the VAT on standard-rated supplies or acquisitions if he would have been liable to register but for the simplification<sup>5</sup>. Certain transactions involving a supply of eligible goods are treated as supplies of goods and not supplies of services for the purposes of VAT<sup>6</sup>.

The Commissioners for Her Majesty's Revenue and Customs<sup>7</sup> may make regulations governing the deposit, keeping, securing and treatment of goods in a fiscal warehouse and the removal<sup>8</sup> of goods from such a warehouse<sup>9</sup>.

1   le tin, copper, zinc, nickel, aluminium, lead, indium, silver, platinum, palladium and rhodium, cereals (including unprocessed rice), oil seeds and oleaginous fruits, nuts, olives, grains and seeds (including soya beans), potatoes, unroasted coffee, tea, cocoa beans (whether whole or broken, raw or roasted), raw sugar, rubber (in primary forms or in plates, sheets or strip), wool, chemicals in bulk, mineral oils (including propane and butane and crude petroleum oils) and vegetable oils and fats and their fractions (whether or not refined but not chemically modified): see the Value Added Tax Act 1994 s 18B(6)(a), Sch 5A (ss 18B, 18F, Sch 5A added by the Finance Act 1996 s 26(1), Sch 3 para 18). The Treasury may by order vary the Value Added Tax Act 1994 Sch 5A (as added) by adding to or deleting from it any goods or varying any description of goods: s 18B(8) (added by the Finance Act 1996 Sch 3 para 5). At the date at which this volume states the law, no such order had been made. In order to enable suppliers to take advantage of the fiscal warehousing system, certain supplies which would otherwise be supplies of services are deemed to be supplies of goods for these purposes: see the Value Added Tax (Fiscal Warehousing) (Treatment of Transactions) Order 1996, SI 1996/1255; and PARA 27 text and note 5 ante.

2   See the Value Added Tax Act 1994 ss 18B, 18C (as added); and PARAS 149, 154 post. As to fiscal warehouses and fiscal warehousing regimes see PARAS 146-148 post.

3   le supplies or acquisitions which are deemed to take place in accordance with *ibid* s 18B(4) (as added) (last acquisition or supply of goods before their removal from the fiscal warehouse): see PARA 149 post.

4   See *ibid* Sch 1 para 1(9), Sch 2 para 1(7), Sch 3 para 1(6) (added by the Finance Act 1996 Sch 3 paras 13, 14, 15 respectively); and PARAS 64, 69, 72 ante.

5   See the Value Added Tax Act 1994 s 18B(5) (as added: see note 1 supra); and PARA 149 post.

6   See the Value Added Tax (Fiscal Warehousing) (Treatment of Transactions) Order 1996, SI 1996/1255; and PARA 27 note 5 ante.

7   As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8   As to the removal of goods from a fiscal warehousing regime see PARA 151 post.

9   Value Added Tax Act 1994 s 18F(7) (as added: see note 1 supra). Without prejudice to the generality of this power, the regulations may include provision as to the keeping, preservation and production of records and the furnishing of returns and information by fiscal warehousekeepers and any other persons in relation to goods which are, have been or are to be subject to a fiscal warehousing regime (s 18F(8)(a)(i) (as so added)) and other goods which are, have been or are to be kept in fiscal warehouses (s 18F(8)(a)(ii) (as so added)). Pursuant to the exercise of this power see the Value Added Tax Regulations 1995, SI 1995/2518, reg 40 (as substituted and amended) (see PARA 248 post), reg 145B (as added) (see PARA 149 post), regs 145C, 145D (as added) (see

PARA 154 post), reg 145E (as added) (see PARA 148 post) and reg 145F, Sch 1A (as added) (see PARA 241 post). The regulations may also include provision as to the keeping, preservation and production of records and the furnishing of returns and information by fiscal warehousekeepers and any other persons in relation to fiscal warehouse premises (Value Added Tax Act 1994 s 18F(8)(a)(iii) (as so added)) and fiscal warehousekeepers and their businesses (s 18F(8)(a)(iv) (as so added)). For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 post. Regulations may also make provision requiring goods deposited in a fiscal warehouse to be produced to or made available for inspection by an authorised person on request by him (see s 18F(8)(b) (as so added); the Value Added Tax Regulations 1995, SI 1995/2518, reg 145F(5)(b) (as added); and PARA 148 post); prohibiting the carrying out on fiscally warehoused goods of such operations as the Commissioners may prescribe (Value Added Tax Act 1994 s 18F(8)(c) (as so added)); regulating the transfer of goods from one fiscal warehouse to another (see s 18F(8)(d) (as so added); the Value Added Tax Regulations 1995, SI 1995/2518, reg 145G (as added); and PARA 150 post); concerning goods which, though kept in a fiscal warehouse, are either not eligible to be so kept (see PARA 148 note 1 post) or are not intended by a relevant person to be goods in respect of which reliefs under the Value Added Tax Act 1994 ss 18A-18F (as added) are to be enjoyed (s 18F(8)(e) (as so added)); and prohibiting the fiscal warehousekeeper from allowing goods to be removed from the fiscal warehousing regime without payment of any value added tax payable under s 18D (as added) (see PARAS 149, 154 post) on or by reference to that removal and, if in breach of that prohibition he allows goods to be so removed, making him liable for the VAT jointly and severally with the remover (see s 18F(8)(f) (as so added); the Value Added Tax Regulations 1995, SI 1995/2518, regs 145H-145J (as added); and PARA 151 post). Regulations may also contain such incidental or supplementary provisions as the Commissioners think necessary or expedient (Value Added Tax Act 1994 s 18F(8) (as so added) and may make different provision for different cases, including different provision for different fiscal warehousekeepers or descriptions of fiscal warehousekeeper, for fiscal warehousekeepers of different descriptions or for goods of different classes or descriptions or of the same class or description in different circumstances (s 18F(9) (as so added)).

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#### **147. Fiscal warehouses and fiscal warehousekeepers.**

'Fiscal warehouse' means such place in the United Kingdom<sup>1</sup> in the occupation or under the control of the fiscal warehousekeeper<sup>2</sup>, not being retail premises, as the fiscal warehousekeeper notifies in writing to the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> and from which that status has not been withdrawn<sup>4</sup>. Any registered person<sup>5</sup> may apply to the Commissioners for approval as a fiscal warehousekeeper<sup>6</sup>, and the Commissioners may approve any such person provided that it appears to them to be proper so to do<sup>7</sup>. An approval may be subject to such conditions as the Commissioners may impose<sup>8</sup>; and subject to those conditions, and to any relevant regulations<sup>9</sup>, an approved person is entitled to keep a fiscal warehouse<sup>10</sup>.

If the Commissioners consider it appropriate they may from time to time:

- 402 (1) impose conditions on a fiscal warehousekeeper in addition to any such conditions they may have imposed on approval, and may vary or revoke any conditions previously imposed<sup>11</sup>;
- 403 (2) withdraw approval of any person as a fiscal warehousekeeper<sup>12</sup>; and
- 404 (3) withdraw fiscal warehouse status from any premises<sup>13</sup>.

1 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 As to the approval of fiscal warehousekeepers see the text and notes 3-10 infra.

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 Value Added Tax Act 1994 ss 18A(3), 18F(1) (ss 18A, 18F added by the Finance Act 1996 s 26(1), Sch 3 para 5). Such a place becomes a fiscal warehouse on receipt by the Commissioners of the notification or on the date stated in it as the date from which it is to have effect, whichever is the later, and, subject to the Value Added Tax Act 1994 s 18A(6) (as added) (see the text and notes 11-13 infra), remains a fiscal warehouse so long as it is in the occupation or under the control of the fiscal warehousekeeper or until he notifies the Commissioners in writing that it is to cease to be a fiscal warehouse: s 18A(3) (as so added).

5 Without prejudice to the provisions of *ibid* s 43 (as amended) concerning liability for VAT, in s 18A(1), (2) (as added) 'registered person' includes any body corporate which under s 43 (as amended) is for the time being treated as a member of a group: s 18A(9) (as added: see note 4 supra). As to the VAT liability of groups of companies see PARAS 75 ante, 205 et seq post.

6 The application must be in writing in such form as the Commissioners may direct and must be accompanied by such information as they may require: *ibid* s 18A(7) (as added: see note 4 supra).

7 *Ibid* s 18A(1) (as added: see note 4 supra). 'Fiscal warehousekeeper' means a person so approved: s 18F(1) (as so added). In considering an application by a person to be a fiscal warehousekeeper, the Commissioners may take into account any matter which they consider relevant, and, without prejudice to the generality of these provisions, all or any one or more of: (1) the applicant's record of compliance and ability to comply with the requirements of the Value Added Tax Act 1994 and regulations made thereunder (s 18A(4)(a) (as so added)); (2) his record of compliance and ability to comply with the requirements of the Customs and Excise Acts and regulations made thereunder (s 18A(4)(b) (as so added)); (3) his record of compliance and ability to comply with Community customs provisions (s 18A(4)(c) (as so added)); (4) his record of compliance and ability to comply with the requirements of other member states relating to VAT and duties equivalent to duties of excise (s 18A(4)(d) (as so added)); (5) if the applicant is a company, the records of compliance and ability to comply with the matters set out in heads (1) to (4) supra of its directors, persons connected with its directors, its managing officers, any shadow directors or any of those persons and, if it is a close company, the records of



compliance and ability to comply with those matters of the beneficial owners of the shares of the company or any of them (s 18A(4)(e) (as so added)); and (6) if the applicant is an individual, the records of compliance and ability to comply with the matters set out in heads (1) to (4) supra of any company of which he is or has been a director, managing officer or shadow director or, in the case of a close company, a shareholder or the beneficial owner of shares (s 18A(4)(f) (as so added)). As to the Customs and Excise Acts see PARA 115 note 2 ante. For the meaning of 'connected' see PARA 215 note 11 post; for the meaning of 'managing officer' see PARA 322 note 4 post; for the meaning of 'shadow director' see COMPANIES vol 14 (2009) PARA 479; and for the meaning of 'close company' see INCOME TAXATION vol 23(2) (Reissue) PARA 1296 (definitions applied by the Value Added Tax Act 1994 s 18A(4) (as so added)).

An approval must be notified in writing and takes effect on its being made, or on any later date specified for the purpose in the notification: s 18A(8) (as so added). A person approved under these provisions remains a fiscal warehousekeeper until he ceases to be a registered person or until he notifies the Commissioners in writing that he is to cease to be a fiscal warehousekeeper: s 18A(5) (as so added). An appeal lies to a VAT and duties tribunal against any decision of the Commissioners as to whether or not a person is to be approved as a fiscal warehousekeeper or the conditions from time to time subject to which he is so approved: see s 83(da)(i) (s 83(da) added by the Finance Act 1996 Sch 3 para 12); and PARA 346 et seq post.

8 Value Added Tax Act 1994 s 18A(1) (as added: see note 4 supra).

9 The regulations made under ibid s 18F (as added): see PARA 146 ante.

10 Ibid s 18A(2) (as added: see note 4 supra).

11 Ibid s 18A(6)(a) (as added: see note 4 supra). Anything done by the Commissioners under s 18A(6)(a)-(c) (see the text and notes 12-13 infra) must be notified by the Commissioners to the fiscal warehousekeeper in writing, and takes effect on the notification being made, or on any later date specified for the purpose in the notification: s 18A(8) (as so added). An appeal lies to a VAT and duties tribunal against any decision of the Commissioners as to whether or not a person is to be approved as a fiscal warehousekeeper or the conditions from time to time subject to which he is so approved, for the withdrawal of an approval, or for the withdrawal of fiscal warehouse status from any premises: see s 83(da) (as added: see note 7 supra); and PARA 346 et seq post.

12 Ibid s 18A(6)(b) (as added: see note 4 supra). As to notifications of decisions, commencements and appeals see note 11 supra.

13 Ibid s 18A(6)(c) (as added: see note 4 supra). As to notifications of decisions, commencements and appeals see note 11 supra.

## UPDATE

### 147 Fiscal warehouses and fiscal warehousekeepers

NOTE 7--1994 Act s 18A(4) amended: Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/2. THE CHARGE TO VALUE ADDED TAX/(4) VALUE ADDED TAX ON THE IMPORTATION OF GOODS/(iv) Warehousing Regimes/B. FISCAL WAREHOUSING/148. Fiscal warehousing regimes.

#### **148. Fiscal warehousing regimes.**

Upon any eligible goods<sup>1</sup> entering a fiscal warehouse<sup>2</sup>, the relevant fiscal warehousekeeper must record their entry in his relevant fiscal warehousing record<sup>3</sup>. Eligible goods are subject to or in a fiscal warehousing regime at any time only while they are allocated to that regime in the relevant fiscal warehousing record<sup>4</sup>, while they are not identified in that record as having been transferred<sup>5</sup>, or prior to their removal from that regime<sup>6</sup>. A fiscal warehousekeeper<sup>7</sup>, upon receiving a request to do so from any proper officer<sup>8</sup>, must facilitate and permit that officer to inspect any goods which are stored or deposited in his fiscal warehouse, whether or not those goods are allocated to the relevant fiscal warehousing regime<sup>9</sup>.

Where a fiscal warehousekeeper keeps one or more fiscal warehouses there is a single fiscal warehousing regime associated with him<sup>10</sup>.

1 For these purposes, 'eligible goods' means:

- 74 (1) goods of a description falling within the Value Added Tax Act 1994 s 18B, Sch 5A (as added) (see PARA 146 note 1 ante) (ss 18B(6)(a), 18F(1) (ss 18B, 18F added by the Finance Act 1996 s 26, Sch 3 para 5); Value Added Tax Regulations 1995, SI 1995/2518, reg 145A(1) (regs 145A, 145E, 145F added by SI 1996/1250));
- 75 (2) goods upon which any import duties (ie customs duties and charges having an effect equivalent to customs duties payable on the importation of goods, import charges introduced under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products (see EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) establishing the Community Customs Code, art 4(10) (amended by EC Council Regulation 82/97 (OJ L17, 21.1.97, p 1))) have been either paid or deferred under EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) art 224 or regulations made under the Customs and Excise Management Act 1979 s 45 (deferred payment of customs duty: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 976) (Value Added Tax Act 1994 s 18B(6)(b) (as so added); Value Added Tax Regulations 1995, SI 1995/2518, reg 145A(1) (as so added));
- 76 (3) goods upon which, in the case of goods imported from a place outside the member states, any VAT chargeable under the Value Added Tax Act 1994 s 1(1)(c) (see PARAS 4, 113 ante) has been either paid or deferred in accordance with Community customs provisions (Value Added Tax Act 1994 s 18B(6)(b) (as so added); Value Added Tax Regulations 1995, SI 1995/2518, reg 145A(1) (as so added)); and
- 77 (4) goods upon which, in the case of goods subject to a duty of excise, that duty has been either paid or deferred under the Customs and Excise Management Act 1979 s 127A (as added) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1102) (Value Added Tax Act 1994 s 18B(6)(b) (as so added); Value Added Tax Regulations 1995, SI 1995/2518, reg 145A(1) (as so added)).

2 For these purposes 'fiscal warehouse' includes all fiscal warehouses kept by the same fiscal warehousekeeper: *ibid* reg 145A(1) (as added: see note 1 *supra*). As to fiscal warehousing generally see PARA 147 ante.

3 *Ibid* reg 145E(1) (as added: see note 1 *supra*).

4 *Ibid* reg 145E(2)(a) (as added: see note 1 *supra*). As to the maintenance of fiscal warehousekeeping records see PARA 241 post.

5 *Ibid* reg 145E(2)(b) (as added: see note 1 *supra*). As to transfers see PARAS 150, 151 post.

6 *Ibid* reg 145E(2)(c) (as added: see note 1 *supra*). As to removals see PARA 151 post.

7 For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante.

8 For the meaning of 'proper officer' see PARA 115 note 7 ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 145F(5)(b) (as added: see note 1 supra).

10 Ibid reg 145A(2) (as added: see note 1 supra). In these circumstances 'relevant fiscal warehousekeeper', 'relevant fiscal warehouse', 'relevant fiscal warehousing regime', 'his fiscal warehouse', 'his fiscal warehousing regime' and related expressions are construed accordingly: reg 145A(2) (as so added).

## **UPDATE**

### **148 Fiscal warehousing regimes**

NOTE 1--Head (2). Community Customs Code replaced: Community Customs Code (Modernised Customs Code) found in European Parliament and EC Council Regulation 450/2008 (OJ L145, 4.6.2008, p 1), see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 20-345.

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#### **149. Acquisitions and supplies treated as taking place outside the United Kingdom.**

Where there is an acquisition of eligible goods<sup>1</sup> from another member state<sup>2</sup> and either:

- 405 (1) the acquisition takes place while the goods are subject to a fiscal warehousing regime<sup>3</sup>; or
- 406 (2) the acquirer causes the goods to be placed in such a regime after the acquisition but before the supply<sup>4</sup>, if any, of those goods which next occurs<sup>5</sup>,

then, provided that the acquirer, not later than the time of the acquisition, prepares and keeps a certificate<sup>6</sup> that the goods are subject to a fiscal warehousing regime or, as the case may be, that he will cause head (2) above to be satisfied<sup>7</sup>, the acquisition is treated, for the purposes of value added tax, as taking place outside the United Kingdom<sup>8</sup> if any subsequent supply of those goods is while they are subject to the fiscal warehousing regime<sup>9</sup>. If, however, the subsequent supply is not made while the goods are so subject, and the acquisition thus falls to be treated as taking place in the United Kingdom, it is treated as taking place when the goods are removed from the fiscal warehousing regime<sup>10</sup>.

Similarly, where there is a supply of eligible goods and either:

- 407 (a) the supply takes place while the goods are subject to a fiscal warehousing regime<sup>11</sup>; or
- 408 (b) after that supply, but before the supply, if any, of those goods which next occurs, the person to whom the former supply is made causes the goods to be placed in a fiscal warehousing regime<sup>12</sup>,

then, provided that the supply is not a retail transaction<sup>13</sup> and that, in a case falling within head (b) above, the person to whom the supply is made gives the supplier a certificate that he will cause head (b) above to be satisfied<sup>14</sup>, the supply is treated as taking place outside the United Kingdom if any subsequent supply of those goods is made while they are subject to the fiscal warehousing regime<sup>15</sup>. If, however, there is no subsequent supply which is made while the goods are so subject, so that the certified supply falls to be treated as taking place in the United Kingdom, it is treated as taking place when the goods are removed from the fiscal warehousing regime<sup>16</sup>.

Where:

- 409 (i) an acquisition or supply is treated by virtue of these provisions as taking place when the goods are removed from the fiscal warehousing regime<sup>17</sup>;
- 410 (ii) the acquisition or supply is taxable<sup>18</sup> and not zero-rated<sup>19</sup>; and
- 411 (iii) the acquirer or supplier is not a taxable person<sup>20</sup> but would be if the value of that acquisition or supply were taken into account in establishing liability to registration<sup>21</sup>,

VAT is chargeable on that acquisition or supply notwithstanding that the acquirer or supplier is not a taxable person<sup>22</sup>.

- 1 For the meaning of 'eligible goods' see PARA 148 note 1 ante.
- 2 Value Added Tax Act 1994 s 18B(1)(a), (b) (ss 18B, 18D added by the Finance Act 1996 s 26, Sch 3 para 5). For the meaning of 'another member state' see PARA 4 note 15 ante.
- 3 Value Added Tax Act 1994 s 18B(1)(c)(i) (as added: see note 2 supra). As to fiscal warehousing regimes see PARA 148 ante. For these purposes, any reference to goods being subject to a fiscal warehousing regime is, subject to any regulations made under s 18F(8)(e) (as added) (see PARA 146 ante), a reference to eligible goods being kept in a fiscal warehouse or being transferred between fiscal warehouses in accordance with such regulations; and any reference to the removal of goods from a fiscal warehousing regime is to be construed accordingly: s 18F(2) (as so added). Except for the purposes of s 18B(4) (as added) (see the text to notes 10, 16 infra), an acquisition or supply is treated as taking place at the material time for the acquisition or supply: s 18B(7) (as so added). 'Material time' means: (1) in relation to any acquisition or supply the time of which is determined in accordance with regulations under s 6(14) (see PARA 37 ante) or s 12(3) (see PARA 44 ante), such time as may be prescribed for these purposes by those regulations; (2) in relation to any other acquisition, the time when the goods reach the destination to which they are dispatched from the member state in question; (3) in relation to any other supply of goods, the time when the supply would be treated as taking place in accordance with s 6(2) (see PARA 35 ante) if s 6(2)(c) were omitted; and (4) in relation to any other supply of services, the time when the services are performed: s 18F(1) (as so added).
- 4 For the meaning of 'supply' see PARA 27 ante.
- 5 Value Added Tax Act 1994 s 18B(1)(c)(ii) (as added: see note 2 supra).
- 6 The certificate must be in such form, and kept for such period, as the Commissioners for Her Majesty's Revenue and Customs may specify by regulations: *ibid* s 18B(1)(d) (as added: see note 2 supra). The certificate must contain the information indicated in the Value Added Tax Regulations 1995, SI 1995/2518, reg 145B(1), Sch 1 Form 17 (added by SI 1996/1250): Value Added Tax Regulations 1995, SI 1995/2518, reg 145B(1) (as so added). Such a certificate prepared by an acquirer who is not a taxable person must be kept by him for a period of six years commencing on the day the certificate is prepared; and he must produce it to a proper officer when that officer requests him to do so: reg 145B(2) (as so added). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. For the meaning of 'proper officer' see PARA 115 note 7 ante.
- 7 Value Added Tax Act 1994 s 18B(1)(d) (as added: see note 2 supra).
- 8 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.
- 9 Value Added Tax Act 1994 s 18B(3) (as added: see note 2 supra).
- 10 *Ibid* s 18B(4) (as added: see note 2 supra). As to removals see PARA 151 post. Any VAT payable on a supply to which s 18B(4) (as added) applies or on an acquisition to which s 18B(5) (as added) (see the text and notes 17-22 infra) applies must be paid at the time when the supply or acquisition is treated as taking place under the provision in question (s 18D(1), (2)(a) (as so added)) and by the person by whom the goods are removed or, as the case may be, by the person who is required to pay the excise duty and together with that duty (s 18D(2)(b) (as so added)). The Commissioners have, however (pursuant to s 18D(3) (as added)) by regulations made provision for enabling a taxable person to pay the VAT he is so required to pay at a later time (see the Value Added Tax Regulations 1995, SI 1995/2518, reg 43(2)(b) (as substituted); and PARA 145 ante). The Commissioners may make different provisions for different descriptions of taxable persons and for different descriptions of goods and services: Value Added Tax Act 1994 s 18D(3) (as so added).
- 11 *Ibid* s 18B(2)(a), (b), (c)(i) (as added: see note 2 supra).
- 12 *Ibid* s 18B(2)(c)(ii) (as added: see note 2 supra).
- 13 *Ibid* s 18B(2)(e) (as added: see note 2 supra).
- 14 *Ibid* s 18B(2)(d) (as added: see note 2 supra). The certificate must be in such form as the Commissioners may specify by regulations: s 18B(2)(d) (as so added). It must contain the information indicated in the Value Added Tax Regulations 1995, SI 1995/2518, Sch 1 Form 17 (as added: see note 6 supra): reg 145B(1) (as so added).
- 15 Value Added Tax Act 1994 s 18B(3) (as added: see note 2 supra).
- 16 *Ibid* s 18B(4) (as added: see note 2 supra). As to accountability for VAT in these circumstances see note 10 supra.

17 Ibid s 18B(5)(a) (as added: see note 2 supra). The circumstances envisaged in this provision are where s 18B(4) (as added) applies: see the text to notes 10, 16 supra.

18 For the meanings of 'taxable acquisition' and 'taxable supply' see PARAS 19, 18 note 3 respectively ante.

19 Value Added Tax Act 1994 s 18B(5)(b) (as added: see note 2 supra). For the meaning of 'zero-rated' see PARA 174 post.

20 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

21 Value Added Tax Act 1994 s 18B(5)(c) (as added: see note 2 supra). The circumstances envisaged in this provision are where the acquirer or supplier is not a taxable person but would be were it not for Sch 1 para 1(9) (as added), Sch 2 para 1(7) (as added) or Sch 3 para 1(6) (as added): see PARAS 64, 69, 72 ante.

22 Ibid s 18B(5) (as added: see note 2 supra).

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### **150. Fiscal warehousing transfers taking place in the United Kingdom.**

A fiscal warehousekeeper<sup>1</sup> ('the original fiscal warehousekeeper') may permit eligible goods<sup>2</sup> which are subject to his fiscal warehousing regime<sup>3</sup> ('the original regime') to be transferred to another fiscal warehousing regime ('the other regime') without those goods being treated as removed from the original regime<sup>4</sup>. The original fiscal warehousekeeper must not, however, allow eligible goods to exit from his fiscal warehousing regime in pursuance of this provision before he receives a written undertaking from the fiscal warehousekeeper in relation to that other fiscal warehousing regime ('the other fiscal warehousekeeper') that, in respect of those eligible goods, the other fiscal warehousekeeper will comply with the following requirements<sup>5</sup>:

- 412 (1) that upon the entry of the goods to his fiscal warehouse, he will record that entry in his fiscal warehousing record<sup>6</sup> and allocate those goods to his fiscal warehousing regime<sup>7</sup>; and
- 413 (2) that within 30 days commencing with the day on which those goods left the original fiscal warehouse, he will deliver, or cause to be delivered, to the original fiscal warehousekeeper a certificate in a form acceptable to the Commissioners for Her Majesty's Revenue and Customs<sup>8</sup> confirming that he has recorded the entry of those goods to his fiscal warehouse and allocated them to his fiscal warehousing regime<sup>9</sup> and that he will retain a copy of that certificate as part of his fiscal warehousing record<sup>10</sup>.

1 As to fiscal warehousekeepers see PARA 147 ante.

2 For the meaning of 'eligible goods' see PARA 148 note 1 ante.

3 As to fiscal warehousing regimes see PARA 148 ante. As to the meaning of 'his fiscal warehousing regime' see PARA 148 note 10 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 145G(1) (regs 145G, 145H added by SI 1996/1250).

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 145G(2) (as added: see note 4 supra).

6 As to the fiscal warehousing record see PARA 241 post.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 145G(3)(a), (b) (as added: see note 4 supra).

8 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 145G(3)(c) (as added: see note 4 supra). If the certificate referred to in reg 145G(3)(c) (as added) is not received by the relevant fiscal warehousekeeper within the 30-day period therein indicated (commencing on the day on which the relevant eligible goods leave his fiscal warehouse), he must: (1) make an entry by way of adjustment to his fiscal warehousing record to show the relevant goods as having been removed from his fiscal warehousing regime at the time and on the day when they left (reg 145H(3)(a), (4)(a) (as so added)); (2) identify in his fiscal warehousing record the person on whose instructions he allowed the goods to leave his fiscal warehouse as the person removing those goods and that person's address and registration number, if any (reg 145H(3)(b) (as so added)); and (3) notify the person on whose instructions he allowed the goods to leave his fiscal warehouse that the relevant document has not been received by him in time (reg 145H(3)(c) (as so added)). For the meaning of 'registration number' see PARA 59 note 8 ante.

10 Ibid reg 145G(3)(d) (as added: see note 4 supra).



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### **151. Removal from warehousing and transfers overseas.**

Without prejudice to the provisions relating to change of status<sup>1</sup>, eligible goods<sup>2</sup> which are allocated to a fiscal warehousing regime<sup>3</sup> may be removed from that regime only at the following times and in any of these circumstances:

- 414 (1) when an entry in respect of those goods is made in the relevant fiscal warehousing record<sup>4</sup> which indicates the time and date of their removal from that regime<sup>5</sup>;
- 415 (2) when the goods are moved outside the fiscal warehouse in respect of which they are allocated to a fiscal warehousing regime, except in the case of movements between fiscal warehouses kept by the same fiscal warehousekeeper<sup>6</sup>; or
- 416 (3) at the time immediately preceding a retail sale of those goods<sup>7</sup>.

Eligible goods which are subject to a fiscal warehousing regime are not treated as removed from that regime, but as transferred or as being in the process of transfer, as the case requires, in any of these circumstances:

- 417 (a) where the goods in question are transferred or are in the process of transfer<sup>8</sup> to another fiscal warehousing regime<sup>9</sup>;
- 418 (b) where the goods in question are transferred, or are in the process of transfer, to arrangements which correspond in effect, under the law of another member state<sup>10</sup>, to the statutory provisions relating to fiscal warehousing<sup>11</sup>;
- 419 (c) where the goods in question are exported, or are in the process of being exported, to a place outside the member states<sup>12</sup>; or
- 420 (d) where the goods in question are moved temporarily to a place other than the relevant fiscal warehouse for repair, processing, treatment or other operations, subject to the prior agreement of, and to conditions to be imposed by, the Commissioners for Her Majesty's Revenue and Customs<sup>13</sup>.

Except in the case of a removal which is the result of an entry in the relevant fiscal warehousing record made by the relevant fiscal warehousekeeper in consequence of the non-receipt of a document following a transfer or export of goods<sup>14</sup>, a fiscal warehousekeeper must not remove, or allow the removal of, any eligible goods from his fiscal warehousing regime at any time before either he has inspected and placed on his fiscal warehousing record a copy of the relevant removal document issued by the Commissioners<sup>15</sup> or he has been provided with the registration number of a person registered for VAT and a written undertaking from that person that any VAT payable by that person as the result of any removal of eligible goods from that fiscal warehousing regime will be accounted for<sup>16</sup> on that person's VAT return<sup>17</sup>. Where a fiscal warehousekeeper allows the removal of any eligible goods to take place from his fiscal warehousing regime otherwise than in accordance with these requirements, he is jointly and severally liable with the person who removes the goods for the payment of the VAT payable<sup>18</sup> to the Commissioners<sup>19</sup>.

1    le the Value Added Tax Act 1994 s 18F(5), (6) (as added): see PARA 153 post.

2 For the meaning of 'eligible goods' see PARA 148 note 1 ante.

3 As to fiscal warehousing regimes see PARA 148 ante.

4 As to the fiscal warehousing record see PARA 241 post.

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 145H(1)(a) (regs 145H-145J added by SI 1996/1250). The person who is treated as the person who removes, or causes the removal of, the relevant goods from the relevant fiscal warehousing regime in any of the circumstances described in the Value Added Tax Regulations 1995, SI 1995/2518, reg 145H(1)(a)-(c) (as added) (see the text and notes 6-7 infra) is either the person who causes any of those circumstances to occur or, in the case of reg 145H(1)(c) (as added), the person who makes the retail sale there referred to: reg 145H(1) (as so added).

6 Ibid reg 145H(1)(b) (as added: see note 5 supra). As to the person who removes or causes the removal of goods from a fiscal warehousing regime see note 5 supra.

7 Ibid reg 145H(1)(c) (as added: see note 5 supra). As to the person who removes or causes the removal of goods from a fiscal warehousing regime see note 5 supra.

8 Ie in pursuance of ibid reg 145G(1) (as added): see PARA 150 ante.

9 Ibid reg 145H(2)(a) (as added: see note 5 supra). See further PARA 150 note 9 ante.

10 As to the construction of references to the law of another member state see PARA 17 note 2 ante.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 145H(2)(b) (as added: see note 5 supra). For these purposes the statutory provisions relating to fiscal warehousing are the Value Added Tax Act 1994 s 18B(3) (as added) (see PARA 149 ante), whether or not those arrangements also correspond in effect to s 18C(1) (as added) (zero-rating of certain specified services performed in a fiscal or other warehousing regime: see PARA 154 post): Value Added Tax Regulations 1995, SI 1995/2518, reg 145H(2)(b) (as so added). A document evidencing completion of such transfer, or of the export of goods from a fiscal warehousing regime to a place outside the member states, should be received within 60 days of the goods leaving the fiscal warehouse (see note 12 infra): reg 145H(4)(b), (c) (as so added): if it is not so received the relevant fiscal warehousekeeper must: (1) make an entry by way of adjustment to his fiscal warehousing record to show the relevant goods as having been removed from his fiscal warehousing regime at the time and on the day when they left (reg 145H(3)(a) (as so added)); (2) identify in his fiscal warehousing record the person on whose instructions he allowed the goods to leave his fiscal warehouse as the person removing those goods and that person's address and registration number, if any (reg 145H(3)(b) (as so added)); and (3) notify the person on whose instructions he allowed the goods to leave his fiscal warehouse that the relevant document has not been received by him in time (reg 145H(3)(c) (as so added)). For the meaning of 'registration number' see PARA 59 note 8 ante.

12 Ibid reg 145H(2)(c) (as added: see note 5 supra). A document evidencing the export of the goods to that place should be received within 60 days of the goods leaving the fiscal warehouse: reg 145H(4)(c) (as so added). As to the action to be taken by the fiscal warehousekeeper if it is not so received see note 11 supra. As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

13 Ibid reg 145H(2)(d) (as added: see note 5 supra). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

14 Ibid reg 145I(3) (as added: see note 5 supra). A removal such as is referred to in the text is a removal which is the result of an entry in the relevant fiscal warehousing record made by the relevant fiscal warehousekeeper in compliance with reg 145H(3)(a) (as added) (non-receipt of a document following transfer or export) (see PARA 150 note 9 ante; and note 11 supra): reg 145I(3) (as so added).

15 Ibid reg 145I(1)(a) (as added: see note 5 supra). The relevant removal document is the document issued by the Commissioners under reg 145J(1) (as so added), which provides that the Commissioners may, in respect of a person who is seeking to remove, or cause the removal of, eligible goods from a fiscal warehousing regime, accept from, or on his behalf, payment of the VAT payable (if any) as a result of that removal (reg 145J(1)(a) (as so added)) and issue to that person a document bearing a reference or identification number (reg 145J(1)(b) (as so added)). The Commissioners need not act in accordance with these provisions unless they are satisfied as to: (1) the value and material time of any supply of the relevant goods in the fiscal warehousing regime which is treated as taking place in the United Kingdom under the Value Added Tax Act 1994 s 18B(4) (as added) (see PARA 149 ante) and the status of the person who made that supply (Value Added Tax Regulations 1995, SI 1995/2518, reg 145J(2)(a) (as so added)); (2) the nature and quantity of the relevant eligible goods (reg 145J(2)(b) (as so added)); (3) the value of any relevant self-supplies of specified services treated as made under the Value Added Tax Act 1994 s 18C(3) (as added) (see PARA 154 post) in the course or furtherance of his business by the person who is to remove the relevant goods, or by the person on whose behalf the goods are to be

removed, at the time they are removed from the fiscal warehousing regime (Value Added Tax Regulations 1995, SI 1995/2518, reg 145J(2)(c) (as so added)); and (4) the nature and material time of any relevant supplies of specified services in respect of which the self-supplies referred to in head (3) *supra* are treated as being identical (certain supplies of services on or in relation to goods while those goods are subject to the fiscal warehousing regime) (reg 145J(2)(d) (as so added)). In head (1) *supra*, 'status' is a reference to whether the person in question is, or is required to be, registered under the Value Added Tax Act 1994 (see PARA 64 *et seq ante*) (Value Added Tax Regulations 1995, SI 1995/2518, reg 145J(3)(a) (as so added)) or would be required to be so registered were it not for the Value Added Tax Act 1994 Sch 1 para 1(9) (as added) (see PARA 64 *ante*), Sch 2 para 1(7) (as added) (see PARA 69 *ante*), Sch 3 para 1(6) (as added) (see PARA 72 *ante*) or any of those provisions: Value Added Tax Regulations 1995, SI 1995/2518, reg 145J(3)(b) (as so added).

16     *Ie* in accordance with *ibid* reg 40(1)(c) (as substituted): see PARA 248 *post*.

17     *Ibid* reg 145I(1)(b) (as added: see note 5 *supra*).

18     *Ie* under the Value Added Tax Act 1994 s 18D(2) (as added): see PARA 149 *ante*.

19     Value Added Tax Regulations 1995, SI 1995/2518, reg 145I(2) (as added: see note 5 *supra*). This provision is without prejudice to the Value Added Tax Act 1994 s 18E (as added) (deficiency in fiscally warehoused goods: see PARA 152 *post*): Value Added Tax Regulations 1995, SI 1995/2518, reg 145I(2) (as so added).

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## **152. Deficiency in fiscally warehoused goods.**

Where goods have been subject to a fiscal warehousing regime<sup>1</sup> and, before being lawfully removed from the fiscal warehouse, they are found to be missing or deficient<sup>2</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> may require the fiscal warehousekeeper<sup>4</sup> to pay immediately in respect of the missing goods, or of the whole or any part of the deficiency, as they see fit, the value added tax that would have been chargeable<sup>5</sup>. This provision does not, however, apply if it is shown to the satisfaction of the Commissioners that the absence of, or deficiency in, the goods can be accounted for by natural waste or other legitimate cause<sup>6</sup>.

1 As to fiscal warehousing regimes see PARA 148 ante.

2 Value Added Tax Act 1994 s 18E(1) (s 18E added by the Finance Act 1996 s 26(1), Sch 3 para 5).

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante.

5 Value Added Tax Act 1994 s 18E(2) (as added: see note 2 supra). 'VAT that would have been chargeable' means VAT that would have been chargeable on a supply of the missing goods, or the amount of goods by which the goods are deficient, taking place at the time immediately before the absence arose or the deficiency occurred, if the value of that supply were the open market value; but where that time cannot be ascertained to the Commissioners' satisfaction, the VAT that would have been chargeable is the greater of the amounts of VAT which would have been chargeable on a supply of those goods: (1) if the value of that supply were the highest open market value during the period ('the relevant period') commencing when the goods were placed in the fiscal warehousing regime and ending when the absence or deficiency came to the notice of the Commissioners (s 18E(3)(a) (as so added)); or (2) if the rate of VAT chargeable on that supply were the highest rate chargeable on a supply of such goods during the relevant period and the value of that supply were the highest open market value while that rate prevailed (s 18E(3)(b) (as so added)). This provision has effect without prejudice to any penalty incurred under any other provision of the Value Added Tax Act 1994 or regulations made under it: s 18E(4) (as so added). As to penalties see PARA 321 et seq post. For the meaning of 'open market value' see PARA 96 ante.

6 Ibid s 18E(2) (as added: see note 2 supra).

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**153. Changes in eligible goods or in status of fiscal warehousekeeper or fiscal warehouse.**

Where, as a result of an operation on eligible goods<sup>1</sup> subject to a fiscal warehousing regime<sup>2</sup>, they change their nature but the resulting goods are also eligible goods, the provisions relating to warehousing and fiscal warehousing<sup>3</sup> apply as if the resulting goods were the original goods<sup>4</sup>. Where, however, as a result of an operation on such goods they cease to be eligible goods, those provisions apply on their ceasing to be so as if they had at that time been removed<sup>5</sup> from the fiscal warehousing regime and the proprietor of the goods is treated for that purpose as if he were the person removing them<sup>6</sup>.

Where any person ceases to be a fiscal warehousekeeper<sup>7</sup> or any premises cease to have fiscal warehouse<sup>8</sup> status<sup>9</sup>, the provisions relating to warehousing and fiscal warehousing<sup>10</sup> apply as if the goods of which he is the fiscal warehousekeeper, or the goods in the fiscal warehouse, had at that time been removed from the fiscal warehousing regime and the proprietor of the goods is treated for that purpose as if he were the person removing them<sup>11</sup>.

1 For the meaning of 'eligible goods' see PARA 148 note 1 ante.

2 As to fiscal warehousing regimes see PARA 148 ante.

3 I.e. the Value Added Tax Act 1994 ss 18B-18F (as added); see PARAS 146-149, 152 ante.

4 Ibid s 18F(4) (s 18F added by the Finance Act 1996 s 26(1), Sch 3 para 5).

5 As to the removal of goods from a fiscal warehousing regime see PARA 151 ante.

6 Value Added Tax Act 1994 s 18F(5) (as added: see note 4 supra).

7 Ibid s 18F(6)(a) (as added: see note 4 supra). For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante.

8 For the meaning of 'fiscal warehouse' see PARA 147 ante.

9 Value Added Tax Act 1994 s 18F(6)(b) (as added: see note 4 supra).

10 See note 3 supra.

11 Value Added Tax Act 1994 s 18F(6) (as added: see note 4 supra).

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### **C. SERVICES PERFORMED WITHIN A FISCAL OR OTHER WAREHOUSING REGIME**

#### **154. Services performed within a warehousing or fiscal warehousing regime.**

Where a taxable person<sup>1</sup> makes a supply<sup>2</sup> of specified services<sup>3</sup> which are wholly performed on or in relation to goods while those goods are subject to a warehousing or fiscal warehousing regime<sup>4</sup>, his supply is zero-rated<sup>5</sup> if:

- 421 (1) except where the services are the supply by an occupier of a warehouse or a fiscal warehousekeeper of warehousing or fiscally warehousing the goods, the person to whom the supply is made gives the supplier a certificate<sup>6</sup> that the services are performed as described above<sup>7</sup>;
- 422 (2) the supply of services would otherwise be taxable<sup>8</sup> and not zero-rated<sup>9</sup>; and
- 423 (3) the supplier issues to the person to whom the supply is made an invoice<sup>10</sup> of the prescribed<sup>11</sup> description<sup>12</sup>.

The advantage of zero-rating is, however, lost<sup>13</sup> unless there is a supply of the goods in question the material time for which is both while the goods are subject to a warehousing or fiscal warehousing regime<sup>14</sup> and after the material time for the zero-rated supply of services<sup>15</sup>. If there is no such supply of the goods, the following provisions apply:

- 424 (a) a supply of services identical to the zero-rated supply of services is treated for the purposes of value added tax as being both made, for the purposes of his business<sup>16</sup>, to the person by whom the zero-rated supply of services was actually made and as made by him in the course or furtherance<sup>17</sup> of his business at the time the goods are removed from the warehousing or fiscal warehousing regime or, if earlier, at the duty point<sup>18</sup>;
- 425 (b) that supply has the same value as the zero-rated supply of services<sup>19</sup>;
- 426 (c) that supply is a taxable and not a zero-rated supply<sup>20</sup>; and
- 427 (d) VAT is charged on that supply even if the person treated as making it is not a taxable person<sup>21</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 Value Added Tax Act 1994 s 18C(1)(a) (ss 18C, 18D, 18F added by the Finance Act 1996 s 26(1), Sch 3 para 5). For these purposes, 'specified services' means: (1) services of an occupier of a warehouse or of a fiscal warehousekeeper of keeping the goods in question in a warehousing or fiscal warehousing regime (Value Added Tax Act 1994 s 18C(4)(a) (as so added)); (2) in relation to goods subject to a warehousing regime, services of carrying out on the goods operations which are permitted to be carried out under Community customs provisions or warehousing regulations (s 18C(4)(b) (as so added)); and (3) in relation to goods subject to a fiscal warehousing regime, services of carrying out on the goods any physical operations (other than any operations prohibited by regulations made under s 18F (as added) (see PARAS 146-148 ante) (eg preservation and repacking operations)) (s 18C(4)(c) (as so added)). For these purposes 'warehouse', except in the expression 'fiscal warehouse', has the same meaning as in s 18(6) (see PARA 144 note 6 ante): s 18F(1) (as so added). 'Warehousing regulations' means regulations made under the Customs and Excise Management Act 1979 s 93 (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 669): Customs and Excise Management Act

1979 s 1(1); Value Added Tax Act 1994 s 18F(1) (as so added). For the meaning of 'fiscal warehouse' see PARA 147 ante. For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante. As to goods subject to a fiscal warehousing regime see PARA 149 note 3 ante. For these purposes, any reference to goods being subject to a warehousing regime (as opposed to a fiscal warehousing regime) or to the removal of goods from such a regime has the same meaning as in s 18(7) (see PARA 144 note 6 ante): see s 18F(3) (as so added).

4 Ibid s 18C(1)(b) (as added: see note 3 supra).

5 Ibid s 18C(1) (as added: see note 3 supra). For the meaning of 'zero-rated' see PARA 174 post.

6 The certificate must be in such form as the Commissioners for Her Majesty's Revenue and Customs may specify by regulations: ibid s 18C(1)(c) (as added: see note 3 supra). The certificate must contain the information indicated in the Value Added Tax Regulations 1995, SI 1995/2518, reg 145C, Sch 1 Form 18 (regs 145C, 145D, Sch 1 Form 18 added by SI 1996/1250): Value Added Tax Regulations 1995, SI 1995/2518, reg 145C (as so added). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

7 Value Added Tax Act 1994 s 18(1)(c) (as added: see note 3 supra).

8 For the meaning of 'taxable supplies' see PARA 18 note 3 ante.

9 Value Added Tax Act 1994 s 18C(1)(d) (as added: see note 3 supra).

10 For the meaning of 'invoice' see PARA 17 note 9 ante.

11 In the case of such a description as the Commissioners may by regulations prescribe: Value Added Tax Act 1994 s 18C(1)(e) (as added: see note 3 supra). The invoice is to be known as a VAT invoice and, unless the Commissioners allow any of these requirements to be relaxed or dispensed with, must state: (1) an identifying number (Value Added Tax Regulations 1995, SI 1995/2518, reg 145D(1), (2)(a) (as added: see note 6 supra)); (2) the material time of the supply of the services in question (reg 145D(2)(b) (as so added)); (3) the date of the issue of the invoice (reg 145D(2)(c) (as so added)); (4) the name, an address and the registration number of the supplier (reg 145D(2)(d) (as so added)); (5) the name and an address of the person to whom the services are supplied (reg 145D(2)(e) (as so added)); (6) a description sufficient to identify the nature of the services supplied (reg 145D(2)(f) (as so added)); (7) the extent of the services and the amount payable, excluding VAT, expressed in sterling (reg 145D(2)(g) (as so added)); (8) the rate of any cash discount offered (reg 145D(2)(h) (as so added)); (9) the rate of VAT as 0% (reg 145D(2)(i) (as so added)); and (10) a declaration that in respect of the supply of services in question, the requirements of the Value Added Tax Act 1994 s 18C(1) (as added) will be, or have been, satisfied (Value Added Tax Regulations 1995, SI 1995/2518, reg 145D(2)(j) (as so added)). The supplier of the services in question must issue the invoice to the person to whom the supply is made within 30 days of the material time of that supply of services, or within such longer period as the Commissioners may allow in general or special directions: reg 145D(3) (as so added). 'Material time' has the meaning given by the Value Added Tax Act 1994 s 18F(1) (as added) in the case of a fiscal warehousing regime (see PARA 149 note 3 ante) and the meaning given by s 18(6) (see PARA 144 note 5 ante) in relation to a warehousing regime: Value Added Tax Regulations 1995, SI 1995/2518, reg 145A(1) (as so added).

12 Value Added Tax Act 1994 s 18C(1)(e) (as added: see note 3 supra).

13 In the case of ibid s 18C(3) (as added) applies: see the text and notes 16-21 infra.

14 Ibid s 18C(2)(a) (as added: see note 3 supra).

15 Ibid s 18C(2)(b) (as added: see note 3 supra).

16 For the meaning of 'business' see PARA 23 ante.

17 As to the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

18 Value Added Tax Act 1994 s 18C(3)(a) (as added: see note 3 supra). In other words, there is a deemed taxable self-supply. As to self-supplies see PARA 32 ante. For these purposes, 'duty point' has the same meaning as in s 18(6) (see PARA 98 note 10 ante): s 18F(1) (as so added).

19 Ibid s 18C(3)(b) (as added: see note 3 supra).

20 Ibid s 18C(3)(c) (as added: see note 3 supra).

21 Ibid s 18C(3)(d) (as added: see note 3 supra). Any VAT payable on a supply to which s 18C(3) (as added) applies must be paid at the time when the supply is treated as taking place (s 18D(1), (2)(a) (as so added)) and by the person by whom the goods are removed or, as the case may be, by the person who is required to pay

the excise duty and together with that duty (s 18D(2)(b) (as so added)). The Commissioners have, however (pursuant to s 18D(3) (as added)) by regulations made provision for enabling a taxable person to pay the VAT he is so required to pay at a later time (see the Value Added Tax Regulations 1995, SI 1995/2518, reg 43(2)(b) (as substituted); and PARA 145 ante). The Commissioners may make different provisions for different descriptions of taxable persons and for different descriptions of goods and services: Value Added Tax Act 1994 s 18D(3) (as so added).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3.  
EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(i) In general/155.  
Meaning of 'exempt supply' and 'exempt acquisition'.

### **3. EXEMPTIONS AND RELIEFS**

#### **(1) EXEMPT SUPPLIES AND ACQUISITIONS**

##### **(i) In general**

##### **155. Meaning of 'exempt supply' and 'exempt acquisition'.**

A supply<sup>1</sup> of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 to the Value Added Tax Act 1994 and an acquisition of goods from another member state<sup>2</sup> is an exempt acquisition if the goods are acquired in pursuance of an exempt supply<sup>3</sup>. Where the grant of any interest, right, licence or facilities gives rise to supplies made at different times after the making of the grant, and a question whether any of those supplies is zero-rated<sup>4</sup> or exempt falls to be determined according to whether or not the grant is of a specified description<sup>5</sup>, that question is to be determined according to whether the description is applicable as at the time of supply<sup>6</sup> rather than by reference to the time of the grant<sup>7</sup>.

The Treasury may by order vary the relevant provisions<sup>8</sup> by adding to or deleting from them any description of supply or by varying any description of supply for the time being specified in them<sup>9</sup>. An order which provides for certain supplies which relate to gold to be exempt supplies may provide that a supply which would be an exempt supply by virtue of the order is, if the supplier so chooses, an exempt supply, and make provision by reference to notices to be published by the Commissioners for Her Majesty's Revenue and Customs<sup>10</sup>.

The supplies specified are divided into the following groups<sup>11</sup>, which are described in detail in subsequent paragraphs: (1) land<sup>12</sup>; (2) insurance<sup>13</sup>; (3) postal services<sup>14</sup>; (4) betting, gaming and lotteries<sup>15</sup>; (5) finance<sup>16</sup>; (6) education<sup>17</sup>; (7) health and welfare<sup>18</sup>; (8) burial and cremation<sup>19</sup>; (9) trades unions and professional bodies<sup>20</sup>; (10) sport, sports competitions and physical education<sup>21</sup>; (11) works of art etc<sup>22</sup>; (12) fund-raising events by charities and other qualifying bodies<sup>23</sup>; (13) cultural services<sup>24</sup>; (14) supplies of goods where input tax cannot be recovered<sup>25</sup>; and (15) investment gold<sup>26</sup>.

VAT is not chargeable on exempt supplies<sup>27</sup>. A supplier is not, therefore, entitled to credit for the input tax<sup>28</sup> which he incurs on supplies made to him for the purposes of his exempt activities<sup>29</sup>. Certain anti-avoidance measures ensure that partially exempt traders suffer an appropriate amount of irrecoverable input tax on supplies made to them for the purposes of their business<sup>30</sup>.

Exemption from VAT prevents double taxation on the supply of goods if no tax is deductible on the purchase, acquisition, importation or production of the goods, either because they are used for making exempt transactions or where a specific exclusion applies<sup>31</sup>.

Certain exemptions which are directed towards activities which are socially beneficial are available only to legal, and not to natural persons<sup>32</sup>. This distinction, which exists in the Sixth Directive<sup>33</sup>, has not always been clearly made in United Kingdom law; but it is clear that an individual whose supplies would otherwise be exempted under one of the relevant exemptions may rely on the direct effect of the Sixth Directive in order to treat his supplies as standard-rated<sup>34</sup>.

- 1 As to the meaning of 'supply' see PARA 27 ante.
- 2 As to acquisitions of goods from other member states see PARA 19 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.
- 3 Value Added Tax Act 1994 s 31(1). Section 31(1), Sch 9 (as amended) is to be interpreted in accordance with the notes contained in it: see s 96(9).
- 4 See PARA 174 post.
- 5 le described in the Value Added Tax Act 1994 ss 30, 31, Schs 8, 9 (as amended) or s 43, Sch 10 para 2(2), (3) (as amended): see PARA 157 post.
- 6 See PARA 35 ante.
- 7 Value Added Tax Act 1994 s 96(10A) (added by the Finance Act 1997 s 35(1)). Notwithstanding the Value Added Tax Act 1994 s 96(10A) (as added), Sch 9 Pt II Group 1 item 1 (see PARA 156 post) does not make exempt any supply that arises for the purposes of the Value Added Tax Act 1994 from the prior grant of a fee simple falling within Sch 9 Pt II Group 1 item 1(a) (see PARA 156 head (1) post), and that provision does not prevent the exemption of a supply that arises for those purposes from the prior grant of a fee simple not falling within that provision: s 96(10B) (added by the Finance Act 2003 s 20(1)).
- 8 le the Value Added Tax Act 1994 Sch 9 Pts I, II (as amended): see PARA 156 et seq post. The powers conferred by the Value Added Tax Act 1994 to vary Sch 9 (as amended) include a power to add to, vary or delete the notes thereto: s 96(9).
- 9 Ibid s 31(2). In exercise of the power so conferred, the Treasury has made the Value Added Tax (Education) (No 2) Order 1994, SI 1994/2969 (amending the Value Added Tax Act 1994 Sch 9 Pt II Group 6: see PARA 165 post); the Value Added Tax (Land) Order 1995, SI 1995/282 (amending the Value Added Tax Act 1994 Sch 9 Pt II Group 1: see PARA 156 post); and the Value Added Tax (Cultural Services) Order 1996, SI 1996/1256 (substituting the Value Added Tax Act 1994 Sch 9 Pt II Group 12 note 3 (see PARA 171 note 4 post) and adding Sch 9 Pt II Group 13 (see PARA 172 post)). For further orders amending the relevant provisions see PARAS 156-172 post. As to the making of orders generally see PARA 14 ante. Schedule 9 (as amended) may be varied so as to describe a supply of goods by reference to the use which has been made of them or to other matters unrelated to the characteristics of the goods themselves: s 31(2). However, the description of supplies which is contained in Sch 9 (as amended) is derived from EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) and, subject to limited opportunities for derogation, must reflect the exemptions which are permitted thereby: see PARA 3 ante; and Case 235/85 *EC Commission v Netherlands* [1987] ECR 1471, [1988] 2 CMLR 921, ECJ (exemptions from VAT must be expressly provided for and precisely defined); Case 348/87 *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* [1989] ECR 1737, [1991] 2 CMLR 429, ECJ (supplies of goods or services effected for consideration are, generally, to be subject to VAT and any exemption given by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13 is to be interpreted strictly); Case C-453/93 *Bulthuis-Griffioen v Inspecteur der Omzetbelasting* [1995] ECR I-2341, [1995] STC 954, ECJ. For a fuller consideration of this topic and as to composite and separate supplies generally see PARA 31 text and notes 3-4 ante.
- 10 See the Finance Act 1999 s 13(2). Such an order may be expressed to apply in specified circumstances and to apply subject to compliance with specified conditions, which may include conditions relating to general or specific approval by the Commissioners: s 13(4). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.
- 11 The descriptions of groups in the Value Added Tax Act 1994 Sch 9 (as amended) are for ease of reference only and do not affect the interpretation of the descriptions of items in them: s 96(10).
- 12 See PARA 156 post.
- 13 See PARA 160 post.
- 14 See PARA 161 post.
- 15 See PARA 162 post.
- 16 See PARA 163 post.
- 17 See PARA 165 post.
- 18 See PARA 166 post.

19 See PARA 167 post.

20 See PARA 168 post.

21 See PARA 169 post.

22 See PARA 170 post.

23 See PARA 171 post.

24 See PARA 172 post.

25 See PARA 173 post; and note 31 infra.

26 See PARA 164 post.

27 See the Value Added Tax Act 1994 s 4(1), (2); and PARA 18 ante.

28 For the meaning of 'input tax' see PARAS 4 ante, 215 post.

29 As to allowable input tax generally see the Value Added Tax Act 1994 ss 25, 26; and PARAS 216-217 post. As to the methods of calculating input tax where a taxable person has both taxable and exempt supplies see s 26(3); the Value Added Tax Regulations 1995, SI 1995/2518, Pt XIV (regs 99-111) (as amended); and PARA 224 et seq post.

30 As to goods supplied to a trader for the purpose of his business see the Value Added Tax Act 1994 s 5(5); and PARA 32 ante (self-supply). As to the reverse charge on supplies received from abroad see s 8 (as amended); and PARA 33 ante. These provisions only apply to traders whose business activities are exempt or partially exempt, and do not apply to final consumers who take similar steps to avoid incurring irrecoverable VAT: see PARAS 32-33 ante.

31 See *ibid* Sch 9 Pt II Group 14 (added by the Value Added Tax (Supplies of Goods where Input Tax cannot be recovered) Order 1999, SI 1999/2833, art 2; and amended by the Finance Act 2001 s 98); and PARA 173 post.

32 See EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(b), (g)-(i), (l)-(o). The corresponding provisions in the Value Added Tax Act 1994 are Sch 9 Pt II Group 7 items 4, 9 (as amended) (medical treatment and welfare services: see PARA 166 post), Sch 9 Pt II Group 6 item 1 (education etc: see PARA 165 post), Sch 9 Pt II Group 7 item 10 (religious communities: see PARA 166 post), Sch 9 Pt II Group 9 (as amended) (trade unions and professional bodies: see PARA 168 post), Sch 9 Pt II Group 10 (as amended) (sport etc: see PARA 169 post), and Sch 9 Pt II Group 13 (as added) (cultural services: see PARA 172 post). A natural person or persons running a welfare service may be able to claim exemption under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A): Case C-216/97 *Gregg v Customs and Excise Comrs* [1999] 3 All ER (EC) 775, ECJ.

33 See Case C-453/93 *Bulthuis-Griffioen v Inspecteur der Omzetbelasting* [1995] ECR I-2341, [1995] STC 954, ECJ.

34 *Kaul (t/a Alpha Care Services) v Customs and Excise Comrs* (1996) VAT Decision 14028, [1996] V & DR 360. Regrettably, the tribunal did not explain whether its view was that EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(b) had direct effect, or that the Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 4 was, on a proper construction, only to be considered to extend to legal persons. The European Court of Justice has since stated that EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(b) has direct effect: Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Giessen* [2004] 1 CMLR 991, ECJ.

## UPDATE

### 155 Meaning of 'exempt supply' and 'exempt acquisition'

NOTE 5--Reference to Value Added Tax Act 1994 Sch 10 para 2(2) or (3) is now to Sch 10 paras 5-11: s 96(10A)(b) (amended by SI 2008/1146).

NOTES 9, 32, 34--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.



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## **(ii) Exempt Supplies of Land**

### **156. In general.**

Subject to certain exceptions<sup>1</sup>, the grant<sup>2</sup> of any interest in or right over land<sup>3</sup> or of any licence to occupy<sup>4</sup> land is an exempt supply<sup>5</sup>. The exceptions are:

- 428 (1) the grant of the fee simple in:  
3
  - 6. (a) a building which has not been completed<sup>6</sup> and which is neither designed as a dwelling or number of dwellings<sup>7</sup> nor intended for use solely for a relevant residential purpose<sup>8</sup> or relevant charitable purpose<sup>9</sup>;
  - 7. (b) a new<sup>10</sup> building which is neither designed as a dwelling or a number of dwellings nor intended for use solely for a relevant residential purpose or a relevant charitable purpose after the grant<sup>11</sup>;
  - 8. (c) a civil engineering work which has not been completed<sup>12</sup>; or
  - 9. (d) a new civil engineering work<sup>13</sup>;
- 4  
429 (2) a supply made pursuant to a developmental tenancy, developmental lease, or developmental licence<sup>14</sup>;
- 430 (3) the grant of any interest, right or licence consisting of a right to take game or fish unless at the time of the grant the grantor grants to the grantee the fee simple of the land over which the right to take game or fish is exercisable<sup>15</sup>;
- 431 (4) the provision in an hotel, inn, boarding house or similar establishment<sup>16</sup> of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering<sup>17</sup>;
- 432 (5) the grant of any interest in, right over, or licence to occupy holiday accommodation<sup>18</sup>;
- 433 (6) the provision of seasonal pitches for caravans<sup>19</sup>, and the grant of facilities at caravan parks to persons for whom such pitches are provided<sup>20</sup>;
- 434 (7) the provision of pitches for tents or of camping facilities<sup>21</sup>;
- 435 (8) the grant of facilities for parking a vehicle<sup>22</sup>;
- 436 (9) the grant of any right to fell and remove standing timber<sup>23</sup>;
- 437 (10) the grant of facilities for housing, or storage of, an aircraft or for mooring<sup>24</sup>, or storage of, a ship, boat or other vessel<sup>25</sup>;
- 438 (11) the grant of any right to occupy a box, seat or other accommodation at a sports ground, theatre, concert hall or other place of entertainment<sup>26</sup>;
- 439 (12) the grant of facilities for playing any sport or participating in physical recreation<sup>27</sup>;
- 440 (13) the grant of any right, including an equitable right or right under an option or right of pre-emption, to call for or be granted any interest or right which would fall within any of the above heads other than head (2)<sup>28</sup>.

1 See heads (1)-(13) in the text.

2 'Grant' includes an assignment or surrender and the supply made by the person to whom an interest is surrendered when there is a reverse surrender: Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 1 note (1)

(substituted by the Value Added Tax (Land) Order 1995, SI 1995/282, arts 2, 3). A 'reverse surrender' is one in which the person to whom the interest is surrendered is paid by the person by whom the interest is being surrendered to accept the surrender: Value Added Tax Act 1994 Sch 9 Pt II Group 1 note (1A) (added by the Value Added Tax (Land) Order 1995, SI 1995/282, arts 2, 4). A variation of a lease may take effect in law as a surrender or regrant: see generally LANDLORD AND TENANT. As to the charge to tax on interest relating to deferred payment for land see Case C-281/91 *Muys' en De Winter's Bouw-en Aannemingsbedrijf BV v Staatssecretaris van Financiën* [1997] STC 665, EC].

The Commissioners for Her Majesty's Revenue and Customs have had considerable difficulty in properly analysing the liability to VAT of the various supplies which may be made by a tenant or a landlord in relation to the grant, variation or surrender of a lease. Originally, they adopted the position that only the grant of the lease and the surrender of the lease could be treated as exempt from VAT; and any ancillary payments which were made (eg a reverse premium paid by the landlord to the tenant to persuade him to accept the lease, or a payment made by the tenant to the landlord to persuade him to accept the surrender or variation in the terms of a lease) were standard-rated. However, following the decision in Case C-63/92 *Lubbock Fine & Co v Customs and Excise Comrs* [1994] QB 571, [1994] STC 101, EC] (payment received by a tenant from a landlord for surrendering the residue of a lease to the landlord is itself consideration for an exempt supply of land under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b), on the ground that where a given transaction, such as the letting of a building which would be taxed on the basis of the rents paid, falls within the scope of an exemption, a change in the contractual relationship must also be regarded as falling within the scope of the exemption), the Commissioners have accepted: (1) that a payment for a variation of a lease is consideration for an exempt supply unless the landlord has elected to waive exemption under the Value Added Tax Act 1994 s 51(1), Sch 10 para 2 (as amended) (see PARA 157 post) (Customs and Excise Business Brief 16/94 [1994] STI 1011); (2) that, in cases where the landlord has not elected to waive exemption, a payment for the lifting of a restrictive covenant is consideration for an exempt supply (Customs and Excise Business Brief 17/94 [1994] STI 1158); and (3) that, following the decision in *Central Capital Corpn Ltd v Customs and Excise Comrs* (1995) VAT Decision 13319, [1995] STI 1151 (any payment made by a landlord to a tenant or by a tenant to a landlord should be treated as potentially within the scope of the exemption in EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b)), the supply made by a landlord in accepting the surrender of his tenant's lease in return for a payment made by the tenant is also exempt in the ordinary case (Customs and Excise Business Brief 18/95 [1995] STI 1380); and see *Lloyds Bank plc v Customs and Excise Comrs* (1996) VAT Decision 14181, [1996] STI 1358. It would appear that the decision in *Central Capital Corpn Ltd v Customs and Excise Comrs* supra may cover the case of a reverse premium paid to a tenant to induce him to accept the grant of a lease, and it is clear that the Commissioners are of this view: see Customs and Excise Public Notice 742 *Land and Property* (March 2002) PARA 10.1; cf *Neville Russell v Customs and Excise Comrs* [1987] VATTR 194. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

An apportionment of rent between vendor and purchaser on sale of freehold reversion is outside the scope of VAT: see [1991] STI 485. It is also the long-standing policy of the Commissioners that rent-free periods are outside the scope of VAT unless, in return, the tenant performs services for the landlord, eg where the tenant is obliged to fit out the building to a particular standard during the period: 20 HC Official Report (6th series) written answers col 119 (17 December 1991); but see *Ridgeon's Bulk Ltd v Customs and Excise Comrs* [1992] VATTR 169; affd [1994] STC 427. If maintenance contributions are paid to trustees for the purpose of being expended on the upkeep of a block of flats, the contributions are not consideration for a supply of services: *Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Comrs* [1999] 1 All ER 385, [1999] 1 WLR 174, HL. A payment received by a tenant for taking a lease is not a payment for the leasing or letting of immovable property within the meaning of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b): Case C-409/98 *Mirror Group plc v Customs and Excise Comrs* [2002] QB 546, [2001] STC 1453, EC]. For the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b), member states may, by means of a general rule, subject to VAT lettings of immovable property and, by way of exception to that rule, exempt only lettings to such property to be used for dwelling purposes: Case C-12/98 *Amengual Far v Amengual Far* [2002] STC 382, EC]. See Case C-315/00 *Maierhofer v Finanzamt Augsburg-Land* [2003] 2 CMLR 1137, [2003] STC 564, EC] (letting of buildings made of prefabricated components assembled and bolted onto concrete constituted letting of immovable property under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b). Member states may not treat the private use by a taxpayer of part of a building as forming, in its entirety, part of the assets of his business as an exempt supply of services on the basis that it constitutes a letting or a leasing of immovable property: Case C-269/00 *Seeling v Finanzamt Starnberg* [2004] 2 CMLR 757, EC].

3 For the meaning of 'land' see PARA 14 note 22 ante.

4 A distinction must be drawn between the grant or assignment of a licence to occupy land (which may be exempt) and the grant or assignment of a licence to go upon land (which is not). For the Commissioners' views as to when a licence to occupy land is (or is not) created see Customs and Excise Public Notice 742 *Land and Property* (March 2002) PARA 2.7 (updated 1 December 2003). A licence to enter the grounds of a club and enjoy its facilities is standard-rated: *Trewby v Customs and Excise Comrs* [1976] 2 All ER 199, [1976] 1 WLR 932, DC; *King v Customs and Excise Comrs* [1980] VATTR 60 (the grant of a non-exclusive grazing licence was not a licence to occupy land). See also Customs and Excise Public Notice 701/13 *Gaming and Amusement Machines* (June 2004) PARA 5.3. Cf *British Airports Authority v Customs and Excise Comrs* [1977] 1 All ER 497, [1977] 1

WLR 302, CA (the right to display and sell merchandise from shop in airport was an exempt licence to occupy land and did not involve a separate standard-rated supply); *Swindon Masonic Association Ltd v Customs and Excise Comrs* [1978] VATTR 200 (permission to use buildings for meeting was a licence to occupy land); *Tameside Metropolitan Borough Council v Customs and Excise Comrs* [1979] VATTR 93 (the hire for one business day of a site on which to place a market stall was an exempt licence to occupy land); *Business Enterprises (UK) Ltd v Customs and Excise Comrs* [1988] VATTR 160 (the grant of an exclusive right to occupy a serviced office suite, subject to retention of key for cleaning purposes, was an exempt composite supply of licence to occupy land); and see PARA 31 ante. Cf *Greater London Council v Customs and Excise Comrs* [1982] VATTR 94 (grant of a licence to use a concert hall; provision of stewards and ticket-issuing facilities by licensor were separate standard-rated supplies of services). An exempt supply of letting might lose its identity as such in a case where sufficient non-exempt supplies were added to the exempt supply to create a new composite supply: *Haringey London Borough Council v Customs and Excise Comrs* (1994) VAT Decision 12050, [1994] STI 1027 (revsd on other grounds [1995] STC 830); *Swiss National Tourist Office v Customs and Excise Comrs* (1995) VAT Decision 13192, [1995] STI 990 (payment for sharing a stand at an exhibition not consideration for an exempt supply). The liability of the supply made by a site owner to a vending machine operator is taxable: Case C-275/01 *Sinclair Collis Ltd v Customs and Excise Comrs* [2003] STC 898, ECJ, see Customs and Excise Business Brief 18/03 [2003] STI 1678. See also Case C-284/03 *Belgium v Temco Europe SA* [2005] STC 1451, (2004) Times, 25 November, ECJ (granting of licence to several companies to occupy single property was letting of immovable property for purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b).

5 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1. For the meaning of 'exempt supply' see PARA 155 ante. Regarding the nature of the supply where residential property is conveyed under a tripartite arrangement involving the landowner, the developer and the purchasers see *Customs and Excise Comrs v Latchmere Properties Ltd* [2005] EWHC 133 (Ch), [2005] STC 731.

6 A building is taken to be completed when an architect issues a certificate of practical completion in relation to it or it is first fully occupied, whichever happens first; and a civil engineering work is taken to be completed when an engineer issues a certificate of completion in relation to it or it is first fully used, whichever happens first: Value Added Tax Act 1994 Sch 9 Pt II Group 1 note (2). The exemption under Sch 9 Pt II Group 1 (as amended) for the supply of land other than certain supplies relating to new or partially completed buildings and civil engineering works is intended, it seems, to reflect EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(h) which requires member states to exempt the supply of land which has not been built on other than building land as described in art 4(3)(b), which describes building land as 'any unimproved or improved land defined as such by the member state'. In Case C-468/93 *Gemeente Emmen v Belastingdienst Grote Ondernemingen, Haren* [1996] All ER (EC) 372, [1996] STC 496, ECJ, the court held that it was for each member state, and not for the court, to define the concept of 'building land' for those purposes.

7 For the meaning of 'designed as a dwelling or a number of dwellings' see PARA 179 note 8 post (applied by the Value Added Tax Act 1994 Sch 9 Pt II Group 1 note (3) (amended by the Value Added Tax (Land) Order 1995, SI 1995/282, arts 5, 7)).

8 For the meaning of 'use for a relevant residential purpose' see PARA 179 note 9 post (applied by the Value Added Tax Act 1994 Sch 9 Pt II Group 1 note (3) (as amended: see note 7 supra)).

9 Ibid Sch 9 Pt II Group 1 item 1(a)(i). For the meaning of 'use for a relevant charitable purpose' see PARA 179 note 10 post (applied by Sch 9 Pt II Group 1 note (3) (as amended: see note 7 supra)).

10 A building or civil engineering work is new if it was completed less than three years before the grant: ibid Sch 9 Pt II Group 1 note (4).

11 Ibid Sch 9 Pt II Group 1 item 1(a)(ii). The grant of the fee simple in a building completed before 1 April 1989 is not thereby excluded unless the grant is the first grant of the fee simple made on or after that date and the building was not fully occupied before that date: Sch 9 Pt II Group 1 notes (5), (6).

12 Ibid Sch 9 Pt II Group 1 item 1(a)(iii). See also note 6 supra.

13 Ibid Sch 9 Pt II Group 1 item 1(a)(iv). See also note 10 supra. The grant of the fee simple in a work completed before 1 April 1989 is not thereby excluded unless the grant is the first grant of the fee simple made on or after that date and the work was not fully used before that date: Sch 9 Pt II Group 1 notes (5), (6).

14 Ibid Sch 9 Pt II Group 1 item 1(b). A tenancy of, lease of or licence to occupy a building or work is treated as becoming a developmental tenancy, lease or licence (as the case may be) when a tenancy of, lease of or licence to occupy a building or work, whose construction, reconstruction, enlargement or extension commenced on or after 1 January 1992 is treated as being supplied to and by the developer under s 51(1), Sch 10 para 6(1) (see PARA 34 ante), except where Sch 10 para 6(1) applies by virtue of Sch 10 para 5(1)(b) (as substituted) (see PARA 34 ante): Sch 9 Pt II Group 1 note (7) (amended by the Value Added Tax (Land) Order 1995, SI 1995/282, art 6). The effect of the rule is that rent and other consideration payable under the tenancy or lease etc after 1 January 1992 becomes subject to VAT at the standard rate.

15 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(c). Where a grant of an interest in, right over or licence to occupy land (ie other than of the fee simple of the relevant land) includes a valuable right to take game or fish, an apportionment must be made to determine the supply so falling outside the exemption granted by Sch 9 Pt II Group 1 (as amended): Sch 9 Pt II Group 1 note (8). This operates as an exception to the general rule that a composite supply takes its status (as a standard-rated, exempt or zero-rated supply) from its principal element: see PARA 31 ante.

16 'Similar establishment' includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by or held out as being suitable for use by visitors or travellers: *ibid* Sch 9 Pt II Group 1 note (9). See *Namecourt Ltd v Customs and Excise Comrs* [1984] VATTR 22; *Westminster City Council v Customs and Excise Comrs* [1989] VATTR 71. It is irrelevant that the majority of occupants may be permanently resident if the premises also offer lodging to the casual visitor: *McGrath v Customs and Excise Comrs* [1992] STC 371n. As to special rules for valuing long-stay accommodation of this kind see the Value Added Tax Act 1994 s 19(1), Sch 6 para 9; and PARA 101 ante. A student hall of residence licensed as such by a university has been held not to be carrying on business as an hotel, inn or boarding house, or to be an establishment similar thereto: *McMurray (a Governor of Allen Hall) v Customs and Excise Comrs* [1973] VATTR 161; and see also *International Students House v Customs and Excise Comrs* (1996) VAT Decision 14420, [1996] STI 1722. See also *Acorn Management Services Ltd v Customs and Excise Comrs* (2001) VAT Decision 17338, [2002] STI 270.

17 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(d).

18 *Ibid* Sch 9 Pt II Group 1 item 1(e). 'Holiday accommodation' includes any accommodation in a building, hut (including a beach hut or chalet), caravan, houseboat or tent which is advertised or held out as holiday accommodation or as suitable for holiday or leisure use, but excludes any accommodation within head (4) in the text: Sch 9 Pt II Group 1 note (13). Schedule 9 Group 1 item 1(e) includes: (1) any grant excluded from Sch 8 Pt II Group 5 item 1 (as substituted) (see PARA 179 post) by Sch 8 Pt II Group 5 note (13) (as substituted) (ie the grant of an interest in a building, or in part of a building, designed as a dwelling or a number of dwellings, or the site of such a building, if the interest granted is such that the grantee is not entitled to reside in the building throughout the year, or residence there throughout the year, or the use of the building or part as the grantee's principal private residence, is prevented by the terms of a covenant, statutory planning consent, or similar permission); (2) any supply made pursuant to a tenancy, lease or licence under which the grantee is or has been permitted to erect and occupy holiday accommodation: Sch 9 Pt II Group 1 note (11) (amended by the Value Added Tax (Land) Order 1995, SI 1995/282, arts 2, 7); *revsg Haven Leisure Ltd v Customs and Excise Comrs* [1990] VATTR 77 (where it had been decided that the grant of a 40-year lease of a chalet which had previously been let as holiday accommodation was an exempt supply of the chalet and not a standard-rated supply of holiday accommodation). The Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (13)(a) (as substituted) (which exempts a grant of an interest in, or in any part of, a building designed as a dwelling or number of dwellings) has been criticised as being discriminatory and as exceeding the limitation on the exemption for land imposed by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b)(1): see *Ashworth v Customs and Excise Comrs* (1995) VAT Decision 12924, [1995] STI 478; and PARA 179 post. 'Houseboat' includes a houseboat within the meaning of the Value Added Tax Act 1994 Sch 8 Pt II Group 9 (ie a boat or other floating structure designed or adapted for use solely as a place of permanent habitation and not having means of, or capable of being readily adapted for, self-propulsion: see PARA 184 post): Sch 9 Pt II Group 1 note (10).

The exclusion from exemption under Sch 9 Pt II Group 1 item 1(e) does not extend to a grant, in respect of a building or part of a building which is not a new building (see note 7 supra), of: (a) the fee simple; or (b) a tenancy, lease or licence to the extent that the grant is made for a consideration in the form of a premium: Sch 9 Pt II Group 1 note (12).

There was no taxable supply of holiday accommodation (enabling the owner to recover input tax on his expenditure) where flats had been advertised as holiday accommodation but had not been let to holidaymakers: *Cooper & Chapman (Builders) Ltd v Customs and Excise Comrs* [1993] STC 1, distinguishing *Sheppard v Customs and Excise Comrs* [1977] VATTR 272. The issue of a certificate evidencing a right to occupy a house for one or more weeks per annum in perpetuity (a time-share agreement) (*American Real Estate (Scotland) Ltd v Customs and Excise Comrs* [1980] VATTR 88), and an arrangement whereby each customer had the right to occupy for one or more weeks per annum for a period of 28 years, followed by a right to participate in the proceeds of sale of the freehold (*Cretnay v Customs and Excise Comrs* [1983] VATTR 271) have both been held to be supplies of holiday accommodation. The grant of an annual licence to use a beach hut has been held to be a supply of holiday accommodation, notwithstanding that the hut might not be used as a dwelling: *Poole Borough Council v Customs and Excise Comrs* [1992] VATTR 88.

19 A 'seasonal pitch' is a pitch which is provided for a period of less than a year or which is provided for a period longer than a year but which the person to whom it is provided is prevented by the terms of any covenant, statutory planning consent or similar permission from occupying by living in a caravan at all times throughout the period for which the pitch is provided: Value Added Tax Act 1994 Sch 9 Pt II Group 1 note (14). The supply of a residential caravan may be zero-rated: see Customs and Excise Public Notice 701/20 *Caravans*



and *Houseboats* (February 2004) PARA 2.2; and see PARA 184 post. The supply of services in the course of the construction of any civil engineering work necessary for the development of a permanent park for residential caravans is also zero-rated: see the Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 2(b) (substituted by the Value Added Tax (Construction of Buildings) Order 1995, SI 1995/280, art 2); and PARA 179 post.

20 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(f). This exception is not ultra vires EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b): *Colaingrove Ltd v Customs and Excise Comrs* [2004] EWCA Civ 146, [2004] STC 712, [2004] 09 EG 145 (CS).

21 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(g). No distinction is made for these purposes between seasonal and permanent pitches: cf the provision made in relation to caravans (see head (6) in the text).

22 Ibid Sch 9 Pt II Group 1 item 1(h). Where a lock-up garage is let, the plain implication is that facilities have been granted for parking a vehicle unless use for that purpose is expressly precluded by the terms of the lease: *Customs and Excise Comrs v Trinity Factoring Services Ltd* [1994] STC 504. It has been held, however, that the letting of premises and sites for parking vehicles cannot be excluded from the exemption where the letting thereof is closely linked to the letting of immovable property to be used for another purpose, such as residential or commercial property, which is itself exempt, so that the two lettings constitute a single economic transaction: Case 173/88 *Skatteministeriet v Henriksen* [1989] ECR 2763, [1990] STC 768, EC]. As to the Commissioners' views see Customs and Excise Leaflet 701/24/92 *Parking Facilities* (1 September 1992). See also *Customs and Excise Comrs v Venuebest Ltd* [2002] EWHC 2870 (Ch), [2003] STC 433 (lease of land for purpose of car parking business within exclusion). A caravan is a vehicle, and the provision of storage facilities on the basis that owners have access at all times, with the right to remove and replace the caravans at any time, constitutes the provision of facilities for parking a vehicle: *Hopcraft v Customs and Excise Comrs* VAT Decision 18590, [2004] STI 1562.

23 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(j).

24 'Mooring' includes anchoring or berthing: ibid Sch 9 Pt II Group 1 note (15).

25 Ibid Sch 9 Pt II Group 1 item 1(k). Some supplies of these facilities qualify for zero-rating as 'handling services' under Sch 8 Pt II Group 8 item 6(a) when supplied in a port or Customs airport: see Customs and Excise Notice 744C *Ships, Aircraft and Associated Services* (September 2005) PARA 8; and PARA 183 post. The supply of mooring for a houseboat is exempt: Customs and Excise Public Notice 701/20 *Caravans and Houseboats* (February 2004) PARA 7.6. See *Roberts v Customs and Excise Comrs* [1992] VATTR 30 (a temporarily unseaworthy yacht falls within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(k), which does not require the vessel to be capable of navigation; and is not within Sch 8 Pt II Group 9 (see PARA 184 post) if not designed or adapted solely for use as a place of permanent habitation).

26 Ibid Sch 9 Pt II Group 1 item 1(l). This provision is designed to reverse both the decision in *Customs and Excise Comrs v Zinn* [1988] STC 57 (where the transfer of the residue of a 999-year lease in a specified seat in the Royal Albert Hall was held to be exempt from VAT because the ability to enjoy performances was merely consequential on, and not the subject of, the assignment of the right to the seat itself) and the decision in *Customs and Excise Comrs v Parkinson* [1989] STC 51 (see note 15 supra).

27 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(m). This exclusion from exemption does not apply where the grant of the facilities is for: (1) a continuous period of use exceeding 24 hours; or (2) a series of ten or more periods, whether or not exceeding 24 hours in total, where the following conditions are satisfied: (a) each period is in respect of the same activity carried on at the same place; (b) the interval between each period is not less than one day and not more than 14 days; (c) consideration is payable by reference to the whole series and is evidenced by written agreement; (d) the grantee has exclusive use of the facilities; and (e) the grantee is a school, a club, an association, or an organisation representing affiliated clubs or constituent associations: Sch 9 Pt II Group 1 note (16). As to applicable Commissioners' views see Customs and Excise Leaflet 742/1/90 *Letting Facilities for Sport and Physical Recreation*. Certain grants and supplies relating to sports, sports competitions and physical education may be exempted by the Value Added Tax Act 1994 Sch 9 Pt II Group 10 (as amended): see PARA 169 post. The grant of a mere licence to occupy land with the object or purpose of putting that land to a sporting use does not amount to the grant of 'facilities' within the meaning of Sch 9 Pt II Group 1 item 1(m): *Abbotsley Golf and Squash Club Ltd v Customs and Excise Comrs* [1997] V & DR 335.

28 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(n).

## UPDATE

### 156-159 Exempt Supplies of Land

The Treasury may by order (1) make provision for substituting the Value Added Tax Act 1994 Sch 10 for the purpose of rewriting Sch 10 with amendments and make provision amending ss 83, 84 (see PARAS 346, 347) in connection with any provision of Sch 10 as so rewritten; (2) make provision repealing Sch 9 Pt II Group 1 item 1(b) and note (7) (without prejudice to the powers contained in s 31(2) (see PARA 174); (3) make provision repealing the Finance Act 1995 s 26 and the Value Added Tax Act 1994 s 51A, Sch 10 paras 8(2), (3) (inserted by the 1995 Act s 26) (see PARAS 77, 34 respectively): Finance Act 2006 s 17(1)-(3). The powers so conferred include power to make any provision that might be made by a statute and to make incidental, consequential, supplemental or transitional provision or savings; and such consequential provision includes provision amending any statute or any instrument made under any statute: s 17(4), (5). Any such order must be made by statutory instrument laid before the House of Commons (which ceases to have effect unless approved by that House before the end of the period of 28 days beginning with the date on which it is made (in reckoning which period, no account is taken of any time during which Parliament is dissolved or prorogued, or during which the House of Commons is adjourned for more than four days): s 17(6), (8). If an order so ceases to have effect, that cessation does not affect anything previously done under the order or the making of a new order: s 17(7).

## 156 In general

NOTES 2, 4, 6, 18, 20--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 2--If the benefit of the consideration for the grant of an interest in, right over or licence to occupy land accrues to a person ('the beneficiary') other than the person making the grant, the beneficiary is treated as the person making the grant: Value Added Tax Act 1994 Sch 10 para 40 (Sch 10 substituted by SI 2008/1146).

The concept of letting of immovable property includes the letting of both water-based berths for boats and land sites for storage of boats: see Case C-428/02 *Fonden Marselisborg Lystbådehavn v Skatteministeriet* [2006] STC 1467, ECJ. A legal relationship under which a person is granted the right to occupy and use public property for a specified period and against payment, is covered by the concept of leasing or letting immovable property: Case C-174/06 *Ministero dello Finanze-Ufficio IVA di Milano v CO.GE.P. Srl* [2008] STC 2744, ECJ. The transmission of the right to fish by means of a transfer of fishing permits for valuable consideration constitutes a supply of services connected with immovable property: Case C-166/05 *Heger Rudi GmbH v Finanzamt Graz-Stadt* [2008] STC 2679, ECJ. Letting of immovable property and cleaning service of commons parts of it must be regarded as independent, mutually divisible operations, and so do not fall within art 13(B)(b): Case C-572/07 *RLRE Tellmer Property sro; Financni reditelstvi v Usti nad Labem* [2009] STC 2006, ECJ.

NOTE 4--See *Byrom (t/a Salon 24) v Revenue and Customs Comrs* [2006] EWHC 111 (Ch), [2006] STC 992 (supplies of massage parlour services, one element of which was provision of a room, not exempt: not supplies of licences to occupy land but of various facilities to which occupation licences merely incidental), applying Case C-349/96 (see PARA 160 NOTE 5). See also *Revenue and Customs Comrs v Denyer* [2007] EWHC 2750 (Ch), [2008] STC 633 (grant of right of exclusive use of chair and area immediately surrounding it in hair salon to self employed hairdressers, but with shared use of facilities such as wash basins and waiting area, was a licence to use rather than to occupy land); *Holland (t/a The Studio Hair Co) v Revenue and Customs Comrs; Vigdor v Revenue and Customs Comrs* [2008] EWHC 2621 (Ch), [2009] STC 150.

NOTE 5--See *Abbey National plc v Revenue and Customs Comrs* [2006] EWCA Civ 886, [2006] STC 1961 ('virtual assignment', conferring no right of occupation, not an exempt supply); Case 246/04 *Turn- und Sportunion Waldburg v Finanzlandsdirektion für Oberösterreich* [2006] STC 1506, ECJ.

NOTE 6--The exemption does not extend to the supply of land still occupied by a dilapidated building that was to be demolished and replaced by a new building: Case C-461/08 *Don Bosco Onroerend Goed BV v Staatssecretaris van Financiën* [2010] STC 476, ECJ.

TEXT AND NOTE 14--Head (2) omitted (with effect in relation to supplies made on or after 1 June 2020): SI 2008/1146.

NOTE 15--See Case C-451/06 *Walderdorff v Finanzamt Waldviertel* [2008] STC 3079, ECJ.

NOTE 16--See *Holding v HMRC Comrs* (2006) VAT Decision 19573, [2006] STI 2105.

NOTE 22--'Vehicles' used in Directive 77/388 art 13(B)(b) (now Directive 2006/112 art 135(2)(b)) covers all means of transport, including boats: Case C-428/02 NOTE 2.

NOTE 27--See *Revenue and Customs Comrs v Polo Farm Sports Club* (2007) VAT Decision 20105, [2007] STI 1705.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(ii) Exempt Supplies of Land/157. Election to waive exemption.

### 157. Election to waive exemption.

A grant<sup>1</sup> made in relation to any land<sup>2</sup> in which a person has an interest does not fall within the exemption from value added tax<sup>3</sup> if and to the extent that it is made at a time when an election to waive that exemption<sup>4</sup> has effect in relation to the land and is made either by the person who made the election or, where that person is a body corporate, by that person or a relevant associate<sup>5</sup>. The owner of an interest in land who makes such an election can recover the VAT which he may suffer on, for example, construction services for the purpose of developing the land and he can avoid, in some instances, the developer's self-supply charge<sup>6</sup>. No input tax<sup>7</sup> on any supply<sup>8</sup> or importation which would otherwise be allowable by virtue of the operation of these provisions is, however, allowed if the supply or importation took place before the first day for which the election in question has effect<sup>9</sup>; but this restriction does not apply where the person by whom the election was made has not made any grant falling within the exemption provisions<sup>10</sup> before the first day for which it has effect<sup>11</sup>. In cases where input tax is allowable on a supply or importation which took place before the first day for which the election in question has effect, the input tax is recoverable only at the end of the prescribed accounting period in which the election is notified to the Commissioners for Her Majesty's Revenue and Customs<sup>12</sup>. An election may be made by conduct, as, for example by charging a tenant VAT on the rent payable under a lease<sup>13</sup>.

The owner of an interest in land cannot, however, make such an election in relation to a grant if the grant is made:

- 441 (1) in relation to a building or part of a building intended for use as a dwelling or number of dwellings<sup>14</sup> or solely for a relevant residential purpose<sup>15</sup>;
- 442 (2) in relation to a building or part of a building intended for use solely for a relevant charitable purpose<sup>16</sup> other than as an office<sup>17</sup>;
- 443 (3) in relation to a pitch for a residential caravan<sup>18</sup>;
- 444 (4) in relation to facilities for the mooring of a residential houseboat<sup>19</sup>;
- 445 (5) to a relevant housing association<sup>20</sup> and the association has given to the grantor a certificate stating that the land is to be used (after any necessary demolition work) for the construction of a building or buildings intended for use as a dwelling or number of dwellings or solely for a relevant residential purpose<sup>21</sup>; or
- 446 (6) to an individual and the land is to be used for the construction, otherwise than in the course or furtherance of a business<sup>22</sup> carried on by him, of a building intended for use by him as a dwelling<sup>23</sup>.

1 For the meaning of 'grant' see PARAS 156 note 2 ante, 179 note 3 post (definition applied by the Value Added Tax Act 1994 s 51(1), Sch 10 para 9 (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, art 9)).

2 For the meaning of 'land' see PARA 14 note 22 ante. See *White v Customs and Excise Comrs* (1998) VAT Decision 15388, [1998] STI 950 (election covered the goodwill attaching to a public house).

3 I.e. the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 1 (as amended): see PARA 156 ante. As to when a contract for the sale of land specifies the purchase price 'deemed to be inclusive of VAT' where the vendor has not elected to waive exemption see *Jaymarke Development Ltd v Elinacre Ltd (in liquidation)* [1992] STC 575, Ct of Sess.

4 I.e. an election under the Value Added Tax Act 1994 Sch 10 para 2 (as amended): see the text and notes 5-14 infra; and PARAS 158-159 post. See *Beaverbank Properties Ltd v Customs and Excise Comrs* (2003) VAT

Decision 18099, [2003] STI 1431 (a property developer incurred speculative costs in respect of land it did not own, which proved abortive through lack of planning permission; input tax on these costs was recovered on the basis that, had the project proceeded, the developer would have opted to waive exemption). The fact that the tenant of the land is a partially exempt trader does not affect the exercise of the election: *R Walia Opticians Ltd v Customs and Excise Comrs* [1997] V & DR 368.

5 Value Added Tax Act 1994 Sch 10 para 2(1) (amended by the Value Added Tax (Buildings and Land) Order 1994, SI 1994/3013, arts 1, 2). A 'relevant associate', in relation to a body corporate by which such an election has been made in relation to any building or land, means a body corporate which under the Value Added Tax Act 1994 s 43 (as amended) (see PARAS 75 ante, 205 post): (1) was treated as a member of the same group as the body corporate by which the election was made at the time when the election first had effect; (2) has been so treated at any later time when the body corporate by which the election was made had an interest in, right over or licence to occupy the building or land, or any part of it; or (3) has been treated as a member of the same group as a body corporate within head (1) or (2) supra at a time when that body corporate had an interest in, right over or licence to occupy the building or land, or any part of it: Sch 10 para 3(7).

6 As to the self-supply charge see *ibid* Sch 10 paras 5, 6 (as amended); and PARA 34 ante. Under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(C) (which permits member states to grant an option for taxation in certain cases of supply relating to land) a taxpayer may, by the exercise of such an option, convert an exempt supply into a taxable supply, although a supply which falls outside the scope of tax cannot thereby be converted into a taxable supply: Case C-291/92 *Finanzamt Uelzen v Armbrrecht* [1995] ECR I-2775, [1995] STC 997, ECJ. EEC Council Directive 67/227 (OJ 71, 14.4.67, p 1301) art 2 does not prevent a member state from revoking a right of option once it has been granted: Case C-381/97 *Belgocodex SA v Belgium* [2000] STC 351, ECJ.

7 For the meaning of 'input tax' see PARAS 4 ante, 215 post.

8 For the meaning of 'supply' see PARA 27 ante.

9 Value Added Tax Act 1994 Sch 10 para 2(4). This restriction has been held not to be inconsistent with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 17: *Newcourt Property Fund v Customs and Excise Comrs* (1991) VAT Decision 5825 (unreported); *Bradshaw (Taylor Dyne Ltd Pension Fund Trustees) v Customs and Excise Comrs* [1992] VATTR 315; *Acre Friendly Society v Customs and Excise Comrs* [1992] VATTR 308.

10 *Ie* falling within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 (as amended): see PARA 156 ante.

11 *Ibid* Sch 10 para 2(5)(a). Nor does Sch 10 para 2(4) apply: (1) in relation to any election having effect from any day on or after 1 January 1992, except in relation to input tax on a supply or importation which took place before 1 August 1989 (Sch 10 para 2(8)); or (2) in relation to input tax on grants or other supplies made in the period beginning with 1 April 1989 and ending with 31 July 1989 if: (a) they would have been zero-rated by virtue of Sch 8 Pt II Group 5 items 1, 2 (see PARA 179 post) or exempt by virtue of Sch 9 Pt II Group 1 item 1 (as amended) (see PARA 156 ante) but for the amendments made by the Finance Act 1989 s 18, Sch 3; and (b) the election has effect from 1 August 1989 (Value Added Tax Act 1994 Sch 10 para 2(7) (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 3)); or (3) where the person by whom the election was made has, before the first day for which the election has effect, made in relation to that land a grant or grants falling within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 (as amended), but the grant, or all the grants, were made in the period beginning with 1 April 1989 and ending with 31 July 1989, and would have been taxable supplies but for the amendments made by the Finance Act 1989 Sch 3 (Value Added Tax Act 1994 Sch 10 para 2(5)(b)). Schedule 10 para 2(5) does not make allowable any input tax on supplies or importations taking place before 1 August 1989 unless: (i) it is attributable by or under regulations to grants made by the person on or after 1 April 1989 which would have been taxable supplies but for the amendments made by the Finance Act 1989 Sch 3; and (ii) the election has effect from 1 August 1989: Value Added Tax Act 1994 Sch 10 para 2(6).

12 *Lawson Mardon Group Pension Scheme v Customs and Excise Comrs* (1993) VAT Decision 10231, [1993] STI 948. The Commissioners may not treat as binding a notification which is not accordance with the election made: *Blythe Limited Partnership v Customs and Excise Comrs* [1999] V & DR 112. See also Customs and Excise Business Brief 17/99 [1999] STI 1391. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

13 *Fencing Supplies Ltd v Customs and Excise Comrs* [1993] VATTR 302.

14 As to the meaning of 'intended for use as a dwelling or a number of dwellings' see the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 5 note (2) (as substituted); and PARA 179 note 8 post (applied by Sch 10 para 9 (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 9)).

15 Value Added Tax Act 1994 Sch 10 para 2(2)(a). For the meaning of 'use for a relevant residential purpose' see Sch 8 Pt II Group 5 notes (4)-(5), (12) (as substituted); and PARA 179 note 9 post (applied by Sch 10 para 9 (as amended: see note 14 supra)). By concession, with effect from 12 February 1996, Sch 10 para 2(2)(a) may be disregarded where a grant in relation to a building or part of a building is made to a person who intends to make a grant of that building, or part, which will be zero-rated by virtue of Sch 8 Pt II Group 5 item 1(b) (as substituted) (see PARA 179 post): Customs and Excise Press Notice 9/96 (13 February 1996) [1996] STI 307. The effect of this is to enable the VAT incurred prior to the sale of commercial property which is to be converted into domestic dwellings to be recovered in full, rather than being passed on as part of the price for an exempt supply, as was previously the case. The owner must be aware at the time of the sale of the intended use, which must be by the purchaser and not a sub-purchaser: *SEH Holdings Ltd v Customs and Excise Comrs* [2000] V & DR 324.

16 For the meaning of 'use for a relevant charitable purpose' see PARA 179 note 10 post (applied by the Value Added Tax Act 1994 Sch 10 para 9 (as amended)).

17 Ibid Sch 10 para 2(2)(b).

18 Ibid Sch 10 para 2(2)(c) (added by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 3). A caravan is not a residential caravan if residence in it throughout the year is prevented by the terms of a covenant, statutory planning consent or similar permission: Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (19) (as substituted) (applied by Sch 10 para 9 (as amended)).

19 Ibid Sch 10 para 2(2)(d) (added by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 3). For these purposes, 'houseboat' means a boat or other floating decked structure designed or adapted for use solely as a place of permanent habitation and not having means of, or capable of being readily adapted for, self-propulsion: Value Added Tax Act 1994 Sch 8 Pt II Group 9 item 2 (applied by Sch 10 para 3(7A)(a) (added by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 4)). A houseboat is not a residential houseboat if residence in it throughout the year is prevented by the terms of a covenant, statutory planning consent or similar permission: Value Added Tax Act 1994 Sch 10 para 3(7A)(b) (as so added).

20 'Relevant housing association' means a registered social landlord within the meaning of the Housing Act 1996 Pt 1 (see HOUSING vol 22 (2006 Reissue) PARA 67): Value Added Tax Act 1994 Sch 10 para 2(3)(a), 3(8) (amended by the Value Added Tax (Registered Social Landlords) (No 2) Order 1997, SI 1997/51, art 2).

21 See the Value Added Tax Act 1994 Sch 10 para 2(3)(a) (as amended: see note 20 supra).

22 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

23 Value Added Tax Act 1994 Sch 10 para 2(3)(b).

## UPDATE

### 156-159 Exempt Supplies of Land

The Treasury may by order (1) make provision for substituting the Value Added Tax Act 1994 Sch 10 for the purpose of rewriting Sch 10 with amendments and make provision amending ss 83, 84 (see PARAS 346, 347) in connection with any provision of Sch 10 as so rewritten; (2) make provision repealing Sch 9 Pt II Group 1 item 1(b) and note (7) (without prejudice to the powers contained in s 31(2) (see PARA 174); (3) make provision repealing the Finance Act 1995 s 26 and the Value Added Tax Act 1994 s 51A, Sch 10 paras 8(2), (3) (inserted by the 1995 Act s 26) (see PARAS 77, 34 respectively): Finance Act 2006 s 17(1)-(3). The powers so conferred include power to make any provision that might be made by a statute and to make incidental, consequential, supplemental or transitional provision or savings; and such consequential provision includes provision amending any statute or any instrument made under any statute: s 17(4), (5). Any such order must be made by statutory instrument laid before the House of Commons (which ceases to have effect unless approved by that House before the end of the period of 28 days beginning with the date on which it is made (in reckoning which period, no account is taken of any time during which Parliament is dissolved or prorogued, or during which the House of Commons is adjourned for more than four days): s 17(6), (8). If an order so ceases to

have effect, that cessation does not affect anything previously done under the order or the making of a new order: s 17(7).

### **157 Election to waive exemption**

TEXT AND NOTES--An option to tax has effect in relation to the particular land specified in the option, but if it is exercised in relation to a building or a part of a building, the option has effect in relation to the whole of the building and all the land within its cartilage: Value Added Tax Act 1994 Sch 10 para 18(1), (2) (Sch 10 substituted by SI 2008/1146). If the option is exercised in relation to any land, but is not exercised by reference to a building or part of a building, the option is nonetheless taken to have effect in relation to any building which is (or is to be) constructed on the land (as well as in relation to land on which no building is constructed): Value Added Tax Act 1994 Sch 10 para 18(1)-(3). 'Building' includes an enlarged or extended building, an annexe to a building, and a planned building; and buildings linked internally or by a covered walkway, and complexes consisting of a number of units round around a fully enclosed concourse are treated as a single building: Sch 10 para 18(4), (6) However, buildings which are linked internally are not treated as a single building if the internal link is created after the buildings are completed; and buildings which are linked by a covered walkway are not treated as a single building if the walkway starts to be construed after the buildings are completed: Sch 10 reg 18(5). 'Covered walkway' does not include a covered walkway to which the general public has reasonable access: Sch 10 reg 18(7).

An option to tax has effect from the start of the day on which it is exercised, or the start of any later day specified therein: Sch 10 para 19(1). The option, together with any information that the Commissioners may require, must be notified to the Commissioners before the end of the period of 30 days beginning with the day on which it was exercised (or within such longer period as the Commissioners may in any particular case allow) ('the allowed time'); and the Commissioners may publish a notice specifying the form in which such notification is to be given and the information which it must contain; and an option not so notified has no effect: Sch 10 para 20(1)-(3).

A person (E) may make an election (a 'real estate election') in relation to relevant interests in any building or land which E acquires after the election is made and relevant interests in any building or land which a body corporate acquires after the election is made at a time when the body is a relevant group member: Sch 10 para 21(1). If such an election is made, E is treated as if he had exercised an option to tax in relation to the building or land in which the relevant interest is acquired, and that option is treated for those purposes as if it had been exercised on the day on which the acquisition was made, and as if it had effect from the start of that day: Sch 10 para 21(2). 'Relevant group member', in relation to any person making a real estate election and any time, means a body corporate which is treated under ss 43A-43D (see PARA 75) as a member of the same group as that person at that time; and 'relevant interest', in relation to any building or land, means any interest in, right over or licence to occupy the building or land (or any part thereof): Sch 10 para 22(12).

However, a person (P) is not to be treated as a result of Sch 10 para 21 as exercising an option to tax in relation to any building or land where at any time P, or any body corporate which was a relevant group member at that time, exercises an option to tax in relation to the building (or part of the building) or land apart from this provision, and that option has effect from a time earlier than that from which an option to tax exercised by P in relation to the building or land would otherwise have been treated as having effect as a result of this provision: Sch 10 para 21(3). Further, a person (P) is not to be treated as a result of Sch 10 para 21 as exercising an option to tax in relation to any building or land in which a relevant interest is acquired ('the later interest') if

the person making the acquisition in question held another relevant interest in that building or land before P makes a real estate election, and that person continues to hold that other relevant interest at the time when the later interest is acquired (Sch 10 para 21(4)); nor is a person to be treated as a result of Sch 10 para 21 as exercising an option to tax in relation to any building or land if a relevant interest in the building or land is acquired after the election is made and, on the relevant assumptions, the case would fall within Sch 10 para 28 (Sch 10 para 21(5)). The 'relevant assumptions' are that the effect of Sch 10 para 21 is disregarded and the day from which the person would want the option to tax to have effect for the purposes of Sch 10 para 28 or 29: Sch 10 para 21(5), (6).

Notification is not required on either occasion under Sch 10 para 20. Instead, notification of the election must be given to the Commissioners before the end of the period of 30 days beginning with the day on which it was made (or such longer period as the Commissioners may in any particular case allow), in a form which must be specified in a public notice, and containing such information as so specified: Sch 10 para 21(2), (7). In addition, the Commissioners may at any time require a person who has made a real estate election to give to the Commissioners (within the period of 30 days beginning with that time or such longer period as the Commissioners may allow), information specified in a public notice: Sch 10 para 21(8). If the person fails to comply with such a notice, the Commissioners may revoke the election with effect in relation to relevant interests in any building or land acquired by the person concerned (or a body corporate which is a relevant group member at the time of acquisition) after a time notified by the Commissioners to the person concerned ('the notified time') which may not be before notification is given: Sch 10 para 21(9). A real estate election may not otherwise be revoked: Sch 10 para 21(10). If a real estate election is so revoked, another such election may be made at any subsequent time by the person concerned or any body corporate which is a relevant group member at the subsequent time, but only with the prior permission of the Commissioners: Sch 10 para 21(11). For this purpose, the time at which a relevant interest in any building or land is acquired is the time at which a supply is treated as taking place for the purposes of the charge to VAT in respect of the acquisition, or, if there is more than one such time, the earliest of them; and any order under s 5(3)(c) (see PARA 27) that would otherwise have the effect that the acquisition in question is to be treated as neither a supply or goods nor a supply of services must be disregarded for this purpose: Sch 10 para 21(13), (14) (added by SI 2009/1966). See further PARA 159.

If (1) a person wishes to exercise an option to tax any land with effect from a particular day; (2) at any time ('the relevant time') before that day the person has made, makes or intends to make an exempt supply to which any grant in relation to the land gives rise; and the relevant time is within the period of ten years ending with that day, the option may be exercised only if the conditions specified in a public notice are met in relation to the land, or the person gets the prior permission of the Commissioners: Sch 10 para 28(1), (2). The Commissioners must refuse permission if they are not satisfied that there would be a fair and reasonable attribution of relevant input tax to any relevant supplies; and in deciding whether there would be such an attribution, the Commissioners must have regard to all the circumstances of the case, but in particular (a) the total value of any exempt supply to which any grant in relation to the land gives rise and which is made or to be made before the day from which the person wants the option to have effect; (b) the expected total value of any supply to which any grant in relation to the land gives rise that would be taxable (if the option had effect); and (c) the total amount of input tax incurred, or likely to be incurred, in relation to the land: Sch 10 para 28(5), (6). 'Relevant input tax' means input tax incurred, or likely to be incurred, in relation to the land; and 'relevant supplies' means supplies to which any grant in relation to the land gives rise which would be taxable (if the option has effect):



Sch 10 para 28(4). An application for prior permission must be made in a form specified in a public notice, contain a statement by the applicant certifying which (if any) of the conditions specified in the public notice referred to above are met in relation to the land, and contain other information specified in a public notice: Sch 10 para 29(1). The Commissioners may specify conditions subject to which permission is given and, if any of those conditions is broken, they may treat the application as if it had not been made: Sch 10 para 29(2). If permission is granted, the applicant is treated for the purposes of Sch 10 Pt 1 (paras 1-34) as if he had exercised the option to tax the land with effect from the start of the day on which the application was made, or the start of any later day specified in the application: Sch 10 para 29(3). If permission was not obtained, but the option was purportedly exercised and notified to the Commissioners under Sch 10 para 20, the Commissioners may dispense with the requirement to obtain permission, and if they do so, the option is treated as validly exercised and effective in accordance with Sch 10 para 19: Sch 10 para 30.

NOTES 6, 9--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

TEXT AND NOTES 15-23--An option to tax has no effect in relation to a grant (1) in relation to a building or part of a building (1) if the building or part of the building is designed or adapted, and is intended for use, as a dwelling or a number of dwellings, or solely for a relevant residential purpose; (2) in relation to a building or part of a building if the grantee ('the recipient') certifies that the building or part of the building is intended for use as a dwelling or a number of dwellings, or solely for a relevant residential purpose; (3) in relation to any grant made to a person in relation to a building or part of a building is intended by the grantee for use solely for a relevant charitable purpose, but not as an office; (4) in relation to any grant made in relation to a pitch for a residential caravan; (5) in relation to any grant made in relation to facilities for the mooring of residential houseboats; (6) in relation to any grant made to a relevant housing association in relation to any land of the association certifies that the land is to be used (after any necessary demolition work) for the construction of a building or buildings intended for use as a dwelling or a number of dwellings, or solely for a relevant residential purpose; (7) in relation to any grant made to an individual if the land is to be used for the construction of a building intended for use by the individual as a dwelling, and the construction is not carried out in the course or furtherance of a business carried on by the individual: Sch 10 paras 5(1), 6(1), 7-9, 10(1), (3), 11.

In a case falling within head (2), the recipient must give the certificate to the grantor ('the seller') within the period specified in a public notice or, if the seller agrees, at any later time before the grantor makes a supply to which the grant gives rise; but may only be given if the recipient has the specified intention, has the relevant conversion intention, or is a relevant intermediary: Sch 10 para 6(2), (3). The 'relevant conversion intention' means an intention on the part of the person concerned to convert the building or part of the building with a view to its being used as mentioned in head (2); and the recipient is a 'relevant intermediary' if he intends to dispose of the relevant interest to another person and that other person gives the recipient a certificate stating that he has the relevant conversion intention or the relevant disposal intention: Sch 10 para 6(4), (7). A person has the 'relevant disposal intention' if he intends to dispose of the relevant interest to a third person (P) who gives him a qualifying certificate: Sch 10 para 6(5). The 'relevant interest', in relation to an interest in the building or part of the building to which the grant gives rise, means the whole of that interest; and a qualifying certificate must state that P has the relevant conversion intention or intends to dispose of the relevant interest to another person (Q) who has given a certificate to P stating Q has the relevant conversion intention, or intends to dispose of the relevant interest to another person who has given a qualifying

certificate to Q, and so on in the case of further disposals of the relevant interest: Sch 10 para 6(6), (7). For the purposes of head (2), a building or part of a building is not regarded as intended for use as a dwelling or number of dwellings at any time if there is intended to be a period before that time during which it will not be so used (but disregarding use for incidental or other minor purposes): Sch 10 para 6(8). The Commissioners may publish a notice for the purposes of Sch 10 para 6 or 10 preventing a person from giving any certificate unless the person meets conditions specified in the notice, specifying the form in which any such certificate must be made, and specifying any information which any such certificate must contain: Sch 10 paras 6(10), 10(5).

In a case falling within head (6), the association must give the certificate to the person making the grant ('the seller') within the period specified in a public notice or, if the seller agrees, at any later time before the seller made a supply to which the grant gives rise: Sch 10 para 10(2). For the purpose of Sch 10 para 10, the reference to use solely for a relevant residential purpose must be read without regard to Sch 8 Group 5 note (12): Sch 10 para 10(4).

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### **158. Effect of election to waive exemption.**

An election to waive exemption<sup>1</sup> has effect in relation to any land<sup>2</sup> specified, or of a description specified, in the election<sup>3</sup>, although where it is made in relation to a building, or part of a building (or planned building), it has effect in relation to the whole of the building and all the land within its curtilage<sup>4</sup>. The election has effect, subject to the provisions set out below<sup>5</sup>, either from the beginning of the day on which it is made or of any later day specified in it or, where the election was made before 1 November 1989, from the beginning of 1 August 1989 or of any later day so specified<sup>6</sup>. In addition, in the case of a body corporate, an election binds not only that body but also any relevant associate<sup>7</sup> of that body<sup>8</sup>.

An election made before 1 March 1995 has effect after that date only if it also had effect before that date or if written notification of the election is given to the Commissioners for Her Majesty's Customs and Excise not later than the end of the period of 30 days beginning with the day on which the election was made, or not later than the end of such longer period beginning with that day as the Commissioners may in any particular case allow, together with such information as they may require<sup>9</sup>.

An election made on or after 1 March 1995 has effect after that date only if: (1) written notification of the election is given to the Commissioners not later than the end of the period of 30 days beginning with the day on which the election is made, or not later than the end of such longer period beginning with that day as the Commissioners may in any particular case allow, together with such information as they may require; and (2) in a case in which the prior written permission of the Commissioners must be obtained<sup>10</sup>, that permission has been given<sup>11</sup>. Such prior written permission is required where a person who wishes to make an election in relation to any land ('the relevant land') to have effect on or after 1 January 1992 has made, makes or intends to make an exempt grant<sup>12</sup> in relation to the relevant land at any time between 1 August 1989 and before the beginning of the day from which he wishes an election in relation to the relevant land to have effect<sup>13</sup>. In such a case he may not make an election in relation to the relevant land unless the conditions for automatic permission specified in a notice published by the Commissioners<sup>14</sup> are met or he obtains the prior written permission of the Commissioners<sup>15</sup>. The Commissioners must give such permission only if they are satisfied, having regard to all the circumstances of the case and in particular to: (a) the total value of exempt grants in relation to the relevant land made or to be made before the day from which the person wishes his election to have effect; (b) the expected total value of grants relating to the relevant land that would be taxable if the election were to have effect; and (c) the total amount of input tax which has been incurred on or after 1 August 1989 or is likely to be incurred in relation to the relevant land, that there would be secured a fair and reasonable attribution of the input tax mentioned in head (c) above to grants in relation to the relevant land which, if the election were to have effect, would be taxable<sup>16</sup>. An owner of an interest in land who wishes to obtain such permission to waive exemption is expected to write to his local value added tax office setting out proposals for the attribution of previously incurred input tax<sup>17</sup>.

Where an election has been made in relation to any land and a supply is made that would fall<sup>18</sup> to be treated as excluded by virtue of the election<sup>19</sup>, that supply is to be so treated if the following conditions are satisfied: (i) that an agreement in writing, made at or before the time of the grant between the person making the grant and the person to whom it is made, declares that the election is to apply in relation to the grant; and (ii) that the person to whom the supply

is made intends, at the time when it is made, to use the land for the purpose only of making a supply which is zero-rated<sup>20</sup>.

Where an election has been made in relation to any land, a supply is not to be taken by virtue of that election to be a taxable supply if: (A) the grant giving rise to the supply was made by a person (the 'grantor') who was a developer of the land<sup>21</sup>; and (B) at the time of the grant, it was the intention or expectation of the grantor, or a person responsible for financing the grantor's development of the land for exempt use, that the land would become exempt land (whether immediately or eventually and whether or not by virtue of the grant) or, as the case may be, would continue for a period at least, to be exempt land<sup>22</sup>.

Where an election is made in relation to any land and a grant in relation to that land would otherwise be taken to have been made (whether in whole or in part before the time when the election takes effect), these provisions have effect, in relation to any supplies to which the grant gives rise which are treated for the purposes of the Value Added Tax Act 1994 as taking place after that time, as if the grant had been made after that time. Accordingly, the references to exempt grants and taxable grants are to be construed as references to supplies to which a grant gives rise being exempt or taxable, as the case may be<sup>23</sup>.

1    le an election under the Value Added Tax Act 1994 s 51(1), Sch 10 para 2 (as amended): see PARA 157 ante.

2    For the meaning of 'land' see PARA 14 note 22 ante.

3    Value Added Tax Act 1994 Sch 10 para 3(2).

4    Ibid Sch 10 para 3(3). For these purposes, buildings which are linked internally or by a covered walkway, and complexes consisting of a number of units grouped around a fully inclosed concourse, are taken to be a single building (if they would otherwise not be): Sch 10 para 3(3) (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 4).

5    le the Value Added Tax Act 1994 Sch 10 para 3(6)-(9) (as amended): see the text and notes 6-16 infra; and PARA 159 post.

6    Ibid Sch 10 para 3(1).

7    For the meaning of 'relevant associate' see PARA 157 note 5 ante.

8    See the Value Added Tax Act 1994 Sch 10 para 2(1) (as amended); and PARA 157 ante. The election is given such a wide scope to prevent the landowner obtaining the benefits of the recovery of input tax whilst avoiding the corresponding output VAT charge on sale by transferring the land within its VAT group. As to VAT groups see PARA 205 post; and as to the effect of the existence of the option to waive exemption on stamp duty see Inland Revenue Statement of Practice SP 11/91 (12 September 1991) [1991] STI 818; and Institute of Chartered Accountants of England and Wales Guidance Note 19/92 *Inland Revenue Statement of Practice SP 11/91 - Stamp Duty and VAT; Interaction* (14 December 1992) [1992] STI 1109. From 1 January 2003 stamp duty land tax replaced stamp duty for United Kingdom transactions of land and buildings; VAT is included as part of the chargeable consideration for stamp duty land tax where it has been paid in respect of the transaction, or where a landlord has elected under the Value Added Tax Act 1994 Sch 10 para 2 or before the grant of a new lease to charge VAT on the rents under that lease: see the Finance Act 2003 s 50, Sch 4 para 2. For the meanings of 'input tax' and 'output tax' see PARAS 4 ante, 215 post.

9    Value Added Tax Act 1994 Sch 10 para 3(6)(a) (Sch 10 para 3(6) substituted by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 4). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

10   See the text and notes 12-15 infra.

11   Value Added Tax Act 1994 Sch 10 para 3(6)(b) (as substituted: see note 9 supra).

12   For the meaning of 'grant' see PARAS 156 note 2 ante, 179 note 3 post (definition applied by ibid Sch 10 para 9 (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, art 9)).

13   See the Value Added Tax Act 1994 Sch 10 para 3(9).

14 At the date at which this volume states the law no such notice had been published.

15 See the Value Added Tax Act 1994 Sch 10 para 3(9) (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 4). Where, after such an election has been made, the building in question would fall within the scope of the capital goods scheme (see PARA 235 post), it is not open to the Commissioners to accept a method of attribution and recovery of input tax other than that laid down by the capital goods scheme itself: *Customs and Excise Comrs v R & R Pension Fund Trustees* [1996] STC 889. Quaere whether there is a right of appeal to the VAT and duties tribunal if the appellant's complaint is as to the conditions imposed by the Commissioners under the Value Added Tax Act 1994 Sch 10 para 3(9) (as amended): see *Customs and Excise Comrs v R & R Pension Fund Trustees* supra at 896 per Buxton J, referring to *Kohanzad v Customs and Excise Comrs* [1994] STC 967, *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941, CA and *Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd* [1981] AC 22, [1980] 2 All ER 72, HL; *Island Trading Co Ltd v Customs and Excise Comrs* [1996] V & DR 245, [1996] STI 572. As to the decisions against which an appeal lies see PARA 346 post.

16 See the Value Added Tax Act 1994 Sch 10 para 3(9).

17 Customs and Excise Public Notice 742A *Opting to Tax Land and Buildings* (March 2002) PARA 4.

18 Ie but for the Value Added Tax Act 1994 Sch 10 para 2(2)(a) (see PARA 157 ante and notes 15-16 supra).

19 Ie from ibid Sch 9 Pt II Group 1 (as amended): see PARA 156 ante.

20 Ie by virtue of ibid Sch 8 Pt II Group 5 item 1(b) (as substituted) (see PARA 179 post): Sch 10 para 2(2A), (2B) (added by the Finance Act 1997 s 36).

21 A grant made by any person in relation to land is a grant made by a developer of that land if: (1) the land or building or part of a building on that land is an asset falling in relation to that person to be treated as a capital item for the purposes of regulations made under the Value Added Tax Act 1994 s 26(3), (4) (see PARA 217 post) providing for adjustments relating to the deduction of input tax; or (2) that person or a person financing his development of the land for exempt use intended or expected that the land or a building or a part of a building on, or to be constructed on, that land would become an asset falling in relation to: (a) the grantor; or (b) any person to whom it was to be transferred either in the course of a supply or in the course of a transfer of a business as a going concern, to be treated as a capital item for the purposes of such regulations, unless the grant was made at a time falling after the expiry of the period over which such regulations require or allow adjustments relating to the deduction of input tax to be made as respects that item: Sch 10 para 3A(2) (para 3A added by the Finance Act 1997 s 37; the Value Added Tax Act 1994 Sch 10 para 3A(2) substituted by the Value Added Tax (Buildings and Land) Order 1999, SI 1999/593, arts 2, 5(b)). A person is responsible for financing the grantor's development of the land for exempt use if (with the intention or in the expectation that the land will become, or continue to be, exempt land) he has provided finance for the grantor's development of the land or has entered into any agreement, arrangement or understanding (whether or not legally enforceable) to provide such finance: Value Added Tax Act 1994 Sch 10 para 2(3AA) (added by the Finance Act 1997 s 37; and amended by the Value Added Tax (Buildings and Land) Order 1999, SI 1999/593, art 2, 3; and the Value Added Tax (Buildings and Land) Order 2004, SI 2004/778, arts 2, 3); Value Added Tax Act 1994 Sch 10 para 3A(3) (Sch 10 para 3A added by the Finance Act 1997 s 37; Value Added Tax Act 1994 Sch 10 para 3A(3) (as added) amended by the Value Added Tax (Buildings and Land) Order 2004, SI 2004/778, arts 2, 5). 'Providing finance for the grantor's development of the land' means doing any one or more of the following: (i) directly or indirectly providing funds for meeting the whole or any part of the cost of that development; (ii) directly or indirectly procuring the provision of such funds by another; (iii) directly or indirectly providing funds for discharging, in whole or in part, any liability that has been or may be incurred by any person for or in connection with the raising of funds to meet the cost of the grantor's development of the land; (iv) directly or indirectly procuring that any such liability is or will be discharged in whole or in part by another: Value Added Tax Act 1994 Sch 10 para 3A(4) (as so added). The provision of finance includes making loans, the provision of a guarantee or other security, the provision of consideration for shares or securities issued to raise funds, and any other transfer of assets or value as a consequence of which any of those funds are made available for the purpose: Sch 10 para 3A(5) (as so added; and amended by the Value Added Tax (Buildings and Land) Order 2004, SI 2004/778, arts 2, 5).

Where a supply is made by a person other than the person who made the grant giving rise to it, then for the purposes of the Value Added Tax Act 1994 Sch 10 para 2(3AA) (as added and amended) the person making the supply is treated as the person who made that grant, and the grant is treated as made at the time when that person made his first supply arising from the grant: Sch 10 para 2(3B) (added by the Value Added Tax (Buildings and Land) Order 2004, SI 2004/778, arts 2, 4). For these purposes, where a person is so treated as making a grant of the land giving rise to a supply made by him, and the grant is not a grant made by a developer of that land within the Value Added Tax Act 1994 Sch 10 para 3A(2) (as added and amended) only because it is treated as made at a time falling after the expiry of the period for adjustments of input tax by virtue of regulations made under s 26(3), (4), the grant is treated as such a grant: Sch 10 para 3A(2A) (added by the Value Added Tax (Buildings and Land) Order 2004, SI 2004/778, arts 2, 5). For provisions relating to a

grant in relation to land made on or after 19 March 1997 and before 10 March 1999 see the Value Added Tax Act 1994 Sch 10 para 2(3AAA) (as added); and the Value Added Tax (Buildings and Land) Order 1999, SI 1999/593.

22 See the Value Added Tax Act 1994 Sch 10 para 2(3AA) (as added and amended: see note 21 supra). Land is 'exempt land' if, at a time falling before the expiry of the period provided in regulations made under s 26(3), (4) for the making of adjustments relating to the deduction of input tax as respects the land: (1) the grantor; (2) a person responsible for financing the grantor's development of the land for exempt use; or (3) a person connected with a person within head (2) supra, is in occupation of the land without being in such occupation for eligible purposes: Sch 10 para 3A(7) (as added (see note 21 supra); and amended by the Value Added Tax (Buildings and Land) Order 1999, SI 1999/593, arts 2, 5). For the meaning of 'connected person' see the Income and Corporation Taxes Act 1988 s 839 (as amended); and INCOME TAXATION vol 23(2) (Reissue) PARA 1258 (definition applied by the Value Added Tax Act 1994 Sch 10 para 3A(14) (as added: see note 21 supra)).

23 Ibid Sch 10 para 3(5A), (5B) (added by the Finance Act 1997 s 35(2), (4)).

## UPDATE

### 156-159 Exempt Supplies of Land

The Treasury may by order (1) make provision for substituting the Value Added Tax Act 1994 Sch 10 for the purpose of rewriting Sch 10 with amendments and make provision amending ss 83, 84 (see PARAS 346, 347) in connection with any provision of Sch 10 as so rewritten; (2) make provision repealing Sch 9 Pt II Group 1 item 1(b) and note (7) (without prejudice to the powers contained in s 31(2) (see PARA 174); (3) make provision repealing the Finance Act 1995 s 26 and the Value Added Tax Act 1994 s 51A, Sch 10 paras 8(2), (3) (inserted by the 1995 Act s 26) (see PARAS 77, 34 respectively): Finance Act 2006 s 17(1)-(3). The powers so conferred include power to make any provision that might be made by a statute and to make incidental, consequential, supplemental or transitional provision or savings; and such consequential provision includes provision amending any statute or any instrument made under any statute: s 17(4), (5). Any such order must be made by statutory instrument laid before the House of Commons (which ceases to have effect unless approved by that House before the end of the period of 28 days beginning with the date on which it is made (in reckoning which period, no account is taken of any time during which Parliament is dissolved or prorogued, or during which the House of Commons is adjourned for more than four days): s 17(6), (8). If an order so ceases to have effect, that cessation does not affect anything previously done under the order or the making of a new order: s 17(7).

### 158 Effect of election to waive exemption

TEXT AND NOTES--If a person exercises the option to tax any land under the Value Added Tax Act 1994 Sch 10 Pt 1 (paras 1-34), and a grant is made in relation to that land at any time when that option has effect, then a grant made by that person, or by a relevant associate (if that person is a body corporate), does not fall within Sch 9 Group 1 (see PARA 156): Sch 10 para 2 (Sch 10 substituted by SI 2008/1146). A body corporate is a relevant associate of the body corporate exercising the option ('the opter') if under the Value Added Tax Act 1994 ss 43A-43D (see PARA 75) the first-mentioned body corporate was (1) treated as a member of the same group as the opter at the time when the option first had effect; (2) has been so treated at any later time when the taxpayer had a relevant interest in the building or land; or (3) has been treated as a member of the same group as a body corporate within head (1) or (2) above at a time when that body had a relevant interest in the building or land: Sch 10 para 3(1), (2). However, a body corporate ceases to be a relevant associate of the opter in relation to the building or land at a time when all of the following conditions are first met: (a) the body corporate has no relevant interest in the building or land and

no part of any consideration payable in respect of any disposal by the body corporate of such an interest is unpaid; (b) where the body corporate has disposed of such an interest, it is not the case that a supply for the purposes of the charge to VAT in respect of the disposal is yet to take place, or would be yet to take place if one or more conditions (such as the happening of an event or the doing of an act) were to be met; (c) the body corporate or the opter is not treated under ss 43A-43D as a member of the group mentioned above; and (d) the body corporate is not connected with any person who has a relevant interest in the building or land where that person is the opter or another relevant associate of the opter: Sch 10 para 3(3), (4) (Sch 10 para 3(4) amended by SI 2009/1966). The body corporate also ceases to be a relevant associate of the opter in relation to the building or land if the opter meets conditions specified in a public notice or gets the prior permission of the Commissioners: Value Added Tax Act 1994 Sch 10 para 3(5). In the former case, the body corporate only ceases to be a relevant associate of the opter if notification is given to the Commissioners, in a form specified in a public notice, stating the day from which the body corporate is to so cease (which may not be before the day on which the notification is given); and containing a statement by the body corporate certifying that, on that day, the specified conditions are met in relation to it, and other information specified in a public notice: Sch 10 para 4(1)-(3). An application for the prior permission of the Commissioners must be made in a form specified in a public notice and contain a statement by the body corporate certifying which (if any) of the conditions specified in the public notice, and such other information as may be so specified: Sch 10 para 4(4). If permission is given, the body corporate ceases to be a relevant associate of the opter from the day permission is given or such earlier or later day as may be specified in that permission: Sch 10 para 4(5). The Commissioners may so specify an earlier day only if the body corporate has purported to give notification of cessation, the conditions specified in the public notice are not, in the event, met in relation to the body corporate, and the Commissioners consider that the grounds on which those conditions are not so met are insignificant; and the day so specified may be the day from which cessation would have been effective had those conditions been met: Sch 10 para 4(6), (7). The Commissioners may specify conditions to which their permission is subject, and on any breach of those conditions the Commissioners may treat the application for cessation as if it had not been made: Sch 10 para 4(8). 'Relevant interest in the building or land' means an interest in, right over or licence to occupy the building or land or any part thereof: Sch 10 para 3(6). 'Connected person' has the meaning given by the Income and Corporation Taxes Act 1988 s 839, but a company is not connected with another company only because both are under the control of the Crown, a minister of the Crown, a government department or a Northern Ireland department; and 'company' and 'control' have the same meaning as in s 839: Value Added Tax Act 1994 Sch 10 para 34(2), (2A), (2B) (Sch 10 para 34(2A), (2B) added by SI 2009/1966).

A supply is not, as a result of an option to tax, a taxable supply if the grant giving rise to the supply was made by a person ('the grantor') who was a developer of the land, and the exempt land test is met: Value Added Tax Act 1994 Sch 10 para 12(1). The exempt land test is met if, at the time when the grant was made, or treated for these purposes as made, the relevant person intended or expected that the land would become exempt land (whether immediately or eventually and whether or not as a result of the grant), or would continue, for a period at least, to be exempt land; and 'the relevant person' means the grantor or a development financier: Sch 10 para 12(2), (3). If a supply is made by a person other than the person who made the grant giving rise to it, the person making the supply is treated for this purpose as the person who made the grant giving rise to it, and the grant is treated as made at the time when that person made the first supply arising on the grant: Sch 10 para 12(6).

A grant made by any person ('the grantor') in relation to any land is made by a developer of the land if the land is, or was intended or expected to be, a relevant capital item, and the grant is made at an eligible time as respects that capital item: Sch 10 para 13(1), (2). The land is a 'relevant capital item' if the land or the building or part of a building on the land is a capital item (ie an asset falling, in relation to the person, to be treated as a capital item for the purposes of the relevant regulations) in relation to the grantor; and it is intended or expected to be a relevant capital item if the grantor, or a development financier, intended or expected that the land or a building or part of a building on, or to be constructed on, the land, would become a capital item in relation to the grantor or any relevant transferee (ie someone to whom the land, building or part of a building was to be transferred in the course of a supply or in the course of a transfer of a business or part of a business as a going concern): Sch 10 para 13(3)-(5), (8). A grant is made at an eligible time as respects a capital item if it is made before the end of the period provided in the relevant regulations for the making of adjustments relating to the deduction of input tax as respects the capital item; but if a person other than the grantor is treated under Sch 10 para 12(6) as making the transfer of the land, and the grant is consequently treated as made at what would otherwise be an ineligible time, the grant is instead treated as if it were not made at an ineligible time: Sch 10 para 13(6), (7), (9).

Land is exempt land if, at any time before the end of the relevant adjustment period as respects that land, a relevant person is in occupation thereof, and that occupation is not wholly, or substantially wholly, for eligible purposes: Sch 10 para 15(1), (2). The 'relevant adjustment period' as respects any land is the period provided in the relevant regulations (ie regulations made under s 26(3), (4)) (see PARA 217) for the making of adjustments relating to the deduction of input tax as respects the land; and any question whether a person's occupation of the land is 'wholly or substantially wholly' for eligible purposes is to be decided by reference to criteria specified in a public notice: Sch 10 para 15(4), (5).

Each of the following is a relevant person: (1) the grantor; (2) a person connected with the grantor; (3) a development financier; and (4) a person connected with a development financier. A relevant person cannot occupy land for eligible purposes unless he is a taxable person at that time: Sch 10 paras 15(2), 16(2). However, any occupation of land by a body to which s 33 (see PARA 304) applies is occupation for eligible purposes so far as it is for purposes other than those of a business carried on by the body; and any occupation of land by a Government department (see PARA 208) is occupation of the land for eligible purposes: Sch 10 para 16(5), (6). Otherwise, land is occupied for eligible purposes so far as that occupation is for the purpose of making creditable supplies, or if the occupation arises merely by reference to any automatic teller machine of the person which is fixed to the land: Sch 10 para 16(3), (7). 'Creditable purposes' means supplies which are or are to be made in the course or furtherance of a business carried on by the person and are supplies of such a description that the person would be entitled to a credit for any input tax wholly attributable to those supplies: Sch 10 para 16(4). If a person occupying land holds it in order to put it to use for particular purposes, and does not occupy it for any other purpose, that person is treated for the purposes of Sch 10 para 16, for as long as those circumstances apply, as occupying the land for the purposes for which he proposes to use it: Sch 10 para 16(8). If the land is occupied by a person ('A') who is not a taxable person, but is a person whose supplies are treated for the purpose of the Value Added Tax Act 1994 as made by another person ('B') who is a taxable person, the land is treated as if A and B were a single taxable person: Sch 10 para 16(9). A person occupies land for this purpose whether he occupies it alone or together with one or more other persons, and whether the person occupies all of the land or only part thereof: Sch 10 para 16(10). A 'development financier' means a person who has



provided finance for the grantor's development of the land, or has entered into any arrangement to provide such finance, with the intention or in the expectation that the land will become exempt land or continue (for a period at least) to be exempt land: Sch 10 para 14(1), (2). For these purposes, references to finance being provided for the grantor's development of the land are to doing (directly or indirectly) any of the following: (a) providing funds for meeting the whole or any part of the cost of the grantor's development of the land; (b) procuring the provision of such funds by another; (c) providing funds for discharging (in whole or in part) any liability that has been or may be incurred by any person for or in connection with the raising of funds to meet the cost of the grantor's development of the land; and (d) procuring that any such liability is or will be discharged in whole or in part by another; and references to providing funds for a particular purpose are to (i) the making of a loan of funds that are or are to be used for that purpose; (ii) the provision of any guarantee or other security in relation to such a loan; (iii) the provision of any of the consideration for the issue of any shares or other securities issued wholly or partly for raising those funds; (iv) the provision of any consideration for the acquisition by any person of any shares or other securities issued wholly or partly for raising those funds; or (v) any other transfer of assets or value as a consequence of which any of those funds are made available for that purpose: Sch 16 para 14(3), (4). Also for these purposes, references to the grantor's development of the land are to the acquisition by him of the asset which consists in the land or a building or part of a building on the land, and is, or (as the case may be) was intended or expected to be, a relevant capital item in relation to the grantor; and the reference to the acquisition of the asset includes its construction or reconstruction and the carrying out in relation to it of any other works by reference to which it is, or was intended or expected to be, a relevant capital item: Sch 10 para 14(5), (6). 'Arrangement' means any agreement, arrangement or understanding, whether or not legally enforceable: Sch 10 para 14(7).

Nothing in Sch 10 para 12 applies to a supply arising from a grant made before 26 November 1996 or a grant made on or after that date but before 30 November 1999, in pursuance of a written agreement entered into before 26 November 1996, on terms which (as terms for which provision was made by that agreement) were fixed before 26 November 1996: Sch 10 para 12(8). A grant in relation to land which was made on or after 19 March 1997 and before 10 March 1999 is treated for the purposes of Sch 10 para 12 as made on the latter date if, at the time of the grant, the capital item test was met: Sch 10 para 17(1). That test was met if the person making the grant, or a development financier, intended or expected that the land, or a building or part of a building on, or to be constructed on, the land, would have become a capital item in relation to the grantor or any relevant transferee but it had not become such an item: Sch 10 para 17(2), (3). If a person ('the taxpayer') has at any time opted to tax any land, at any subsequent time the construction of a building ('the new building') on the land begins, and no land within the curtilage of the new building is within the curtilage of an existing building, the taxpayer may exclude the whole of the new building and all the land within its curtilage from the effect of the option: Sch 10 para 27(1), (2). The exclusion has effect from the earliest of the following times: (1) the time when a grant of an interest in, or in any part of, the new building is first made; (2) the time when the new building, or any part of it, is first used; and (3) the time when the new building is completed: Sch 10 para 27(3). The exclusion must be notified to the Commissioners in a form specified in a public notice before the end of the period of 30 days beginning with the day on which it is to have effect or such longer period as the Commissioners may in any case allow, state the time from which it is to have effect, and contain other information so specified: Sch 10 para 27(1), (4) (Sch 10 para 27(4) amended by SI 2009/1966). In this provision, the reference to the construction of a building is to be read without regard to the Value Added Tax Act 1994 Sch 8, Group 5 note (17) or (18) (b) (see PARA 179) and the Commissioners may publish a notice for determining the

time at which the construction of a building on any land is to be taken to begin for this purpose: Sch 10 para 27(6), (7).

If an option to tax is exercised in relation to any land, a grant in relation to the land would otherwise have been taken to have been made (whether in whole or in part) before the time when the option has effect, and the grant gives rise to supplies which are treated for the purposes of the 1994 Act as taking place after that time, then for the purposes of Sch 10 Pt 1 the option to tax has effect, in relation to those supplies, as if the grant had been made after that time: Sch 10 para 31.

NOTE 11--Notification may be given after the disposal of the land: *Marlow Gardner & Cooke Ltd Directors' Pension Scheme v Revenue and Customs Comrs* [2006] EWHC 1612 (Ch), [2006] STC 2014.

NOTE 22--In head (3) a mere physical presence on land for the purpose of making use of it cannot be regarded as being in 'occupation of the land', the opinion of a fact-finding body needs to be considered: *Revenue and Customs Comrs v Newnham College, Cambridge* [2008] UKHL 23, [2008] 2 All ER 863.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(ii) Exempt Supplies of Land/159. Revocability of election to waive exemption.

### **159. Revocability of election to waive exemption.**

Subject to certain exceptions<sup>1</sup>, an election to waive exemption<sup>2</sup> is irrevocable<sup>3</sup>. Where, however, less than three months have elapsed since the day on which the election had effect and:

- 447 (1) no tax has become chargeable and no credit for input tax<sup>4</sup> has been claimed by virtue of the election;
- 448 (2) no grant<sup>5</sup> in relation to the land<sup>6</sup> which is the subject of the election has been made which, by virtue of being a supply<sup>7</sup> of the assets of a business<sup>8</sup> to a person to whom the business (or part of it) is being transferred as a going concern, has been treated as neither a supply of goods nor a supply of services; and
- 449 (3) the person making the election obtains the written consent of the Commissioners for Her Majesty's Revenue and Customs<sup>9</sup>,

the election may be revoked from the date on which it was made<sup>10</sup>.

Where more than 20 years have elapsed since the day on which the election had effect and the person making the election obtains the written consent of the Commissioners, the election may be revoked from the date on which that consent is given or such later date as they may specify in that consent<sup>11</sup>.

1 See the text and notes 3-10 infra.

2 ie an election under the Value Added Tax Act 1994 s 51(1), Sch 10 para 2 (as amended): see PARA 157 ante.

3 Ibid Sch 10 para 3(4) (Sch 10 paras 3(4)-(6) substituted by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 4).

4 As to credits for input tax see PARAS 217-218 post. For the meaning of 'input tax' see PARAS 4 ante, 215 post.

5 For the meaning of 'grant' see PARAS 156 note 2 ante, 179 note 3 post (definitions applied by the Value Added Tax Act 1994 Sch 10 para 9 (as amended)).

6 For the meaning of 'land' see PARA 14 note 22 ante.

7 For the meaning of 'supply' see PARA 27 ante.

8 For the meaning of 'business' see PARA 23 ante.

9 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

10 See the Value Added Tax Act 1994 Sch 10 para 3(5) (as substituted: see note 3 supra).

11 See ibid Sch 10 para 3(5) (as substituted: see note 3 supra).

## **UPDATE**

### **156-159 Exempt Supplies of Land**

The Treasury may by order (1) make provision for substituting the Value Added Tax Act 1994 Sch 10 for the purpose of rewriting Sch 10 with amendments and make provision amending ss 83, 84 (see PARAS 346, 347) in connection with any provision of Sch 10 as so rewritten; (2) make provision repealing Sch 9 Pt II Group 1 item 1(b) and note (7) (without prejudice to the powers contained in s 31(2) (see PARA 174); (3) make provision repealing the Finance Act 1995 s 26 and the Value Added Tax Act 1994 s 51A, Sch 10 paras 8(2), (3) (inserted by the 1995 Act s 26) (see PARAS 77, 34 respectively): Finance Act 2006 s 17(1)-(3). The powers so conferred include power to make any provision that might be made by a statute and to make incidental, consequential, supplemental or transitional provision or savings; and such consequential provision includes provision amending any statute or any instrument made under any statute: s 17(4), (5). Any such order must be made by statutory instrument laid before the House of Commons (which ceases to have effect unless approved by that House before the end of the period of 28 days beginning with the date on which it is made (in reckoning which period, no account is taken of any time during which Parliament is dissolved or prorogued, or during which the House of Commons is adjourned for more than four days): s 17(6), (8). If an order so ceases to have effect, that cessation does not affect anything previously done under the order or the making of a new order: s 17(7).

### **159 Revocability of election to waive exemption**

TEXT AND NOTES--An option to tax is not normally revocable: Value Added Tax Act 1994 Sch 10 para 19(3) (Sch 10 substituted by SI 2008/1146). However, if at any time ('the relevant time'), a person (E) makes a real estate election (except under Sch 10 para 21(11)), an option to tax exercised in relation to any building or part of any building before the relevant time by E or any relevant group member is treated for the purposes of Sch 10 Pt 1 (paras 1-34), but subject to Sch 10 para 26, as if it had been revoked from the relevant time if, at that time, neither E nor any relevant group member has a relevant interest in that land, or E or any relevant group member has a relevant interest in only some of it: Sch 10 para 22. The revocation has effect in relation to the whole of the land or to the part in which no such interest subsists: Sch 10 para 22(1)-(5), (13). An option to tax ('the original option') exercised in relation to any land (otherwise than by reference to any building or part of a building before the relevant time) by E or any relevant group member may, in circumstances specified in a public notice, be converted by E into separate options to tax if, at the relevant time, E or any relevant group member has a relevant interest in the land or any part thereof. The option is converted into separate options to tax different parcels of land comprised in that land or part; and those separate options are treated for the purposes of Sch 10 Pt 1 as if they had been exercised by E and as if they had effect from the time from which the original option had effect: Sch 10 para 22(6)-(8). However, those separate options are treated for the purposes of Sch 10 para 3(2) (see PARA 158) as if they had effect from the relevant time, and Sch 10 para 23 does not apply to those options: Sch 10 para 22(9). Conversion is by notification given by E to the Commissioners which must identify the separate options to tax treated as exercised by him, and the different parcels of land in relation to which those separate options are treated as having effect: Sch 10 para 22(10). Any reference to a relevant group member is to a body corporate which is a relevant group member at the relevant time; and any such reference, in relation to any relevant interest in any building or land (or any part thereof) is to any relevant group member, regardless of whether it has exercised an option to tax the building or land (or any part of it): Sch 10 para 22(11).

If a person does not have a relevant interest in the building or land throughout any continuous period of six years beginning at any time after the option has effect, an

option to tax exercised by that person in relation to any building or land is treated for the purposes of Sch 10 Pt 1 as revoked from the end of that period: Sch 10 para 24(1). 'Relevant interest in the building or land' means an interest in, right over or licence to occupy the building or land (or any part thereof): Sch 10 para 24(2).

Schedule 10 para 22(2), (3) does not apply to treat an option as revoked if (1)(a) the opter, or a relevant associate of the opter, disposes of a relevant interest in the building or land before the relevant time, and (b) at the relevant time, a supply for the purposes of the charge to VAT in respect of the disposal is yet to take place, or would be yet to take place if one or more conditions (such as the happening of an event or the doing of an act) were to be met; or (2)(a) the opter is a body corporate that was, at any time before the relevant time, treated under ss 43A-43D (see PARA 75) as a member of a group ('the group'), and (b) before the relevant time, a relevant associate of the opter in relation to the building or land ceases to be treated under those provisions as a member of the group without at the same time meeting specified conditions: Sch 10 para 26(1), (3), (4) (Sch 10 para 26 substituted by SI 2009/1966). In addition, the Value Added Tax Act 1994 Sch 10 para 24 does not apply to treat a lapsed option as revoked if either of the conditions in head (1) or (2) above is met, or (3) the opter is a body corporate and, at the relevant time, a relevant associate of the opter in relation to the building or land, is treated under ss 43A-43D as a member of the same group as the opter, and holds a relevant interest in the building or land or has held such an interest at any time within the previous six years: Sch 10 para 26(2), (6). The specified conditions are that (i) the person concerned ('A') has no relevant interest in the building or land; (ii) where A has disposed of such an interest, it is not the case that a supply for the purposes of the charge to VAT in respect of the disposal is yet to take place, or would be yet to take place if one or more conditions (such as the happening of an event or the doing of an act) were to be met; and (iii) A is not connected with any person who has a relevant interest in the building or land where that person is the opter or another relevant associate (see PARA 158) of the opter: Sch 10 para 26(5). 'Relevant interest in the building or land' means an interest in, right over or licence to occupy the building or land or any part of it; the 'relevant time', in relation to any option to tax, means the time from which the option would (but for this provision) have been treated as revoked as a result of Sch 10 para 22(2), (3) or 24; and 'opter' means the person who exercised the option to tax in question: Sch 10 para 26(7).

An option to tax any land exercised by any person ('the taxpayer') may be revoked with effect from the day on which it was exercised if (1) the time that has elapsed since the day on which the option had effect is less than six months; (2) the taxpayer has not used the land since the option had effect; (3) no tax has become chargeable as a result of the option; (4) there is no relevant transfer of a business as a going concern; and (5) notification of the revocation is given to the Commissioners in a form specified in a public notice and containing information so specified: Sch 10 para 23(1), (3). There is no relevant transfer of a business as a going concern if, since the option had effect, no grant in relation to the land has been made which is treated as neither a supply of goods nor a supply of services because the supply is a supply of the assets of a business by the taxpayer to a person to whom the business (or part thereof) is transferred as a going concern; or the supply is a supply of assets of a business by a person to the taxpayer to whom the business or part is so transferred: Sch 10 para 23(2). This is known as the 'cooling off' period, and if the person exercising the option intends to revoke it in accordance with these provisions (and, presumably, does so), the option is treated as if it had never been exercised: Sch 10 para 19(2). The Commissioners may publish a notice providing for the purposes of Sch 10 para 23 that a revocation is effective only if conditions specified in the notice are met in relation to the option or the taxpayer gets the Commissioners' permission on an application made

before the end of the six-month period mentioned in head (1) above. Such a notice may (a) provide that, where specified conditions are to be met, the taxpayer must certify that those conditions are met in relation to the option; (b) specify the form in which an application for permission must be made; (c) provide that such an application must contain a statement by the taxpayer certifying which (if any) of the specified conditions are met in relation to the option; (d) specify other information which such an application must contain; and (e) provide that the Commissioners may specify conditions subject to which their permission is given and, if any such condition is broken, the Commissioners may treat the revocation as if it had not been made: Sch 10 para 23(4), (5).

An option to tax any land exercised by any person ('the taxpayer') may be revoked if the time that has elapsed since the day on which it had effect is more than 20 years and either (1) at the time when it is to be revoked the conditions specified in a public notice are met in relation to the option; or (2) the taxpayer gets the prior permission of the Commissioners. If head (1) applies, the revocation has effect only if notification of the revocation is given to the Commissioners; and such notification must be made in the specified form, state the day from which the option is to be revoked (which may not be before the day on which the notification is given), and contain a statement by the taxpayer certifying that, on that day, the conditions so specified are met and such other information as may be specified in a public notice: Sch 10 para 25(1)-(3). If revocation was made on the basis that the specified conditions were met, and it is subsequently discovered that this was not the case, the Commissioners may nevertheless treat the revocation as validly made. An application for permission under head (2) above must be made in a form specified in a public notice; and contain a statement by the taxpayer certifying which (if any) of the specified conditions in head (1) above are met in relation to the option, and other information specified in a public notice. Revocation under head (2) above takes effect on the day permission is given or such earlier or later day or time as may be specified in that permission: Sch 10 para 25(5), (6) (Sch 10 para 25(6) amended by SI 2009/1966). The Commissioners may so specify an earlier day or time only if the taxpayer has purported to give notification of revocation, the conditions specified in the public notice are not, in the event, met in relation to the option, and the Commissioners consider that the grounds on which those conditions are not so met are insignificant; and the day or time may be so specified by reference to the happening of an event or the meeting of a condition: Value Added Tax Act 1994 Sch 10 para 25(7), (8) (Sch 10 para 25(8) amended by SI 2009/1966). The Commissioners may specify conditions to which their permission is subject, and on any breach of those conditions the Commissioners may treat the revocation as if it had not been made: Value Added Tax Act 1994 Sch 10 para 25(9). For further circumstances where revocation can be treated as taking place, see PARA 157.

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### **(iii) Other Exempt Supplies**

#### **160. Insurance.**

Supplies of the following descriptions are exempt supplies<sup>1</sup>:

- 450 (1) insurance transactions and reinsurance transactions<sup>2</sup>;
- 451 (2) the provision by an insurance broker or an insurance agent of any of the services of an insurance intermediary in a case in which those services: (a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction; and (b) are provided by that broker or agent in the course of his acting in an intermediary capacity<sup>3</sup>.

An insurance broker or insurance agent is acting 'in an intermediary capacity' wherever he is acting as an intermediary, or one of the intermediaries, between a person who provides insurance or reinsurance, and a person who is or may be seeking insurance or reinsurance or is an insured person<sup>4</sup>.

The services of an insurance intermediary are: (i) the bringing together, with a view to the insurance or reinsurance of risks, of persons who are or may be seeking insurance or reinsurance and persons who provide insurance or reinsurance; (ii) the carrying out of work preparatory to the conclusion of contracts of insurance or reinsurance; (iii) the provision of assistance in the administration and performance of such contracts, including the handling of claims; and (iv) the collection of premiums<sup>5</sup>.

Where: (A) a person ('the supplier') makes a supply of goods or services to another ('the customer'); (B) the supply is a taxable supply and not a zero-rated supply; (C) a transaction under which insurance is to be or may be arranged for the customer is entered into in connection with the supply of the goods or services; (D) a supply of services which are related (whether or not a contract of insurance is finally concluded) to the provision of insurance in pursuance of that transaction is made by the person by whom the supply of the goods or services is made or a person who is connected<sup>6</sup>; and (E) the related services do not consist in the handling of claims under the contract for that insurance, then those related services do not fall within head (2) above unless a document in specified form containing statements which must have been disclosed to the customer, has been completed ('the relevant requirements')<sup>7</sup>.

<sup>1</sup> See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 2 (as substituted and amended).

<sup>2</sup> Ibid Sch 9 Pt II Group 2 item 1 (Sch 9 Pt II Group 2 substituted by the Finance Act 1997 s 38; Value Added Tax Act 1994 Sch 9 Pt II Group 2 item 1 substituted by the Value Added Tax (Insurance) Order 2004, SI 2004/3083, arts 2, 3).

<sup>3</sup> Value Added Tax Act 1994 Sch 9 Pt II Group 2 item 4 (as substituted (see note 2 supra); and amended by the Financial Services and Markets (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 347(1), (4); and the Value Added Tax (Insurance) Order 2004, SI 2004/3083, arts 2, 4)). See *Century Life plc v Customs and Excise Comrs* [2001] STC 38, CA (provision of compliance services by a third party within exemption); *C & V (Advice Line) Services Ltd v Customs and Excise Comrs* (2001) VAT Decision 17310, [2002] STI 68; *Teletech United Kingdom Ltd v Customs and Excise Comrs* [2003] V & DR 179. A supply is not an exempt supply for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13B(a) where there is no contractual relationship between the service provider and the insured: Case C-240/99 *Re*

*Försäkringsaktiebolaget Skandia (publ)* [2001] All ER (EC) 822, [2001] 1 WLR 1617, EC]. See also *Winterthur Life UK Ltd v Customs and Excise Comrs* (2002) VAT Decision 17572, [2002] STI 1034 (management services provided by group company in respect of self-administered element of personal pension scheme contract with insurance company; as contract as a whole was a policy of insurance, not dissectable into constituent elements; self-administered element did not nullify insurance element; management services, therefore, within head (2) in the text); Case C-472/03 *Staatssecretaris van Financiën v Arthur Andersen & Co Accountants* [2005] STC 508, ECJ ('back office' activities consisting in rendering services, for payment, to an insurance company do not constitute the performance of services relating to insurance transactions carried out by an insurance broker or an insurance agent within the meaning of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13B(a)). For the meaning of 'exempt supply' see PARA 155 ante. A reverse charge may arise under the Value Added Tax Act 1994 s 8 (as amended) (see PARA 33 ante), eg where insurance services (including reinsurance, but not including the provision of safe deposit facilities) are supplied by a person belonging in a country other than the United Kingdom and are received by a person who belongs in the United Kingdom for the purposes of any business carried on by him, unless the services fall within the exemptions provided in Sch 9 (as amended): see further PARA 33 ante.

4 Ibid Sch 9 Pt II Group 2 note (2) (as substituted (see note 2 supra); and amended by the Value Added Tax (Insurance) Order 2004, SI 2004/3083, art 1). See *SOC Private Capital Ltd v Customs and Excise Comrs* [2002] V & DR 179 (services of Lloyd's members' agent exempt from value added tax). A telephone sales company which contracted with a life insurance company to sell that company's policies by cold-calling was supplying the services of an insurance agent for these purposes: *Teletech UK Ltd v Customs and Excise Comrs* [2003] BVC 2514.

5 See the Value Added Tax Act 1994 Sch 9 Pt II Group 2 note (1) (as substituted: see note 2 supra). However, head (2) in the text does not include: (1) the supply of any market research, product design, advertising, promotional or similar services; (2) the collection, collation and provision of information for use in connection with such activities, valuation or inspection services; or (3) the services of loss adjusters, average adjusters, motor assessors, surveyors or other experts, except where: (a) the services consist in the handling of a claim under a contract of insurance or reinsurance; (b) the person handling the claim is authorised when doing so to act on behalf of the insurer or reinsurer; and (c) that authority includes written authority to determine whether to accept or reject the claim and to settle any amount to be paid thereon: Sch 9 Pt II Group 2 notes (7-9) (as so substituted). Services supplied in pursuance of a contract of insurance or reinsurance or of any arrangements made in connection with such a contract and which are so supplied either instead of the payment of the whole or part of any indemnity for which the contract provides or for the purpose, in any other manner, of satisfying any claim under that contract, whether in whole or in part, are also excluded: Sch 9 Group 2 note (10) (as so substituted). Head (2) in the text does not extend to the actual meeting of the claims dealt with by the intermediary: *WHA Ltd v Customs and Excise Comrs* [2004] EWCA Civ 559, [2004] STC 1081. In *Equitable Life Assurance Society v Customs and Excise Comrs* (2003) VAT Decision 18072, [2003] STI 1404, an insurer with a claims handling department experienced in dealing with health claims provided the services of that department to another insurer seeking to establish a local department, and also provided training for the second insurer's staff. The tribunal had no difficulty in separating the claims handling services (exempt under head (iii) in the text) from the training element (standard-rated). Work preparatory to the conclusion of contracts of insurance does not include the training of sales staff: *Agentevent Ltd v Customs and Excise Comrs* (2002) VAT Decision 17764, [2003] STI 307. The separate fee charged by an insurance broker for arranging the valuation of a car for the purposes of a policy of insurance was exempt as an integral part of the provision of that policy: *Lancaster Insurance Services Ltd v Customs and Excise Comrs* (1991) VAT Decision 5455, [1991] STI 76.

Where a consumer hired a television set and, at the same time and by the same agreement, applied to enter into an insurance policy with an insurance company, and each appellant was the holding company of a group of companies of which one hired television sets and another was an insurance company, there were separate supplies of the hire of the television (standard-rated) and of insurance (exempt), rather than a single composite supply of a television: *Thorn EMI plc and Granada plc v Customs and Excise Comrs* [1993] VATTR 94. But a company which provided card registration services and in addition engaged an insurance broker to provide a policy of insurance indemnifying the cardholder against fraudulent misuse of his credit cards for a fee of £16 was held simply to be making a standard-rated supply of convenience, to which the provision of insurance was merely incidental: *Card Protection Plan Ltd v Customs and Excise Comrs* [1994] 1 CMLR 756, [1994] STC 199, CA. The handling for a fee of a claim on behalf of a committee set up to negotiate policies on behalf of a number of insurance companies is a supply of services for a consideration and is not exempt as part of the provision of insurance: *National Transit Insurance Co Ltd v Customs and Excise Comrs* [1974] VATTR 158. As to composite and separate supplies see PARA 31 ante.

6 For the meaning of 'connected person' see the Income and Corporation Taxes Act 1988 s 839 (as amended); and INCOME TAXATION vol 23(2) (Reissue) PARA 1258.

7 Value Added Tax Act 1994 Sch 9 Pt II Group 2 notes (3)-(6) (as substituted: see note 2 supra). The requirement in Sch 9 Pt II Group 2 note (5)(b) (as substituted) that the supplier must set out in a document every amount that the customer is required to pay in connection with the insurance transaction is satisfied if the customer can calculate the amount that he is required to pay, and no particular form is necessary: *CR Smith Glaziers (Dunfermline) Ltd v Customs and Excise Comrs* [2003] UKHL 7, [2003] 1 All ER 801.



**UPDATE****160 Insurance**

NOTES 1-3--See *Morganash Ltd v HMRC Comrs* (2006) VAT Decision 19777, [2006] STI 2567 (company instructed by life assurance companies to interview by telephone those who had made proposals for life cover and which passed on information obtained, without further input to insurance process, an 'insurance agent' in United Kingdom, but not European, law for this purpose). A provider of exempt insurance services cannot recover input tax attributable to those services: *WHA Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 728, [2007] STC 1695.

NOTE 2--See Case C-13/06 *EC Commission v Hellenic Republic* [2007] STC 194, ECJ (services of roadside assistance provided in return for the payment of a fixed annual subscription fell within the definition of 'insurance transactions'); and Case C-242/08 *Swiss Re Germany Holding GmbH v Finanzamt Munchen fur Körperschaften* [2010] STC 189, ECJ (transfer of life reinsurance contracts did not constitute insurance transaction).

NOTE 3--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2). The use of a sub-agent does not prevent insurance services from being exempt from value added tax: Case C-124/07 *JCM Beheer BV v Staatssecretaris van Financiën* [2008] STC 3360, ECJ. The act of introduction is sufficient to render a trader an insurance agent or insurance broker or intermediary: *InsuranceWide.com Services Ltd v Revenue and Customs Comrs* [2010] EWCA Civ 422, [2010] All ER (D) 145 (Apr).

NOTE 5--See Case C-8/01 *Assurandør-Societetet, acting on behalf of Taksatorringen v Skatteministeriet* [2006] STC 1842, ECJ.

NOTE 7--See also *Ford Motor Co Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 1370, [2008] STC 1016 (car insurance).

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## **161. Postal services.**

The conveyance of postal packets<sup>1</sup> by the Post Office company<sup>2</sup> and the supply by the Post Office company of any services in connection with the conveyance of postal packets<sup>3</sup> are exempt supplies<sup>4</sup>. Where a retailer sells goods by mail order and adds postage as a separate item on the bill, the separate charge is nevertheless, as a general rule, subject to value added tax at the standard rate because the charge is for the service of delivering goods through the Post Office and not a disbursement<sup>5</sup>. In certain cases direct mailing services may be treated as an exempt disbursement<sup>6</sup>. International freight transport and ancillary transport services may be zero-rated or outside the scope of VAT in certain circumstances, such as where goods are transported to or from a place outside the European Community<sup>7</sup>.

1 'Postal packet' means a letter, parcel, packet or other article transmissible by post: Postal Services Act 2000 s 125(1) (applied by the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 3 note (1)).

2 Value Added Tax Act 1994 Sch 9 Pt II Group 3 item 1 (Sch 9 Pt II Group 3 items 1, 2 amended by the Postal Services Act 2000 s 127(4), Sch 8 Pt II para 22(a)). Consignia plc has been nominated as the Post Office company for the purposes of the Postal Services Act 2000 by the Post Office Company (Nomination and Appointed Day) Order 2001, SI 2001/8, art 3.

3 Value Added Tax Act 1994 Sch 9 Pt II Group 3 item 2 (as amended: see note 2 supra). Schedule 9 Pt II Group 3 item 2 (as amended) does not include the letting on hire of goods: Sch 9 Pt II Group 3 note (2). The sale of unused United Kingdom or Isle of Man postage stamps which are valid for postage (ie stamps denominated in decimal currency or in multiples of £1, being of the present monarch's reign) are not subject to VAT if sold at or below face value; but VAT is charged on the amount by which the price paid exceeds the face value of the stamp: see Customs and Excise Public Notice 701/8 *Postage Stamps and Philatelic Supplies* (November 2003). Stamps over 100 years old may fall within the margin scheme for antique dealers: see PARA 202 post.

4 Value Added Tax Act 1994 Sch 9 Pt II Group 3 (as amended). For the meaning of 'exempt supply' see PARA 155 ante.

5 *BSN (Import and Export) Ltd v Customs and Excise Comrs* [1980] VATTR 177. See *Customs and Excise Comrs v Plantiflor Ltd* [2002] UKHL 33, [2002] 1 WLR 2287 (payment to taxpayer by customer for delivery by Post Office part of receipts of taxpayer's turnover).

6 See Customs and Excise Public Notice 700/24 *Postage and Delivery Charges* (April 2003).

7 See PARA 59 ante.

## **UPDATE**

### **161 Postal services**

NOTE 4--The exemption applies to the supply by the public postal services acting as such, namely, in their capacity as an operator who undertakes to provide all or part of the universal postal service in a member state, of services other than passenger transport and telecommunications services, and the supply of goods incidental to those services; it does not apply to incidental supplies of services or of goods for which the terms have been individually negotiated. Case C-357/07 *R (on the application of TNT Post UK Ltd) v Revenue and Customs Comrs* [2009] STC 1438, ECJ.

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## 162. Betting, gaming and lotteries.

The provision of any facilities<sup>1</sup> for the placing of bets or the playing of any game of chance<sup>2</sup> is an exempt supply<sup>3</sup>. This exemption does not, however, extend to or include:

- 452 (1) admission to any premises<sup>4</sup>;
- 453 (2) the granting of a right to take part in a game in respect of which a charge may be made by virtue of certain regulations under the Gaming Act 1968<sup>5</sup>;
- 454 (3) the provision by a club of such facilities to its members as are available to them on payment of their subscription but without further charge; or
- 455 (4) the provision of a gaming machine<sup>6</sup>.

The granting of a right to take part in a lottery is also an exempt supply<sup>7</sup>.

1 Although the meaning of 'the provision of any facilities for the placing of bets or the playing of a game of chance', is inherently unclear, when construed in the light of the wording and purpose of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(f) it excludes gambling from the scope of VAT. It does not, however, exclude from charge the physical supply of gambling equipment to a casino: *Customs and Excise Comrs v Annabel's Casino* [1995] STC 225. See Case C-283/95 *Karlheinz Fischer v Finanzamt Donaueschingen* [1998] All ER (EC) 567, ECJ (the unlawful operation of games of chance constitutes a supply of services to which VAT should be applied). See also *United Utilities plc v Customs and Excise Comrs* [2004] EWCA Civ 245, [2004] STC 727, CA (provision of facilities for receiving telephone bets and communicating their acceptance to customer, all vetting and financial transactions being carried out elsewhere by different persons, not the provision of facilities for placing of bets but operation of call centre).

2 'Game of chance' has the meaning given in the Gaming Act 1968 (see s 52 (as amended)); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 310: Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 4 note (2). See Case C-283/95 *Karlheinz Fischer v Finanzamt Donaueschingen* [1998] All ER (EC) 567, ECJ; and note 1 supra.

3 Value Added Tax Act 1994 Sch 9 Pt II Group 4 item 1. For the meaning of 'exempt supply' see PARA 155 ante.

4 Where a charge is made on entry to a club on nights when bingo is to be played, it must be asked whether payment is made in order to play the game or in order to gain admission to the premises: *Tynnewydd Labour Working Men's Club and Institute v Customs and Excise Comrs* [1979] STC 570.

5 ie regulations made by virtue of the Gaming Act 1968 s 14.

6 Value Added Tax Act 1994 Sch 9 Pt II Group 4 item 1 note (1). 'Gaming machine' means a machine in respect of which the following conditions are satisfied: (1) it is constructed or adapted for playing a game of chance by means thereof; and (2) a player pays to play the machine (except where he has an opportunity to play payment-free as the result of having previously played successfully) either by inserting a coin, token or other thing into the machine or in some other way; and (3) the element of chance in the game is provided by means of the machine: Value Added Tax Act 1994 Sch 9 Pt II Group 4 item 1 note (3) (amended by the Finance Act 2003 s 10(4)). As to the valuation of the consideration provided in the case of a supply of services by way of a gaming machine see PARA 96 ante. The imposition of VAT on the proceeds from gaming machines is not incompatible with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(f): *R v Ryan* [1994] 2 CMLR 399, [1994] STC 446; *Feehan v Customs and Excise Comrs* [1995] 1 CMLR 193, [1995] STC 75; see also Case C-38/93 *HJ Glawe Spiel-und Unterhaltungsgeräte Aufstellungsgesellschaft GmbH & Co v Finanzamt Hamburg-Barmbeck-Uhlenhorst* [1994] ECR I-1679, [1994] STC 543, ECJ.

7 Value Added Tax Act 1994 Sch 9 Pt II Group 4 item 2.

## UPDATE

## 162 Betting, gaming and lotteries

NOTES 1, 6--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

TEXT AND NOTES 1-3--The exemption now applies to provision of any facilities for the placing of bets or the playing of any game of chance for a prize: Value Added Tax Act 1994 Sch 9 Pt II Group 4 item 1 (amended by SI 2006/2685). 'Game of chance' is now defined as including (1) a game that involves both an element of chance and an element of skill; (2) a game that involves an element of chance that can be eliminated by superlative skill; and (3) a game that is presented as involving an element of chance; but as excluding a sport: 1994 Act Sch 9 Pt II Group 4 note (2) (Sch 9 Pt II Group 4 notes (2)-(4) substituted, notes (5)-(8) repealed, by SI 2006/2685). A person participates in a game of chance if he participates in such a game, whether or not there are other participants in the game, and whether or not a computer generates images or data taken to represent the actions of other participants in the game: Sch 9 Pt II Group 4 note (3) (as so substituted). See *Rank Group Ltd v Revenue and Customs Comrs* [2008] 3 CMLR 872 (before amendment, Sch 9 Pt II Group 4 note (3) offended EC law principle of fiscal neutrality owing to exemption of comparable machines under Gaming Act 1968 s 21) (affirmed: [2009] EWHC (Ch) 1244, [2009] STC 2304). 'Prize' does not include the opportunity to play the game again: 1994 Act Sch 9 Pt II Group 4 note (4) (as so substituted).

NOTE 1--See also Case C-89/05 *United Utilities plc v Comrs of Customs and Excise* [2006] STC 1423, ECJ.

TEXT AND NOTE 5--Now, head (2) the granting of a right to play a game of chance for a prize unless the playing of the game constitutes (a) remote gaming for the purposes of remote gaming duty; (b) prize gaming under a permit or at any qualifying centre or fair; (c) non-commercial gaming; (d) equal chance gaming at a qualifying club or institute; or (e) gaming for small prizes in a bingo hall: 1994 Act Sch 9 Pt II Group 4 notes (1), (5) (note (1) amended, notes (5)-(11) added by SI 2007/2163). 'Prize gaming under a permit or at any qualifying centre or fair' means the playing of a game where the provision of facilities for its playing falls within the Gambling Act 2005 s 289 (prize gaming permits), 290 (gaming and entertainment centres) or 292 (fairs) (see LICENSING AND GAMBLING vol 68 (2008) PARA 673); 1994 Act Sch 9 Pt II Group 4 notes (6), (11) (as so added). 'Non-commercial gaming' means the playing of a game in respect of which the conditions in the Gambling Act 2005 s 299 (non-commercial prize gaming) or 300 (equal chance gaming) (see LICENSING AND GAMBLING vol 68 (2008) PARA 652) are complied with: 1994 Act Sch 9 Group 4 notes (7), (11) (as so added). 'Equal chance gaming at a qualifying club or institute' means the playing of a game whereby the provision of facilities for its playing falls within the Gambling Act 2005 s 269 (equal chance gaming by members' or commercial clubs and miners' welfare institutes) (see LICENSING AND GAMBLING vol 68 (2008) PARA 665); 1994 Act Sch 9 Pt II Group 4 notes (8), (11) (as so added). 'Gaming for small prizes in a bingo hall' means the playing of a game where the provision of facilities for its playing falls within the Gambling Act 2005 s 291 (bingo halls) or the playing at any licensed premises of bingo in respect of which (i) the amount charged for any one chance to win one or more prizes in a particular game does not exceed 50 pence; (ii) the aggregate amount charged for participating in a particular game does not exceed £500; (iii) no money prize for which a game is played exceeds £50; and (iv) the aggregate amount or value of the prizes for which a game is played does not exceed £500: 1994 Act Sch 9 Pt II Group 4 notes (9)-(11) (as so added). 'Licensed premises' means premises in respect of which a bingo premises licence (within the meaning of the Gambling Act 2005 Pt 8 (ss 150-213) (see LICENSING

AND GAMBLING vol 68 (2008) PARA 744) has effect: 1994 Act Sch 9 Pt II Group 4 notes (9), (11) (as so added).

NOTE 6--'Gaming machine' now has the meaning given in the 1994 Act s 23: see PARA 106.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(iii) Other Exempt Supplies/163. Finance.

### 163. Finance.

Supplies of the following descriptions are exempt supplies<sup>1</sup>:

- 456 (1) the issue, transfer or receipt of, or any dealing with, money<sup>2</sup>, any security for money or any note or order for the payment of money<sup>3</sup>;
- 457 (2) the making of any advance or the granting of any credit<sup>4</sup>;
- 458 (3) the management of credit by the person granting it<sup>5</sup>;
- 459 (4) the provision of the facility of instalment credit finance in a hire-purchase, conditional sale or credit sale agreement for which facility a separate charge is made and disclosed to the recipient of the supply of goods<sup>6</sup>;
- 460 (5) the provision of administrative arrangements and documentation and the transfer of title to goods in connection with the supply described in head (3) above if the total consideration therefor is specified in the agreement and does not exceed £10<sup>7</sup>;
- 461 (6) the provision of intermediary services in relation to any transaction comprised in heads (1)-(4) above or in head (8) below<sup>8</sup>;
- 462 (7) the underwriting of an issue within head (1) above or any transaction within head (8) below<sup>9</sup>;
- 463 (8) the issue, transfer or receipt of, or any dealing with, certain securities or secondary securities which are:
  - 5
  10. (a) shares, stocks, bonds, notes (other than promissory notes), debentures, debenture stock or shares in an oil royalty<sup>10</sup>;
  11. (b) any document<sup>11</sup> relating to money, in any currency, which has been deposited with the issuer or some other person, being a document which recognises an obligation to pay a stated amount to bearer or to order, with or without interest, and being a document by the delivery of which, with or without indorsement, the right to receive that stated amount is transferable<sup>12</sup>;
  12. (c) any bill, note or other obligation of the Treasury or of a government in any part of the world, being a document by the delivery of which, with or without indorsement, title is transferable, and not being an obligation which is or has been legal tender in any part of the world<sup>13</sup>;
  13. (d) any letter of allotment or rights, any warrant conferring an option to acquire a security included in this head or in heads (a) to (c) above or head (e) below, any renounceable or scrip certificates, rights coupons, coupons representing dividends or interest on such a security, bonds mandates or other documents conferring or containing evidence of title to or rights in respect of such a security<sup>14</sup>; or
  14. (e) units or other documents conferring rights under any trust established for the purpose, or having the effect of providing, for persons having funds available for investment, facilities for the participation by them as beneficiaries under the trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever<sup>15</sup>;
- 6
- 464 (9) the operation of any current, deposit or savings account<sup>16</sup>;
- 465 (10) the management of an authorised unit trust scheme or of a trust-based scheme<sup>17</sup>; and

466 (11) the management of the scheme property of an open-ended investment company<sup>18</sup>.

These provisions include within their scope any supply by a person carrying on a credit card, charge card or similar payment card operation made in connection with that operation to a person who accepts the card used in the operation when presented to him in payment for goods or services<sup>19</sup>. Accordingly, where a credit card company pays a discounted amount to a retailer consequent upon the cardholder purchasing goods with the assistance of the card, the credit card company makes a supply of finance<sup>20</sup> to the retailer<sup>21</sup>. Whether the issuer of 'fuel cards' supplies finance or petrol depends on a combination of the precise terms of the contract between the parties and of the determination of when property in the fuel passed to the cardholder<sup>22</sup>.

1 See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 5 (as amended); and heads (1)-(11) in the text. Schedule 9 Pt II Group 5 (as amended) does not include the supply of a coin or a banknote as a collector's piece or as an investment article: Sch 9 Pt II Group 5 note (2). For the meaning of 'exempt supply' see PARA 155 ante.

2 'Dealing with money' does not include the service of transporting cash between bank branches (*Williams & Glyn's Bank v Customs and Excise Comrs* [1974] VATTR 262) or the restocking of cash machines (*Nationwide Anglia Building Society v Customs and Excise Comrs* (1994) VAT Decision 11826, [1994] STI 607); but cf a credit-checking service provided by a security firm, involving the collecting, opening and counting of sealed cash containers from a bank's customers (*Barclays Bank plc v Customs and Excise Comrs* [1988] 2 CMLR 263, [1988] VATTR 23). The following constitute a transfer of money: (1) the credit and debit entries in a payee and payer's accounts respectively, following a credit card transaction (*Customs and Excise Comrs v FDR Ltd* [2000] STC 672, CA); the reciprocity fee paid by banks to each other when one of their customer's uses the other's automated teller machines (*Royal Bank of Scotland Group plc v Customs and Excise Comrs* [2002] STC 575, IH). As to the meaning of 'money' see PARA 33 note 7 ante. Shopping vouchers may constitute 'securities' for this purpose: *Kingfisher plc v Customs and Excise Comrs* [2000] STC 992.

3 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 1. Transactions falling within Sch 9 Pt II Group 5 item 6 (see head (8) in the text) are excluded from Sch 9 Pt II Group 5 item 1: Sch 9 Pt II Group 5 note (1). Head (1) in the text does not include a supply of services which is preparatory to the carrying out of a transaction falling within head (1): Sch 9 Pt II Group 5 note (1A) (added by the Value Added Tax (Finance) Order 1999, SI 1999/594, arts 2, 5).

4 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 2. This provision includes the supply of credit by a person, in connection with a supply of goods or services by him, for which a separate charge is made and disclosed to the recipient of the supply of goods or services: Sch 9 Pt II Group 5 note (3). As to the requirement of a stated specified separate charge see the text and note 6 infra. If the charge for payment by credit card is made by the supplier of the goods or services being bought, Her Majesty's Revenue and Customs view this as further payment for the purchase. Accordingly, VAT is chargeable at the same rate as on the goods or services in question. However, if the charge is made by an agent acting for the supplier, Her Majesty's Revenue and Customs consider that the charge is for a separate supply of exempt services, ie accepting payment in the form of a credit card: see Customs and Excise Business Brief 17/98 [1998] STI 1194. See *Debt Management Associates Ltd v Customs and Excise Comrs* (2002) VAT Decision 17880, [2003] STI 609 (negotiation on behalf of clients with creditors and distribution of clients' payments to creditors following agreement exempt) and *Bookit Ltd v Revenue and Customs Comrs* [2005] EWHC 1689 (Ch), [2005] STC 1451 (card-handling services connected with the reservation and purchase of cinema tickets not exempt as not 'negotiation'). For the meaning of 'supply' see PARA 27 ante.

5 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 2A (added by the Value Added Tax (Finance) (No 2) Order 2003, SI 2003/1569, art 2(a)).

6 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 3. A separate charge is made (so that the supply is exempt), even if not expressly stated, if the charge can be determined by a simple calculation from the information made available to the customer: *Freight Transport Leasing Ltd v Customs and Excise Comrs* [1991] VATTR 142. For the scope of head (4) in the text see *Wagon Finance Ltd v Customs and Excise Comrs* (1999) VAT Decision 16288, [2000] STI 75, distinguishing *General Motors Acceptance Corp'n (UK) plc v Customs and Excise Comrs* [1999] V & DR 456.

7 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 4.

8 Ibid Sch 9 Pt II Group 5 item 5 (substituted by the Value Added Tax (Finance) Order 1999, SI 1999/594, arts 2, 3). 'Intermediary services' consist of bringing together, with a view to the provision of financial services, persons who are or may be seeking to receive financial services, and persons who provide such services, together with (in the case of financial services falling within heads (1), (2), (4) or (5) in the text, the performance of work preparatory to the conclusion of contracts for the provision of those services, but do not include the supply of any market research, product design, advertising, promotional or similar services to the collection, collation and provision of information in connection with such activities: Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (5) (substituted by the Value Added Tax (Finance) Order 1999, SI 1999/594, arts 2, 7). For this purpose, a person is 'acting in an intermediary capacity' wherever he is acting as an intermediary, or one of the intermediaries, between a person who provides financial services and a person who is or may be seeking to receive such services: Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (5A) (notes (5A), (5B) added by the Value Added Tax (Finance) Order 1999, SI 1999/594, arts 2, 7). 'Financial services' in this context means the carrying out of any transaction falling within head (1), (2), (4), (5) or (8) in the text: Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (5B) (as so added). On the meaning of 'intermediary services' see *Customs and Excise Comrs v BAA plc*; *Institute of Directors v Customs and Excise Comrs* [2002] EWCA Civ 1814, [2003] 1 CMLR 703 (a case involving affinity cards) and *Bookit Ltd v Revenue and Customs Comrs* [2005] EWHC 1689 (Ch), [2005] STC 1451 (card-handling services connected with the reservation and purchase of cinema tickets). For the revised policy following the former decision see Customs and Excise Business Brief 18/03 [2003] STI 1678 at 1680.

In *Rugby Football Union v Customs and Excise Comrs* VAT Decision 18075, [2003] STI 1426, non-interest bearing debentures with a 75-year life carried a parcel of rights, including the right for ten years to purchase a ticket to matches at a rugby football stadium, the reconstruction of which the debentures were issued to finance. It was held that there was a single exempt supply. The rights were not a surrogatum for the interest foregone and any opportunity cost was not the value of such non-monetary consideration as there might be.

Where a solicitor's firm retains the interest on its client general deposit account, that retention is consideration for an exempt supply: *Hedges and Mercer v Customs and Excise Comrs* [1976] VATTR 146. Neither the service provided by an investigator in checking the status of debts for a bank prior to its making a loan against the debts (*Minster Associates v Customs and Excise Comrs* (1990) VAT Decision 4580, [1990] STI 353) nor the provision of facilities, against a fee, by an estate agent to financial consultants to enable them to interview possible clients (*Wright Manley Ltd v Customs and Excise Comrs* (1993) VAT Decision 10295, [1993] STI 980) is exempt under the Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 5 (as substituted). As to what constitutes the making of arrangements for the granting of credit see *Barclays Bank plc v Customs and Excise Comrs* [1991] VATTR 466; *Countrywide Insurance Marketing Ltd v Customs and Excise Comrs* [1994] 3 CMLR 125, [1993] VATTR 277; and *Curtis Edington & Say Ltd v Customs and Excise Comrs* (1994) VAT Decision 11699, [1994] STI 451 (all of which were concerned with the making of arrangements for the provision of insurance); and PARA 160 note 4 ante. Whilst there has to be a clear nexus between the arrangements and the granting of credit, the arrangements do not need to lead to a specific exempt transaction: *Customs and Excise Comrs v Civil Service Motoring Association* [1998] STC 111, CA.

9 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 5A (added by the Value Added Tax (Finance) Order 1999, SI 1999/594, arts 2, 3).

10 See the Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 6(a); and note 15 infra.

11 For the meaning of 'document' see PARA 17 note 9 ante.

12 See the Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 6(b); and note 15 infra.

13 See ibid Sch 9 Pt II Group 5 item 6(c); and note 15 infra.

14 See ibid Sch 9 Pt II Group 5 item 6(d); and note 15 infra.

15 See ibid Sch 9 Pt II Group 5 item 6(e). See *Ivory & Sime Trustlink Ltd v Customs and Excise Comrs* [1998] STC 597 (exemption of initial charges for self-select and managed personal equity plans); *Continuum (Europe) Ltd v Customs and Excise Comrs* [1998] V & DR 70 (services preliminary to issue of securities essential part of, not merely input into, transaction within head (8) in the text); *Trinity Mirror plc v Customs and Excise Comrs* [2001] EWCA Civ 65, [2001] STC 192, CA (taxpayer not entitled to deduct input tax incurred in respect of professional fees in connection with issue of shares, except in so far as they were attributable to non-European Union residents); *Walter Hall Group plc v Customs and Excise Comrs* [2003] V & DR 257 (issue of shares to United Kingdom nominee on behalf of non-European Union beneficial owner not a supply to a person who belongs outside the member states). The supply of financial information on securities is not an exempt supply for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(d)(5): Case C-235/00 *CSC Financial Services Ltd v Customs and Excise Comrs* [2002] All ER (EC) 289, ECJ.

16 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 8. A bank's supply of special cheques advertising customers' businesses for a fee is not exempt: *National Westminster Bank plc v Customs and Excise Comrs* [2002] V & DR 414.



17 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 9 (amended by the Value Added Tax (No 2) Order 2003, SI 2003/1569, art 2(b)). 'Authorised unit trust scheme' has the same meaning as in the Financial Services and Markets Act 2000 s 237(3) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603; and 'trust based scheme' means a scheme the purpose or effect of which is to enable persons taking part in the scheme, by becoming beneficiaries under a trust, to participate in or receive profits of income arising from the acquisition, holding, management or disposal of property of a kind described in s 239(3)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 606) or sums paid out of such profits as income: see the Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (6) (substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 348(1), (2)).

18 Value Added Tax Act 1994 Sch 9 Pt II Group 5 item 10 (added by the Value Added Tax (Finance) Order 1997, SI 1997/510, arts 1, 2; and substituted by the Value Added Tax (Finance) (No 2) Order 2003, SI 2003/1569, art 2(c)). An open-ended investment company's scheme property is the property subject to the collective investment scheme constituted by that company: Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (8) (amended by the Value Added Tax (Finance) (No 2) Order 2003, SI 2003/1569, art 2(h)). 'Collective investment scheme' has the meaning given in the Financial Services and Markets Act 2000 s 235 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603); and 'open-ended investment company' has the meaning given in s 236 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603): Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (10) (substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 348(1), (3)). See *Abbey National plc v Customs and Excise Comrs* (2001) VAT Decision 17506, [2002] STI 842; *Customs and Excise Comrs v Electronic Data Systems Ltd* [2003] EWCA Civ 492, [2003] STC 688 (application of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(d) (3) to outsourcing of supply of services for arrangement for loans).

19 Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (4).

20 Ie within ibid Sch 9 Pt II Group 5 item 1: see head (1) in the text.

21 *Customs and Excise Comrs v Diners Club Ltd* [1989] 2 All ER 385, [1989] STC 407, CA.

22 See *Harpur Group Ltd v Customs and Excise Comrs* (1994) VAT Decision 12001, [1994] STI 716.

## UPDATE

### 163 Finance

NOTES--See Case C-169/04 *Abbey National plc v Customs and Excise Comrs* [2006] 2 CMLR 1587, ECJ; Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust plc v Revenue and Customs Comrs* [2008] STC 1180, ECJ; and Case C-29/08 *Skatteverket v AB SKF* [2010] STC 419, ECJ.

NOTE 3--Services would have to have the effect of transferring funds and changing the legal and financial situation if their supply were to fall within the exemption concerning payments or transfers: *Bookit Ltd v Revenue and Customs Comrs* [2006] EWCA Civ 550, [2006] STC 1367 (transmission of credit or debit card and security information to bank had the effect of transferring funds and entailed changes in the legal and financial situation); *Revenue and Customs Comrs v Axa UK plc* [2008] EWHC 1137 (Ch), [2008] STC 2091. See also HMRC Business Brief 18/2006.

NOTES 15, 18--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

TEXT AND NOTES 17, 18--Replaced. Now, heads (10) the management of (a) an authorised open-ended investment company; (b) an authorised unit trust scheme; (c) a Gibraltar collective investment scheme that is not an umbrella scheme; (d) a sub-fund of any other Gibraltar collective investment scheme; (e) an individually recognised overseas scheme that is not an umbrella scheme; (f) a sub-fund of any other individually recognised overseas scheme; (g) a recognised collective investment scheme authorised in a designated country or territory that is not an umbrella scheme; (h) a sub-fund of any other recognised collective investment scheme authorised in a

designated country or territory; (i) a recognised collective investment scheme constituted in another EEA State that is not an umbrella scheme; or (j) a sub-fund of any other recognised collective investment scheme constituted in another EEA state; (11) the management of a closed-ended collective investment undertaking: Value Added Tax Act 1994 Sch 9 Pt II Group 5 items 9, 10 substituted, Sch 9 Pt II Group 5 added, by SI 2008/2547). A collective investment scheme, or sub-fund, that is not for the time being marketed in the United Kingdom is treated as not falling within head (10)(c)-(j) above if it has never been marketed in the United Kingdom, or less than 5 per cent of its shares or units are held by, or on behalf of, investors who are in the United Kingdom: Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (6A). 'Authorised open-ended investment company' and 'authorised unit trust scheme' have the meaning given in the Financial Services and Markets Act 2000 s 237(3) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603); 'individually recognised overseas scheme' means a collective investment scheme declared by the Financial Services Authority to be a recognised scheme pursuant to s 272 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 676); 'recognised collective investment scheme authorised in a designated country or territory' means a collective investment scheme recognised pursuant to s 270 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 673); 'recognised collective investment scheme constituted in another EEA state' means a collective investment scheme which is recognised pursuant to s 264; 'collective investment scheme' has the meaning given in s 235 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603); and 'regulated market' has the meaning given by s 103(1) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 385): Value Added Tax Act 1994 Sch 5 Group 9 note (6). 'Closed-ended collective investment undertaking' means an undertaking in relation to which the following conditions are satisfied: (a) its sole object is the investment of capital, raised from the public, wholly or mainly in securities; (b) it manages its assets on the principle of spreading investment risk; and (c) all of its ordinary shares (of each class if there is more than one) or equivalent units are included in the official list maintained by the Financial Services Authority pursuant to the Financial Services and Markets Act 2000 s 74(1) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 387); and (d) all of its ordinary shares (of each class if there is more than one) or equivalent units are admitted to trading on a regulated market situated or operating in the United Kingdom: Value Added Tax Act 1994 Sch 9 Group 5 note (6). 'Gibraltar collective investment scheme' means a collective investment scheme to which either (i) the Financial Services and Markets Act 2000 s 264 applies pursuant to an order made under s 409(1)(d), or to which the Financial Services and Markets Act 2000 applies pursuant to an order made under s 409(1)(f): Value Added Tax Act 1994 Sch 9 Pt II Group 5 note (6). 'Umbrella scheme' means a collective investment scheme under which the contributions of the participants in the scheme and the profits or income out of which payments are to be made to them are pooled separately in relation to separate parts of the scheme property; and 'sub-fund' means a separate part of the property of an umbrella scheme that is pooled separately: Sch 9 Pt II Group 5 note (6). Value Added Tax Act 1994 Sch 9 Pt II Group 5 notes (8), (10) repealed: SI 2008/2547.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(iii) Other Exempt Supplies/164. Investment gold.

#### **164. Investment gold.**

The following supplies of goods and services are exempt supplies: (1) the supply of investment gold<sup>1</sup>; (2) the grant, assignment or surrender of any right, interest or claim in, over or to investment gold if the right, interest or claim is or confers a right to the transfer of the possession of investment gold<sup>2</sup>; (3) the supply, by a person acting as agent for an undisclosed principal, of services consisting of: (a) the effecting of a supply falling within head (1) or head (2) above that is made by or to his principal; or (b) attempting to effect such a supply that is intended to be made by his principal but is not in fact made<sup>3</sup>.

A taxable person<sup>4</sup> who produces or transforms investment gold may elect to waive exemption under these provisions<sup>5</sup>.

1 Value Added Tax Act 1994 Sch 9 Pt II Group 15 item 1 (Sch 9 Pt II Group 15 added by the Value Added Tax (Investment Gold) Order 1999, SI 1999/3116, art 2(1), (3)). 'Investment gold' means: (1) gold of a purity not less than 995 thousandths that is in the form of a bar, or a wafer, of a weight accepted by the bullion markets (Sch 9 Pt II Group 15 note (1)(a) (as so added)); (2) a gold coin minted after 1800 that is of a purity of not less than 900 thousandths, is or has been legal tender in its country of origin, and is of a description of coin that is normally sold at a price that does not exceed 180% of the open market value of the gold contained in the coin (Sch 9 Pt II Group 15 note (1)(b) (as so added)); (3) a gold coin of a description specified in a notice that has been published by the Commissioners for Her Majesty's Revenue and Customs for these purposes and has not been withdrawn (Sch 9 Pt II Group 15 note (1)(c) (as so added)) (provided that such notice may provide that a description specified in the notice has effect only for the purposes of supplies made at times falling within a period specified in the notice (Sch 9 Pt II Group 15 note (2) (as so added))). See Customs and Excise Public Notice 701/21 *Gold* (March 2002) PARAS 2, 3. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Value Added Tax Act 1994 Sch 9 Pt II Group 15 item 2 (as added: see note 1 supra). Head (2) in the text does not include the grant of an option, or the assignment or surrender of a right under an option at a time before the option is exercised: Sch 9 Pt II Group 15 note (3) (as so added).

3 Ibid Sch 9 Pt II Group 15 item 3 (as added: see note 1 supra). Schedule 9 Pt II Group 15 (as added) does not include a supply between members of the London Bullion Market Association, or by a member of that association to a taxable person who is not a member or by such a person to a member: Sch 9 Pt II Group 15 note (4) (as so added).

4 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

5 Value Added Tax (Investment Gold) Order 1999, SI 1999/3116, art 3(1). Such an election applies in respect of an individual relevant supply, and has effect on or after the day on which it is made: art 3(2). A 'relevant supply' is a supply of investment gold within head (1) or head (2) in the text made by the taxable person to another taxable person: art 1(2). An agent of a taxable person who has made such an election who supplies services directly linked with the relevant supply, which would otherwise fall within head (3) in the text, may also elect to waive exemption: art 3(5). In each case, the election is irrevocable (but it may be terminated by the Commissioners for Her Majesty's Revenue and Customs): art 3(7), (8). Where such an election is made the self-supply rules under the Value Added Tax Act 1994 s 55(1)-(4) (see PARA 32 ante) apply: Value Added Tax (Investment Gold) Order 1999, SI 1999/3116, art 4.

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EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(iii) Other Exempt  
Supplies/165. Education.

## **165. Education.**

Supplies of the following descriptions are exempt supplies<sup>1</sup>:

- 467 (1) the provision by an eligible body<sup>2</sup> of education, research (where supplied to an eligible body) or vocational training<sup>3</sup>;
- 468 (2) the supply of private tuition, in a subject ordinarily taught in a school or university, by an individual teacher acting independently of an employer<sup>4</sup>;
- 469 (3) the provision of examination services<sup>5</sup> by or to an eligible body, or to a person receiving education or vocational training which is either exempt by virtue of head (1) or head (2) above or head (5) or head (7) below or is provided otherwise than in the course or furtherance of a business<sup>6</sup>;
- 470 (4) the supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within head (1) above ('the principal supply') by or to the eligible body making the principal supply provided both that the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply and that, where the supply is to the eligible body making the principal supply, it is made by another eligible body<sup>7</sup>;
- 471 (5) the provision of vocational training, and the supply of any goods or services essential thereto by the person providing the vocational training<sup>8</sup>, to the extent that the consideration payable is ultimately a charge to funds provided pursuant to arrangements<sup>9</sup> made under certain statutes<sup>10</sup>;
- 472 (6) the provision of facilities by a youth club<sup>11</sup> or an association of youth clubs to its members or by an association of youth clubs to members of a youth club which is a member of that association<sup>12</sup>;
- 473 (7) the provision of education or vocational training and the supply, by the person providing that education or training, of any goods or services essential to that provision, to the extent that the consideration payable is ultimately a charge to funds provided by the Learning and Skills Council for England<sup>13</sup> or the National Council for Education and Training for Wales<sup>14</sup>.

1 See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 6 (as amended); and heads (1)-(7) in the text. For the meaning of 'exempt supply' see PARA 155 ante.

2 An 'eligible body' for these purposes is:

- 78 (1) a school within the meaning of the Education Act 1996 which is: (a) provisionally or finally registered or deemed to be registered as a school within the meaning of that legislation in a register of independent schools; (b) a school in respect of which grants are made by the Secretary of State to the proprietor or managers; or (c) a community, foundation or voluntary school within the meaning of the School Standards and Framework Act 1998 or a special school within the meaning of the Education Act 1996 s 337 (as substituted) (see EDUCATION vol 15(2) (2006 Reissue) PARA 1027) (see the Value Added Tax Act 1994 Sch 9 Pt II Group 6 note (1)(a) (amended by the Education Act 1996 s 582(1), Sch 37 para 125; and the School Standards and Framework Act 1998 s 140(1), Sch 30 para 51(a));
- 79 (2) a United Kingdom University, and any college, institution, school or hall of such a university (Value Added Tax Act 1994 Sch 9 Pt II Group 6 note (1)(b));

- 80 (3) an institution falling within the Further and Higher Education Act 1992 s 91(3)(a), (b) or s 91(5)(b), (c) (see the Value Added Tax Act 1994 Sch 9 Pt II Group 6 note (1)(c));
- 81 (4) a public body of a description in the Value Added Tax Act 1994 Sch 9 Pt II Group 7 note (5) (see PARA 166 note 13 post) (Sch 9 Pt II Group 6 note (1)(d));
- 82 (5) a body which is precluded from distributing and does not distribute any profit it makes and which applies any profits made from supplies of a description within Sch 9 Pt II Group 6 (as amended) to the continuance or improvement of such supplies (Sch 9 Pt II Group 6 note (1)(e) (substituted by the Value Added Tax (Education) (No 2) Order 1994, SI 1994/2969, art 3));
- 83 (6) a body not falling within heads (1) to (5) supra which provides the teaching of English as a foreign language (Value Added Tax Act 1994 Sch 9 Pt II Group 6 note (1)(f) (substituted by the Value Added Tax (Education) (No 2) Order 1994, SI 1994/2969, art 4)).

For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

Head (2) supra does not include a students' union: *Customs and Excise Comrs v University of Leicester Students' Union* [2001] EWCA Civ 1972, [2002] STC 147. Courses to fee-paying students leading to award of degree validated by university, a college of the university and colleges under head (2) supra are not restricted to those within the Education Acts: *Customs and Excise Comrs v School of Finance and Management (London) Ltd* [2001] STC 1690. A supply by a body which is an eligible body only by virtue of falling within head (6) supra does not fall within the Value Added Tax Act 1994 Sch 9 Pt II Group 6 (as amended) in so far as it consists of the provision of anything other than the teaching of English as a foreign language: Sch 9 Pt II Group 6 note (2) (amended by the Value Added Tax (Education) (No 2) Order 1994, SI 1994/2969, art 5).

An eligible body can only be a legal person and not a school carried on by an individual (or, presumably, a partnership): Case C-453/93 *Bulthuis-Griffioen v Inspecteur der Omzetbelasting* [1995] ECR I-2341, [1995] STC 954, ECJ; *Kaul (t/a Alpha Care Services) v Customs and Excise Comrs* (1996) VAT Decision 14028, [1996] STI 996. The teaching of English as a foreign language may include associated transport, catering and accommodation, and the provision of methodology courses for teachers of English as a foreign language: *Pilgrims Language Courses v Customs and Excise Comrs* [1999] STC 874, CA. In such cases, the tour operators' margin scheme (see PARA 214 post) does not apply: Customs and Excise Business Brief 27/99 [2000] STI 18.

The United Kingdom's exemption of any body, whatever its aims, which provides the teaching of English as a foreign language, is not in conformity with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1): *Cooke (t/a Surrey Language Centre) v Customs and Excise Comrs* [2002] V & DR 357. The United Kingdom legislation originally required the body to be providing education otherwise than for profit: see *Customs and Excise Comrs v Bell Concord Educational Trust Ltd* [1990] 1 QB 1040, [1989] 2 All ER 217, CA. There is a systematic intention to make a profit (in terms of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(2)(a)) where an individual carries on activities in a manner which seeks to achieve a positive revenue not exceeding the amount which she would have had to pay another as an employed person: *Bulthuis-Griffioen v Inspecteur der Omzetbelasting* supra at 2349-2350 and 959 (opinion of the Advocate-General); and see *Manuel (t/a Stage Coach Centre for the Performing Arts) v Customs and Excise Comrs* (1992) VAT Decision 6623, [1992] STI 47; and cf *North London College of Accountancy Ltd v Customs and Excise Comrs* (1996) VAT Decision 14054, [1996] STI 1101. Research activities carried out for consideration by a public sector higher education establishment cannot be exempted from value added tax under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) since such activities do not increase the cost of university education: Case C-287/00 *EC Commission v Germany* [2002] 3 CMLR 141, ECJ.

The provision of broadly educational services by a zoo is not exempt: *North of England Zoological Society v Customs and Excise Comrs* [1999] STC 1027.

3 Value Added Tax Act 1994 Sch 9 Pt II Group 6 item 1. 'Vocational training' means training, retraining or the provision of work experience for any trade, profession or employment, or any voluntary work connected with: (1) education, health, safety, or welfare; or (2) the carrying out of activities of a charitable nature: Sch 9 Pt II Group 6 note (3) (substituted by the Value Added Tax (Education) (No 2) Order 1994, SI 1994/2969, art 6). The supply to a sponsor of the services of a youth trainee in accordance with the Youth Training Scheme is taxable at the standard rate, even though the consideration received from the sponsor is applied in the provision of vocational training: *North West Leicestershire Youth Training Scheme Ltd v Customs and Excise Comrs* [1989] VATTR 321. As to the provision of education and research to and by an eligible body see *Joseph Rowntree Foundation v Customs and Excise Comrs* (1996) VAT Decision 14534, [1997] STI 62. 'Education' means a specific trade, profession or employment, by reference to the objective of the course and not to the subjective view of the participant; a non-vocational course which is part of a larger course of vocational training may be treated as included in the latter, but the fact that a course allows exemption from part of some future vocational training course is not of itself sufficient to attract the exemption: *Oxford Open Learning (Systems) Ltd v Customs and Excise Comrs* (1999) VAT Decision 16160, [1999] STI 1656.

4 Value Added Tax Act 1994 Sch 9 Pt II Group 6 item 2.

5 'Examination services' include the setting and marking of examinations, the setting of educational or training standards, the making of assessments and other services provided with a view to ensuring educational and training standards are maintained: *ibid* Sch 9 Pt II Group 6 note (4).

6 *Ibid* Sch 9 Pt II Group 6 item 3 (amended by the Learning and Skills Act 2000 s 149, Sch 9 para 47(2)).

7 Value Added Tax Act 1994 Sch 9 Pt II Group 6 item 4. The provision of car parking facilities in a university for the use of staff is incidental to (and presumably, therefore, closely related to) the provision of education: see *RA Archer v Customs and Excise Comrs (No 2)* [1975] VATTR 1. Where the supply concerned is part of a single indivisible supply, the Value Added Tax Act 1994 Sch 9 Pt II Group 6 item 4 has no application. In *College of Estate Management v Customs and Excise Comrs* [2005] UKHL 62, [2005] STC 1597, it was held that in determining the issue whether a college made a single (exempt) supply of education or whether they had also made a distinct zero-rated supply of books to their students, the Court of Appeal had erred in disturbing the conclusion of the VAT and duties tribunal that the college made one supply, the provision of education.

8 For these purposes, a supply of goods or services is not to be taken to be essential to the provision of vocational training unless the goods or services are provided directly to the trainee: Value Added Tax Act 1994 Sch 9 Pt II Group 6 note (5).

9 *Ie* arrangements made under the Employment and Training Act 1973 s 2 (as substituted and amended): see EMPLOYMENT vol 40 (2009) PARA 563. As to VAT exemption for supplies of government-funded vocational training see Customs and Excise Business Brief 13/96 [1996] STI 1201. See also VAT Information Sheet 3/99 VAT 'New Deal Programme'.

10 Value Added Tax Act 1994 Sch 9 Pt II Group 6 item 5. The provision of master-classes for a fee by the members of a quartet in connection with the teaching services of two universities has been held to be the exempt supply of the provision of education by each university to the students and not the provision of services by the quartet to the universities: *Alberni String Quartet v Customs and Excise Comrs* [1990] VATTR 166; *sed quaere*. For a similar decision in another context see *Clark v Customs and Excise Comrs* [1996] STC 263.

11 A club is a 'youth club' if: (1) it is established to promote the social, physical, educational or spiritual development of its members; (2) its members are mainly under 21 years of age; and (3) it is precluded from distributing and does not distribute any profit it makes, and applies any profits made from supplies of a description within the Value Added Tax Act 1994 Sch 9 Pt II Group 6 (as amended) to the continuance or improvement of such supplies: Sch 9 Pt II Group 6 note (6) (applying Sch 9 Pt II Group 6 note (1)(e)(i), (ii) (as substituted) (see note 2 head (5) *supra*)). Schedule 9 Pt II Group 6 note (6) in fact refers to satisfying the requirements of Sch 9 Pt II Group 6 note (1)(f)(i), (ii) but it is apprehended that this should have been amended to refer to Sch 9 Pt II Group 6 note (1)(e)(i), (ii) when note (1) was amended by the Value Added Tax (Education) (No 2) Order 1994, SI 1994/2969.

12 Value Added Tax Act 1994 Sch 9 Pt II Group 6 item 6. The World Association of Girl Guides and Girl Scouts is not a youth club or association of youth clubs within the meaning of Sch 9 Pt II Group 6 item 6 (*World Association of Girl Guides and Girl Scouts v Customs and Excise Comrs* [1984] VATTR 28); and the Value Added Tax Act 1994 Sch 9 Pt II Group 6 item 6 does not extend to a club part of which has a youth section (*Haggs Castle Golf Club v Customs and Excise Comrs* (1995) VAT Decision 13653, [1995] STI 1979). See also Customs and Excise Public Notice 701/35 *Youth Clubs* (February 2004).

13 *Ie* under the Learning and Skills Act 2000 Pt I (ss 1-29) (as amended) or Pt II (ss 30-51) (as amended): see EDUCATION vol 15(2) (2006 Reissue) PARA 1072 *et seq*.

14 Value Added Tax Act 1994 Sch 9 Pt II Group 6 item 5A (added by the Learning and Skills Act 2000 Sch 9 para 47(3)). For the purposes of head (7) in the text, a supply of any goods or services is not to be taken to be essential to the provision of education or vocational training unless: (1) the case of the provision of education, the goods or services are provided directly to the person receiving the education; (2) in the case of the provision of vocational training, the goods or services are provided directly to the person receiving the training: Value Added Tax Act 1994 Sch 9 Pt II Group 6 note (5A) (added by the Learning and Skills Act 2000 Sch 9 para 47(4)).

## UPDATE

### 165 Education

NOTES 2, 3--See *Birkdale School, Sheffield v Revenue and Customs Comrs* [2008] EWHC 409 (Ch), [2008] STC 2002 (parent, in return for small percentage increase in school fees, 'insured' against child's non-attendance and own death: whether 'insurance' (which was voluntary) was taken or not did not involve separate contract of insurance).

NOTE 2--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 4--It is not a prerequisite that the subject be one that leads to examinations for the purposes of obtaining qualifications: Case C-445/05 *Haderer v Finanzamt Wilmersdorf* [2008] STC 2171, ECJ.

TEXT AND NOTE 14--Reference to National Council for Education and Training for Wales is now to the National Assembly for Wales: 1994 Act Sch 9 Pt II Group 6 item 5A (amended by the National Council for Education and Training for Wales (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3238).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(iii) Other Exempt Supplies/166. Health and welfare.

## **166. Health and welfare.**

Supplies of the following descriptions are exempt supplies<sup>1</sup>:

- 474 (1) the supply of services by a person registered or enrolled in certain specified registers of health practitioners<sup>2</sup>;
- 475 (2) the supply of any services or dental prostheses by persons registered or enrolled in certain registers of dental practitioners or by a dental technician<sup>3</sup>;
- 476 (3) the supply of any services by a person registered in the register of pharmaceutical chemists<sup>4</sup> including supplies of services made by a person who is not registered in either of the specified registers where the services are wholly performed by a person who is so registered<sup>5</sup>;
- 477 (4) the provision of care<sup>6</sup> or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state regulated institution<sup>7</sup>;
- 478 (5) the provision of a deputy for a person registered in the register of medical practitioners or the register of medical practitioners with limited registration<sup>8</sup>;
- 479 (6) human blood<sup>9</sup>;
- 480 (7) products for therapeutic purposes, derived from human blood<sup>10</sup>;
- 481 (8) human (including foetal) organs or tissue for diagnostic or therapeutic purposes or medical research<sup>11</sup>;
- 482 (9) the supply, otherwise than for profit<sup>12</sup>, by a charity, a state-registered private welfare institution or agency, or public body<sup>13</sup> of welfare services<sup>14</sup> and of goods supplied in connection with such services<sup>15</sup>;
- 483 (10) the supply, otherwise than for profit, of goods and services incidental to the provision of spiritual welfare by a religious community to a resident member of that community in return for a subscription or other consideration paid as a condition of membership<sup>16</sup>; and
- 484 (11) the supply of transport services for sick or injured persons in vehicles specially designed for that purpose<sup>17</sup>.

1 See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 7 (as amended); and heads (1)-(11) in the text. For the meaning of 'exempt supply' see PARA 155 ante.

2 See *ibid* Sch 9 Pt II Group 7 item 1 (as amended). The relevant registers are as follows:

- 84 (1) the register of medical practitioners and the register of medical practitioners with limited registration (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 34 et seq) (Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 1(a));
- 85 (2) either of the registers of ophthalmic opticians or the register of dispensing opticians kept under the Opticians Act 1989 or either of the lists kept under s 9 (as amended) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARAS 838, 841-842) of bodies corporate carrying on business as ophthalmic opticians or as dispensing opticians (Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 1(b));
- 86 (3) the register kept under the Health Professions Order 2001, SI 2002/254 (as amended) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARAS 325-327) (Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 1(c) (substituted by the Health Professions Order 2001, SI 2002/254, art 48(3), Sch 4 para 6);
- 87 (4) the register of osteopaths maintained in accordance with the provisions of the Osteopaths Act 1993 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 520 et seq) (Value Added Tax Act



1994 Sch 9 Pt II Group 7 item 1(ca) (added by the Value Added Tax (Osteopaths) Order 1998, SI 1998/1294, art 2);

- 88 (5) the register of chiropractors maintained in accordance with the provisions of the Chiropractors Act 1994 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 615 et seq) (Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 1(cb) (added by the Value Added Tax (Chiropractors) Order 1999, SI 1999/1575, art 2);
- 89 (6) the register of qualified nurses and midwives maintained under the Nursing and Midwifery Order 2001, SI 2002/253, art 5 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 717 et seq) (Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 1(d) (substituted by the Nursing and Midwifery Order 2001, SI 2002/253, art 54(3), Sch 5 para 12);
- 90 (7) the register of dispensers of hearing aids or the register of persons employing such dispensers maintained under the Hearing Aid Council Act 1968 s 2 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 872); Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 1(e).

As to these registers see also Customs and Excise Business Brief 19/99 [1999] STI 1439; and Customs and Excise Public Notice 701/31 *Health and Care Institutions* (March 2002).

The United Kingdom has a discretion as to whether or not to extend the exemption to particular paramedical organisations: *Barkworth v Customs and Excise Comrs* [1988] 3 CMLR 759, [1988] STC 771. For the purposes of the Value Added Tax Act 1994 Sch 9 Pt II Group 7 (as amended), a person who is not registered in the visiting EC practitioners list in the register of medical practitioners at the time he performs services in an urgent case of the kind mentioned in the Medical Act 1983 s 18(3) (as amended) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 100) is to be treated as being registered in that list where he is entitled to be registered in accordance with s 18 (as amended): Value Added Tax Act 1994 Sch 9 Pt II Group 7 note (4).

Exemption is not granted under Sch 9 Pt II Group 7 item 1 (as amended) to the letting on hire of goods except where the letting is in connection with a supply of other services comprised in the item: Sch 9 Pt II Group 7 note (1); and see *Aslan Imaging Ltd v Customs and Excise Comrs* [1989] VATTR 54; cf *Cleary and Cleary (t/a Mobile X-Rays) v Customs and Excise Comrs* (1992) VAT Decision 7305, [1992] STI 532. Exemption is extended to include supplies of services made by a person who is not registered or enrolled in any of the registers or rolls specified in the Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 1(a)-(d) (as amended) where the services are wholly performed or directly supervised by a person who is so registered or enrolled: Sch 9 Pt II Group 7 note (2). The supply of medical facilities by a company employing doctors and nurses is standard-rated: *Harlow Industrial Health Service Ltd v Customs and Excise Comrs* [1974] VATTR 30. Guidelines have been issued to the representative bodies of the healthcare professions as to what the Commissioners will accept as 'direct supervision': see Customs and Excise News Release 23/96 (11 April 1996) [1996] STI 704. As to supplies made by hospitals see the text and note 6 infra. An agency providing self-employed temporary nurses to hospitals is providing nurses and not nursing services and its services are not therefore within the Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 1 (as amended): *Customs and Excise Comrs v Reed Personnel Services Ltd* [1995] STC 588. See also *British Nursing Co-operation Ltd v Customs and Excise Comrs* (1992) VAT Decision 8816, [1992] STI 1036; *Sheffield and Rotherham Nursing Agency v Customs and Excise Comrs* (1993) VAT Decision 11279, [1993] STI 1621; *South Hams Nursing Agency v Customs and Excise Comrs* (1995) VAT Decision 13027, [1995] STI 710. Cf *Allied Medicare Nursing Services Ltd v Customs and Excise Comrs* (1991) VAT Decision 5485, [1991] STI 79; *Elder Home Care Ltd v Customs and Excise Comrs* (1993) VAT Decision 11185, [1993] STI 1390.

Where spectacles are supplied by a company which employs a dispensing optician to advise and fit the customer with the spectacles, the company makes both a standard-rated supply of the spectacles and an exempt supply of the services of the optician: *Customs and Excise Comrs v Leightons Ltd, Customs and Excise Comrs v Eye-Tech Opticians (No 1) and Eye-Tech Opticians (No 2)* [1995] STC 458; and see Case 353/85 *EC Commission v United Kingdom* [1988] ECR 817, [1988] STC 251, ECJ; *Leightons Ltd v Customs and Excise Comrs; Eye-Tech Opticians v Customs and Excise Comrs* [2001] V & DR 468 (*Customs and Excise Comrs v Leightons Ltd, Customs and Excise Comrs v Eye-Tech Opticians (No 1) and Eye-Tech Opticians (No 2)* supra was not to be inconsistent with Case C-349/96 *Card Protection Plan v Customs and Excise Comrs* [1999] STC 270). See also Customs and Excise Business Brief 03/02 [2002] STI 202; and *Rowe v Customs and Excise Comrs* [2002] V & DR 156 (audiologist). For the apportionment of charges between supplies of spectacles and dispensing services see VAT Information Sheet 10/98, September 1998. The supply of drugs and prosthetics to hospital in-patients constitutes separate supplies of goods for the purposes of VAT: *Customs and Excise Comrs v Wellington Private Hospital* [1997] STC 445, CA. See also Case C-384/98 *D v W (Österreichischer Bundesschatz intervenient)* [2002] STC 1200, ECJ (paternity test carried out by doctor acting as expert in legal proceedings not exempt under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(c); Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Giessen* [2004] 1 CMLR 991, ECJ (provision of psychotherapeutic treatment at charitable foundation by qualified psychologists who were not doctors exempt under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(c)). A doctor's administration of a vaccine constitutes a single exempt supply of medical services, to which the provision of the drug is merely ancillary: *Beynon & Partners v Customs and Excise Comrs* [2004] UKHL 53, [2005] STC 55. If the purpose of a medical service is to provide medical advice prior to taking a decision with legal consequences, the service is not exempt: Case C-307/01 *D'Ambrumenil v Customs and Excise Comrs* [2004] QB 1179, [2004] 3 WLR 174, ECJ;

Case C-212/01 *Unterpertinger v Pensionsversicherungsanstalt der Arbeiter* [2004] QB 1179, [2004] 3 WLR 174, ECJ.

Medical testing conducted other than for the purposes of prospective employees and insurers is exempt when it is intended principally to prevent or detect illness or to monitor the health of the individual concerned: *Dispute Resolution Services (Dr Peter d'Ambrumenil) v Customs and Excise Comrs* VAT Decision 18551 (also reported as 18581), [2004] STI 1554. See Customs and Excise Public Notice 701/31 *Health and Care Institutions* (March 2002).

As to single and composite supplies see PARA 31 ante.

3 Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 2. The specified registers etc are: (1) the dentists' register; and (2) any roll of dental auxiliaries having effect under the Dentists Act 1984 s 45 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARAS 486-487): Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 2(a), (b). Exemption is extended to include supplies of services made by a person who is not so registered or enrolled where the services are wholly performed or directly supervised by a person who is so registered or enrolled: Sch 9 Pt II Group 7 note (2). See Customs and Excise Public Notice 701/31 *Health and Care Institutions* (March 2002) PARA 6.

4 Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 3. The register is that kept under the Pharmacy Act 1954: see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 888 et seq. The letting of goods on hire is not exempt under the Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 3: Sch 9 Pt II Group 7 note (3).

5 Ibid Sch 9 Pt II Group 7 note (2A) (added by the Value Added Tax (Pharmaceutical Chemists) Order 1996, SI 1996/2949, art 2).

6 The provision of care extends, but is limited, to services supplied for patients necessarily involving in their performance some personal contact with the patients; and the exemption covers not only the supply of employees to perform such services but also the supply of the services of persons supervising and controlling the performance of such services; and cleaning services provided by a contractor are therefore not exempt: *Crothall & Co Ltd v Customs and Excise Comrs* [1973] VATTR 20. The provision of telephones to patients is not exempt: *League of Friends of Poole General Hospital v Customs and Excise Comrs* (1993) VAT Decision 10621, [1993] STI 1189. However, the provision of accommodation and food to a child patient's parent is a necessary ingredient of the supply of care to the child and is thus exempt: *Nuffield Nursing Home Trust v Customs and Excise Comrs* [1989] VATTR 62.

7 Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 4 (amended by the Value Added Tax (Health and Welfare) Order 2002, SI 2002/762, arts 2, 3). 'State-regulated institution' means approved, licensed, registered or exempted from registration by any minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas: Value Added Tax Act 1994 Sch 9 Pt II Group 7 note (8) (added by the Value Added Tax (Health and Welfare) Order 2002, SI 2002/762, art 1). 'Act' means: (1) an Act of Parliament; (2) an Act of the Scottish Parliament; (3) an Act of the Northern Ireland Assembly; (4) an Order in Council under the Northern Ireland Act 1974 Sch 1; (5) a Measure of the Northern Ireland Assembly established under the Northern Ireland Assembly Act 1973 s 1; (6) an Order in Council under the Northern Ireland (Temporary Provisions) Act 1972 s 1(3); (7) an Act of the Parliament of Northern Ireland: Value Added Tax Act 1994 Sch 9 Pt II Group 7 note (8) (as so added). See *Catholic Care Consortium Ltd v Customs and Excise Comrs* (2001) VAT Decision 17315, [2002] STI 124 (provision of psychological care and vocational training for children in special schools an exempt supply); and Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Giessen* [2004] 1 CMLR 991, ECJ (provision of psychotherapeutic treatment at charitable foundation by qualified psychologists who were not doctors not within EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(b) but exempt under art 13(A)(1)(c)); *Ulster Independent Clinic Ltd v Customs and Excise Comrs* [2004] V & DR 32 (supplies of laundry to a hospital and disposal of clinical and non-clinical waste not sufficiently related to provision of health and medical care to qualify for exemption). This provision does not exempt the provision of care by individuals or other natural persons; but applies only to legal persons: *Kaul (t/a Alpha Care Services) v Customs and Excise Comrs* (1996) VAT Decision 14028, [1996] STI 996, following Case C-453/93 *Bulthuis-Griffioen v Inspecteur der Omzetbelasting* [1995] ECR I-2341, [1995] STC 954, ECJ. Like all exemptions, it must be read in the context of its European source, which exempts 'hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature': see EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(b). Nevertheless, the European provision appears to be significantly narrower than the United Kingdom equivalent, which exempts 'care or medical or surgical treatment' and so implies that the care itself need not be medical. As to care in this context see the text and note 6 supra. As to the interpretation of the Value Added Tax Act 1994 generally see PARA 4 ante. For the meaning of 'local authority' see PARA 64 note 25 ante.

8 Ibid Sch 9 Pt II Group 7 item 5.

9 Ibid Sch 9 Pt II Group 7 item 6.

10 Ibid Sch 9 Pt II Group 7 item 7.

11 Ibid Sch 9 Pt II Group 7 item 8.

12 The phrase 'otherwise than for profit' must be interpreted in the context of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(2)(a): *Customs and Excise Comrs v Bell Concord Educational Trust Ltd* [1990] 1 QB 1040, [1989] 2 All ER 217, CA. There is a systematic intention to make a profit (in the terms of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(2)(a)) where an individual carries on activities in a manner which seeks to achieve a positive revenue not exceeding the amount which she would have had to pay another as an employed person: Case C-453/93 *Bulthuis-Griffioen v Inspecteur der Omzetbelasting* [1995] ECR I-2341 at 2349-2350, [1995] STC 954 at 959, ECJ (opinion of the Advocate-General); and see *Manuel (t/a Stage Coach Centre for the Performing Arts) v Customs and Excise Comrs* (1992) VAT Decision 6623, [1992] STI 47; and cf *North London College of Accountancy Ltd v Customs and Excise Comrs* (1996) VAT Decision 14054, [1996] STI 1101.

13 'Public body' means: (1) a government department within the meaning of the Value Added Tax Act 1994 s 41(6) (as amended) (see PARA 208 post); (2) a local authority; (3) a body which acts under any enactment or instrument for public purposes and not for its own profit and which performs functions similar to those of a government department or local authority: Sch 9 Pt II Group 7 note (5).

14 'Welfare services' means services which are directly connected with: (1) the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons; (2) the protection and care of children and young persons; or (3) the provision of spiritual welfare by a religious institution as part of a course of instruction or a retreat, not being a course or a retreat designed primarily to provide recreation or a holiday: see ibid Sch 9 Pt II Group 7 note (6) (substituted by the Value Added Tax (Health and Welfare) Order 2002, SI 2002/762, arts 2, 5). In the case of services supplied by a state-registered private welfare institution, the term includes only those services in respect of which the institution is so regulated: see Sch 9 Pt II Group 7 note (6) (as so substituted).

An establishment providing care and support to cancer sufferers and their carers in a hotel-type environment provided welfare services within the meaning of Sch 9 Pt II Group 7 note (6) (as substituted): *MacMillan Cancer Trust v Customs and Excise Comrs* [1998] V & DR 289.

15 Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 9 (substituted by the Value Added Tax (Health and Welfare) Order 2002, SI 2002/762, arts 2, 4; and amended by the Value Added Tax (Health and Welfare) Order 2003, SI 2003/23, arts 2, 3). This provision implements EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(g): *Yoga for Health Foundation v Customs and Excise Comrs* [1985] 1 CMLR 340, [1984] STC 630. As to the compatibility of the Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 9 (as substituted and amended) with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(g) see Case C-498/03 *Kingscrest Associates Ltd v Customs and Excise Comrs* [2005] STC 1547, [2005] All ER (D) 404 (May), ECJ (scope of the expression 'charitable company'). The Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 9 (as substituted and amended) does not include the supply of accommodation or catering except where it is ancillary to the provision of care, treatment or instruction: Sch 9 Pt II Group 7 note (7). Cf *International Bible Students Association v Customs and Excise Comrs* [1988] 1 CMLR 491, [1988] STC 412; and *Peterborough Diocesan Conference and Retreat House v Customs and Excise Comrs* (1996) VAT Decision 14081, [1996] STI 1236. The provision of 'extra sheltered housing' supplied to persons not capable of caring for themselves may involve the supply of welfare services within the Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 9 (as substituted and amended): *Viewpoint Housing Association Ltd v Customs and Excise Comrs* (1995) VAT Decision 13148, [1995] STI 831. This provision does not exempt the provision of care by individuals or other natural persons, but applies only to legal persons: Case C-453/93 *Bulthuis-Griffioen v Inspecteur der Omzetbelasting* [1995] ECR I-2341, [1995] STC 954, ECJ; and see *Kaul (t/a Alpha Care Services) v Customs and Excise Comrs* [1996] V & DR 360; Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v Finanzamt Für Körperschaften I In Berlin* [2004] 3 CMLR 1175. The provision of welfare services by a natural person, as opposed to a legal person, is not precluded from qualifying for the exemptions outlined by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A): Case C-216/97 *Gregg v Customs and Excise Comrs* [1999] 3 All ER (EC) 775, ECJ. General care and domestic assistance provided as part of an out patient care service amounted to a form of social assistance for the purposes of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(g): see Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v Finanzamt Für Körperschaften I In Berlin* supra.

16 Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 10.

17 Ibid Sch 9 Pt II Group 7 item 11.

## UPDATE

### 166 Health and welfare

TEXT AND NOTES 1-5--In heads (1), (3) the reference is now to a supply of services consisting in the provision of medical care by the person concerned: Value Added Tax Act 1994 Sch 9 Pt II Group 7 items 1, 3 (amended by the Value Added Tax (Health and Welfare) Order 2007, SI 2007/206). In head (2) for 'the supply of any services or dental prostheses' (in relation to any of the persons mentioned in the text, other than a dental technician), read 'the supply of any services consisting in the provision of medical care, or the supply of dental prostheses': 1994 Act Sch 9 Group 7 items 2, 2A (Sch 9 Group 7 item 2 amended, Sch 9 Group 7 item 2A added, by SI 2007/206). These amendments are consequent on the decision in Case C-307/01 (see NOTE 2).

NOTES 2, 7, 12, 15--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

NOTE 2--Now, head (2) a person registered in the dental care professionals register established under the Dentists Act 1984 s 36B (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 498B.1): Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 2(b) (substituted by SI 2005/2011). Value Added Tax Act 1994 Sch 9 Pt II Group 7 note (4) repealed: SI 2007/3101.

See also Cases C-443/04 and C-444/04 *Solleveld v Staatssecretaris van Financiën* [2007] STC 71, ECJ (exclusion of paramedical professions from the exemption had to be justifiable on objective grounds by considerations relating to professional qualifications and therefore the quality of services provided).

NOTE 3--See Case C-410/05 *VDP Dental Laboratory NV v Staatssecretaris van Financiën* [2007] STC 474, ECJ.

NOTE 4--Value Added Tax Act 1994 Sch 9 Pt II Group 7 item 3 amended: SI 2007/289.

NOTE 7--Services which constitute a means of enhancing the enjoyment or benefit of hospital and medical care are not activities closely related to the supply of that care within the meaning of EC Council Directive 77/388 art 13(A)(1)(b): Cases C-394/04 and C-395/04 *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgios Ikononikon* [2006] STC 1349, ECJ. Private companies which carry out medical tests for prophylactic purposes can constitute 'establishments of a similar nature' to hospitals and centres for medical treatment or diagnosis within the meaning of EC Council Directive 77/388 art 13(A)(1)(b): Case C-106/05 *LuP GmbH v Finanzamt Bochum-Mitte* [2008] STC 1742, ECJ.

NOTE 15--Providing a list of people who have been vetted for and trained in the provision of childcare may constitute an exempt supply: Case C-415/04 *Staatssecretaris van Financiën v Stichting Kinderopvang Enschede* [2006] 2 CMLR 1395, ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(iii) Other Exempt Supplies/167. Burial and cremation.

### **167. Burial and cremation.**

Supplies of the following descriptions are exempt supplies<sup>1</sup>: (1) the disposal of the remains of the dead<sup>2</sup>; and (2) the making of arrangements for or in connection with such disposal<sup>3</sup>.

<sup>1</sup> See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 8; and heads (1)-(2) in the text. The exemption covers the services usually provided by an undertaker or funeral director, including the provision of a chapel of rest and transport for mourners and other incidental services, but it does not include insurance arrangements: *Network Insurance Brokers Ltd v Customs and Excise Comrs* [1998] STC 742, applied in *Co-operative Wholesale Society Ltd v Customs and Excise Comrs* [2000] STC 727, CA (actual provision of funeral services to deceased's estate pursuant to insurance arrangements was covered by exemption, but facilitating and administering estate's choice of funeral director was not). The storage of cadavers for other undertakers is covered by the exemption: *CJ Williams' Funeral Service of Telford v Customs and Excise Comrs* [1999] V & DR 318. For the meaning of 'exempt supply' see PARA 155 ante.

<sup>2</sup> Value Added Tax Act 1994 Sch 9 Pt II Group 8 item 1.

<sup>3</sup> Ibid Sch 9 Pt II Group 8 item 2.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(iii) Other Exempt Supplies/168. Trade unions, professional and other public interest bodies.

### **168. Trade unions, professional and other public interest bodies.**

Supplies by any of the following non-profit-making organisations to its members of such services<sup>1</sup> and, in connection with those services, of such goods as are both referable only to the organisation's aims and are available without payment other than a membership subscription<sup>2</sup> are exempt supplies<sup>3</sup>:

- 485 (1) a trade union<sup>4</sup> or other organisation of persons having as its main object the negotiation on behalf of its members of the terms and conditions of their employment<sup>5</sup>;
- 486 (2) a professional association, membership of which is wholly or mainly restricted to individuals who have or are seeking a qualification appropriate to the practice of the profession concerned<sup>6</sup>;
- 487 (3) an association whose primary purpose is the advancement of a particular branch of knowledge, or the fostering of professional expertise, connected with the past or present professions or employments of its members<sup>7</sup>;
- 488 (4) an association whose primary purpose is to make representations to the government on legislation and other public matters which affect the business or professional interests of its members<sup>8</sup>;
- 489 (5) a body which has objects which are in the public domain and are of a political, religious, patriotic, philosophical, philanthropic or civic nature<sup>9</sup>.

1 This exemption does not include any right of admission to any premises, event or performance to which non-members are admitted for a consideration: Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 9 note (1).

2 Ibid Sch 9 Pt II Group 9 (as amended) applies, inter alia, to organisations and associations whose membership consists wholly or mainly of constituent or affiliated associations which as individual associations would be comprised within Sch 9 Pt II Group 9 (as amended); and 'member' is to be construed as including such an association and 'membership subscription' includes an affiliation fee or similar levy: Sch 9 Pt II Group 9 note (3).

3 See ibid Sch 9 Pt II Group 9 (as amended); and heads (1)-(5) in the text. For the meaning of 'exempt supply' see PARA 155 ante. As to the meaning of 'otherwise than for profit' see PARA 166 note 12 ante.

4 'Trade union' has the meaning assigned to it by the Trade Union and Labour Relations (Consolidation) Act 1992 s 1 (see EMPLOYMENT vol 40 (2009) PARA 846): Value Added Tax Act 1994 Sch 9 Pt II Group 9 note (2). An organisation with aims of a trade union nature must have as its main aims the defence of the collective interests of its members and the representation of them to appropriate third parties: Case C-149/97 *Institute of the Motor Industry v Customs and Excise Comrs* [1998] STC 1219, ECJ. For subsequent proceedings see *Institute of the Motor Industry v Customs and Excise Comrs* [2000] V & DR 62 (organisation promoting members' interests, maintaining standards and qualifications and improving public's perception of industry not an organisation with trade union aims).

5 Value Added Tax Act 1994 Sch 9 Pt II Group 9 item 1(a).

6 Ibid Sch 9 Pt II Group 9 item 1(b).

7 Ibid Sch 9 Pt II Group 9 item 1(c). This item does not apply unless the association restricts its membership wholly or mainly to individuals whose present or previous professions or employments are directly connected with the purposes of the association: Sch 9 Pt II Group 9 note (4). An association of managers of local authority recreation facilities is not a professional association: *Institute of Leisure and Amenity Management v Customs and Excise Comrs* [1988] STC 602. An association comprising the directors of every United Kingdom polytechnic is not an association of professional persons and does not have as its purpose the fostering of teaching as an art: *Committee of Directors of Polytechnics v Customs and Excise Comrs* [1993] 2 CMLR 490, [1992] STC 873. A

voluntary association of employees in the retail motor trade, whose objects were to improve work standards and career structures with a view to enhancing the public image of the trade and those who worked in it, was not a professional organisation because the range of activities undertaken by its members was too diverse: *Institute of the Motor Industry v Customs and Excise Comrs* [1996] V & DR 370. For subsequent proceedings see note 4 supra).

The Value Added Tax Act 1994 Sch 9 Pt II Group 9 item 1(c) does not apply unless membership is restricted wholly or mainly to individuals whose present or previous profession or employment is (or was) directly connected with the purposes of the association: *Royal Photographic Society v Customs and Excise Comrs* [1978] VATTR 191. An association whose primary purpose was to advance the education of the public in organic farming (a branch of the science of agriculture) was within the Value Added Tax Act 1994 Sch 9 Pt II Group 9 item 1(c) since the association was likely to improve its own members' ability to understand and make use of such science in connection with their own employment: *British Organic Farmers v Customs and Excise Comrs* [1988] VATTR 64. An association whose primary purpose was the advancement of a particular branch of knowledge connected with the past or present professions or employments of its members was within the Value Added Tax Act 1994 Sch 9 Pt II Group 9 item 1(c) notwithstanding that it was not a professional organisation: *British Association for Counselling v Customs and Excise Comrs* (1994) VAT Decision 11855, [1994] STI 638.

8 Value Added Tax Act 1994 Sch 9 Pt II Group 9 item 1(d). This item does not apply unless the association restricts its membership wholly or mainly to individuals or corporate bodies whose business or professional interests are directly connected with the purposes of the association: Sch 9 Pt II Group 9 note (5). For the meaning of 'business' see PARA 23 ante.

9 Ibid Sch 9 Pt II Group 9 item 1(e) (added by the Value Added Tax (Subscriptions to Trade Unions, Professional and Other Public Interest Bodies) Order 1999, SI 1999/2834, arts 2, 4). The question whether a body has objects of a 'philanthropic' nature is to be determined by reference to its motives and not those of its members: *The Game Conservancy Trust v Customs and Excise Comrs* [2002] V & DR 422. 'Civic' means of or pertaining to the relationship between citizens and the state, as well as to a city, borough or municipality, and can accordingly cover the administration of justice: *Expert Witness Institute v Customs and Excise Comrs* [2001] EWCA Civ 1882, [2002] 1 WLR 1674.

## UPDATE

### 168 Trade unions, professional and other public interest bodies

NOTE 7--See *EMIS National User Group v HMRC Comrs* (2006) VAT Decision 19645, [2006] STI 2113.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(1) EXEMPT SUPPLIES AND ACQUISITIONS/(iii) Other Exempt Supplies/169. Sport, sports competitions and physical education.

### **169. Sport, sports competitions and physical education.**

Supplies of the following descriptions are exempt supplies<sup>1</sup>:

- 490 (1) the grant of a right to enter a competition in sport or physical recreation where the consideration for the grant consists in money<sup>2</sup> which is to be allocated wholly towards the provision of a prize or prizes awarded in that competition<sup>3</sup>;
- 491 (2) the grant, by an eligible body<sup>4</sup> established for the purposes of sport or physical recreation, of a right to enter a competition in such an activity<sup>5</sup>;
- 492 (3) the supply by an eligible body<sup>6</sup> to an individual, except, where the body operates a membership scheme, to an individual who is not a member<sup>7</sup>, of services closely linked with, and essential to, sport or physical education in which the individual is taking part<sup>8</sup>.

1 See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 10 (as amended); and heads (1)-(3) in the text. For the meaning of 'exempt supply' see PARA 155 ante.

2 As to the meaning of 'money' see PARA 33 note 7 ante.

3 Value Added Tax Act 1994 Sch 9 Pt II Group 10 item 1. Match fees paid to meet expenses and not paid on to the competition organisers are not exempt: *Wimborne Rugby Football Club v Customs and Excise Comrs* (1990) VAT Decision 4547, [1990] STI 215.

4 An 'eligible body' is a non-profit making body which: (1) is precluded from distributing any profit it makes, or is allowed to distribute any such profit by means only of distributions to a non-profit making body; (2) applies any profits it makes from supplies of a description within head (2) or head (3) in the text only for the purpose of one or more of: (a) the continuance or improvement of any facilities made available in or in connection with the making of the supplies of those descriptions made by that body; and (b) the purposes of a non-profit making body; and (3) is not subject to commercial influence: Value Added Tax Act 1994 Sch 9 Pt II Group 10 notes (2A), (2B) (Sch 9 Pt II Group 10 notes (2A)-(2C) added by the Value Added Tax (Sport, Sports Competitions and Physical Education) Order 1999, SI 1999/1994, arts 2, 4). See also note 6 infra. In determining whether the requirements for being an eligible body are satisfied in the case of any body, any distribution of amounts representing unapplied or undistributed profits that falls to be made to the body's members on its winding-up or dissolution, is disregarded: Value Added Tax Act 1994 Sch 9 Pt II Group 10 note (2C) (as so added). A body is taken, in relation to a sports supply (ie a supply which, if made by an eligible body, would fall within head (2) or head (3) in the text) to be subject to commercial influence if, and only if, there is a time in the relevant period when: (a) a relevant supply was made to that body by a person associated with it at that time; (b) an emolument was paid by that body to such a person; and (c) an agreement (including any arrangement or understanding, whether or not legally enforceable) existed for either or both of the following to take place after the end of that period, ie the making of a relevant supply to that body by such a person or the payment by that body to such a person of any emoluments: see Sch 9 Pt II Group 10 notes (4), (16) (Sch 9 Group 10 notes (4)-(17) added by the Value Added Tax (Sport, Sports Competitions and Physical Education) Order 1999, SI 1999/1994, arts 2, 4). 'Relevant period' means, where the sports supply is made before 1 January 2003, the period beginning with 14 January 1999 and ending with the making of that sports supply, and where that supply is one made on or after 1 January 2003, the period of three years ending with the making of that sports supply: Value Added Tax Act 1994 Sch 9 Pt II Group 10 note (5) (as so added). 'Relevant supply' means any of the following: (i) the grant, assignment or surrender of any interest in or right over land which at any time in the relevant period was or was expected to become land used or held for use in connection with the provision by that body of facilities for use for or in connection with sport or physical recreation or both ('sports land'); (ii) the grant, assignment or surrender of any licence to occupy any land which at any such time was or was expected to become sports land; (iii) the grant, assignment or surrender, in the case of land in Scotland, of any personal right to call for or be granted any such interest or right as is mentioned in head (i) supra; (iv) a supply arising from a grant falling within heads (1)-(3) supra, other than a grant, assignment or surrender made before 1 April 1996; (v) the supply of any services consisting in the management or administration of any facilities provided by that body; (vi) the supply of any goods or services for a consideration in excess of what would have been agreed between parties entering into a commercial transaction at arm's length: Sch 9 Pt II Group 10 notes (6),



(16) (as so added). A supply which has been, or is to be or may be, made by any person is not taken, in relation to a sports supply made by any body, to be a relevant supply for the purposes of this Group if: (A) the principal purpose of that body is confined, at the time when the sports supply is made, to the provision for employees (including retired employees) of that person of facilities for use for or in connection with sport or physical recreation, or both; (B) the supply in question is one made by a charity or local authority or one which (if it is made) will be made by a person who is a charity or local authority at the time when the sports supply is made; (c) the supply in question is a grant, assignment or surrender falling within heads (1)-(3) supra which has been made, or (if it is made) will be made, for a nominal consideration; (d) the supply in question is one arising from such a grant, assignment or surrender as is mentioned in head (3) supra and is not itself a supply the consideration for which was, or will or may be, more than a nominal consideration; or (E) the supply in question is a grant, assignment or surrender falling within heads (1)-(3) supra which is made for no consideration; but falls to be treated as a supply of goods or services, or (if it is made) will fall to be so treated, by reason only of the application, in accordance with s 5, Sch 4 para 9, of Sch 4 para 5 (as amended) (see PARA 30 ante): Sch 9 Pt II Group 10 notes (7), (16) (as so added). A person (and any person connected with him within the meaning of the Income and Corporation Taxes Act 1988 s 839 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258) is taken to have been associated with a body at a time when: (aa) a supply was made to that body by that person; (bb) an emolument was paid by that body to that person; or (cc) the time when an agreement was in existence for the making of a relevant supply or the payment of emoluments, if, at that time (or at another time, whether before or after that time, in the relevant period), that person was an officer or shadow officer of that body or an intermediary for supplies to that body: Value Added Tax Act 1994 Sch 9 Pt II Group 10 notes (8), (9), (17) (as so added). These provisions are disregarded if the only times in the relevant period when the person concerned (or any person connected with him) was an officer or shadow officer of the body are times before 1 January 2000 and the body is not otherwise treated as subject to commercial influence at any time in the relevant period by virtue of the existence of any agreement entered into on or after 14 January 1999 and before 1 January 2000, or anything done in pursuance of any such agreement: Sch 9 Pt II Group 10 notes (10), (11) (as so added). 'Emolument' means any emolument (within the meaning of the Income Tax Acts) the amount of which falls or may fall, in accordance with the agreement (including any arrangement or understanding, whether or not legally enforceable) under which it is payable, to be determined or varied wholly or partly by reference to the profits from some or all of the activities of the body paying the emolument or to the level of that body's gross income from some or all of its activities: Value Added Tax Act 1994 Sch 9 Pt II Group 10 note (16) (as so added). 'Officer' includes a director of a body corporate and any committee member or trustee concerned in the general control and management of the administration of the body; 'shadow officer' means a person in accordance with whose directions or instructions the members or officers of the body are accustomed to act (this presumably excludes professional advisers, whose advice is normally followed, but the legislation does not actually say this): Sch 9 Pt II Group 10 note (16) (as so added).

A person is taken, in relation to a sports supply, to have been at all times in the relevant period an intermediary for supplies to the body making that supply if at any time in that period either a supply was made to him by another person or an agreement for the making of a supply to him by another was in existence, and the circumstances were such that, if that body had been the person to whom the supply was made or (in the case of an agreement) the person to whom it was to be or might be made; and heads (A)-(E) supra were to be disregarded to the extent (if at all) that they would prevent the supply from being a relevant supply, the body would have fallen to be regarded, in relation to the sports supply, as subject to commercial influence: Sch 9 Pt II Group 10 note (12) (as so added). In determining whether there are such circumstances as mentioned above in the case of any supply, Sch 9 Pt II Group 10 notes (12), (13) (as added) are applied first for determining whether the person by whom the supply was made, or was to be or might be made, was himself an intermediary for supplies to the body in question, and so on through any number of other supplies or agreements: Sch 9 Pt II Group 10 note (13) (as so added). In determining whether a supply made by any person was made by an intermediary for supplies to a body, it is immaterial that the supply by that person was made before the making of the supply or agreement by reference to which that person falls to be regarded as such an intermediary: Sch 9 Pt II Group 10 note (14) (as so added).

Without prejudice to the generality of s 43(1AA) (as added) (see PARA 205 post) for the purpose of determining whether a relevant supply has at any time been made to any person, whether there has at any time been an agreement for the making of a relevant supply to any person, and whether a person falls to be treated as an intermediary for the supplies to any body by reference to supplies that have been, were to be or might have been made to him, reference in the above provisions to a supply is deemed to include references to a supply falling for other purposes to be disregarded in accordance with s 43(1)(a) (see PARA 205 post): Sch 9 Pt II Group 10 note (15) (as so added).

See also Customs and Excise Business Brief 21/99 [1999] STI 1503.

5 Value Added Tax Act 1994 Sch 9 Pt II Group 10 item 2 (Sch 9 Pt II Group 10 items 2, 3 amended by the Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999, SI 1999/1994, arts 2, 3).

6 For the purposes of the Value Added Tax Act 1994 Sch 9 Pt II Group 10 item 3 (as amended) (but not, apparently, for the purposes of Sch 9 Pt II Group 10 item 2 (as amended)), an 'eligible body' does not include: (1) a local authority; (2) a government department within the meaning of s 41(6) (as amended) (see PARA 208 post); or (3) a non-departmental public body which is listed in *Public Bodies* (Office of Public Service and

Science; 1993 Edn): Value Added Tax Act 1994 Sch 9 Pt II Group 10 note (3) (Sch 9 Pt II Group 10 notes (1)-(3) amended by the Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999, SI 1999/1994, arts 2, 3). The exemption under the Value Added Tax Act 1994 Sch 9 Pt II Group 10 item 3 (as amended) extends beyond competition fees to fees charged for casual play by members: *Chard Bowling Club v Customs and Excise Comrs* (1995) VAT Decision 13575, [1995] STI 1732. See, however, *Royal Pigeon Racing Association v Customs and Excise Comrs* (1996) VAT Decision 14006, [1996] STI 963 (the exemption, which is derived from EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(m), does not extend to sports where the individual to whom the services are supplied does not take part in the main sporting activity, which is carried out by an animal or bird); and see the written answer of the European Commission to European Parliamentary Written Question E-3320/95 (OJ C173, 17.06.96, p 5) (although the application of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(m) is mandatory in all member states, by the use of the phrase 'certain services' (in exempting 'certain services closely linked to sport or physical education . . .'), the legal text gives some discretion to national authorities). As to the meaning of 'otherwise than for profit' see PARA 166 note 12 ante.

EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(m) does not provide member states with any discretion to extend the exemption to profit-making bodies: Case C-150/99 *Stockholm Lindöpark AB v Swedish State* [2001] STC 103, ECJ. The term 'non-profit-making' relates to the organisation rather than the services it supplies: Case C-174/00 *Kennemer Golf and Country Club v Staatssecretaris van Financiën* [2002] All ER (EC) 480, ECJ. An organisation which had no power to make, and did not make, distributions to its members was not necessarily a 'non-profit making organisation' for these purposes, notwithstanding that it might achieve surpluses which it retained and used for its own purposes: see *Messenger Leisure Developments Ltd v Revenue and Customs Comrs* [2005] EWCA Civ 648, [2005] STC 1078.

7 An individual is only considered to be a member of an eligible body for the purposes of the Value Added Tax Act 1994 Sch 9 Pt II Group 10 item 3 (as amended) where he is granted membership for a period of three months or more: Sch 9 Pt II Group 10 note (2) (as amended: see note 6 supra). Where a sports centre operated by a charitable trust or similar non-profit making body makes a supply of sporting or physical education services of a kind which would normally qualify for exemption from VAT but does not operate a full membership scheme (eg the members do not have voting rights) such services will, if provided to individuals or groups of individuals, be exempt from VAT irrespective of whether the users are called members. However, where there is a full membership scheme, which operates in relation to selected activities, exemption of qualifying services is restricted to supplies to members: Customs and Excise Business Brief 3/96 [1996] STI 309, following *Basingstoke and District Sports Trust Ltd v Customs and Excise Comrs* (1995) VAT Decision 13347, [1995] STI 1273.

8 Value Added Tax Act 1994 Sch 9 Pt II Group 10 item 3 (as amended: see note 5 supra). There is no need for the recipient of the supply to be engaged physically in the sport when the supply was made, so that berthing and hard-standing fees charged by a yacht club to its members were exempt within Sch 9 Pt II Group 10 item 3 (as amended): *Swansea Yacht and Sub-Aqua Club v Customs and Excise Comrs* (1996) VAT Decision 13938, [1996] STI 829. As to the need to apportion where dissociable supplies of sporting and other services are provided see *Royal Thames Yacht Club v Customs and Excise Comrs* (1996) VAT Decision 14046, [1996] STI 1020. The exemption does not extend to green fees paid by non-members of a non-profit-making golf club: *Keswick Golf Club v Customs and Excise Comrs* (1998) VAT Decision 15493, [1998] STI 1296. The Value Added Tax Act 1994 Sch 9 Pt II Group 10 item 3 (as amended) does not include the supply of any services by an eligible body of residential accommodation, catering or transport: Sch 9 Pt II Group 10 note (1) (as amended: see note 6 supra).

## UPDATE

### 169 Sport, sports competitions and physical education

NOTE 6--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2). The term 'certain services closely linked to sport' does not allow member states to limit the exemption for VAT by reference to recipients of the service in question: Case C-253/07 *Canterbury Hockey Club v Revenue and Customs Comrs* [2008] STC 3351, ECJ. A finding that a taxpayer is not an eligible body, and that its supplies are not therefore exempt from VAT, is not fatal to a finding of abusive practice where a tax advantage is the essential aim of the scheme: *Revenue and Customs Comrs v Atrium Club Ltd* [2010] EWHC 970 (Ch), [2010] All ER (D) 36 (May).

NOTE 8--See *Highland Council v VAT and Duties Tribunal* [2007] CSH 36, [2008] STC 1280 (sale by local authority of cards allowing access to range of leisure facilities was entirely standard-rated rather than mixed supply of taxable and exempt supplies).

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## **170. Works of art.**

Supplies of the following descriptions are exempt supplies<sup>1</sup>:

- 493 (1) the disposal of an object with respect to which estate duty is not chargeable<sup>2</sup>;
- 494 (2) the disposal of an object with respect to which inheritance tax is not chargeable<sup>3</sup> by virtue of the conditional exemption relating to deaths before 7 April 1976<sup>4</sup>;
- 495 (3) the disposal of property with respect to which inheritance tax is not chargeable<sup>5</sup> by virtue of the statutory provisions relating to gifts for national purposes or disposals in satisfaction of tax<sup>6</sup>;
- 496 (4) the disposal of an asset in a case in which any gain accruing on that disposal is not a chargeable gain<sup>7</sup> by virtue of the statutory provisions relating to works of art<sup>8</sup>.

Exemption is thus given on the disposal of items on which conditional exemption for estate duty or inheritance tax purposes has been conferred; on the disposal of items of substantial public interest which are sold by private treaty to a national museum at a reduced price in order to exclude them from a charge to inheritance tax; and to works of art which are accepted by the Treasury in satisfaction of a liability to inheritance tax<sup>9</sup>.

1 See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 11; and heads (1)-(4) in the text. For the meaning of 'exempt supply' see PARA 155 ante.

2 Ibid Sch 9 Pt II Group 11 item 1. The reference to estate duty which is not chargeable is to estate duty not chargeable by virtue of the Finance Act 1953 s 30(3), the Finance Act 1956 s 34(1) or the Finance Act 1930 s 40(2) (proviso) (all repealed): Value Added Tax Act 1994 Sch 9 Pt II Group 11 item 1. As to the transition from estate duty (now abolished) see the Inheritance Tax Act 1984 s 273, Sch 6 (as amended); and INHERITANCE TAXATION.

3 Ie by virtue of the Inheritance Tax Act 1984 s 35(1), Sch 5 paras 1(3)(a), 1(4), 3(4)(a) or by virtue of the words following Sch 5 para 3(4): see INHERITANCE TAXATION vol 24 (Reissue) PARAS 543-544.

4 Value Added Tax Act 1994 Sch 9 Pt II Group 11 item 2.

5 Ie by virtue of the Inheritance Tax Act 1984 s 32(4) or s 32A(5) or (7) (as added): see INHERITANCE TAXATION vol 24 (Reissue) PARA 539.

6 Value Added Tax Act 1994 Sch 9 Pt II Group 11 item 3.

7 Ie by virtue of the Taxation of Chargeable Gains Act 1992 s 258(2) (as amended): see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 280.

8 Value Added Tax Act 1994 Sch 9 Pt II Group 11 item 4.

9 See the text and notes 1-8 supra.

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### **171. Fund-raising events by charities and other qualifying bodies.**

The following supplies of goods and services are now exempt supplies<sup>1</sup>:

- 497 (1) the supply of goods and services by a charity<sup>2</sup> in connection with an event (including an event to which access is gained wholly or partly by means of electronic communications, including any communications by means of an electronic communications network) that is organised for charitable purposes by a charity (or jointly by more than one charity), the primary purpose of which is the raising of money, and which is promoted as being primarily for that purpose<sup>3</sup>;
- 498 (2) the supply of goods and services by a qualifying body<sup>4</sup> in connection with an event that is organised exclusively for the body's own benefit, the primary purpose of which is the raising of money, and which is promoted as being primarily for that purpose<sup>5</sup>;
- 499 (3) the supply of services by a charity or a qualifying body in connection with an event that is organised jointly by a charity, two or more charities, and the qualifying body, that is so organised exclusively for charitable purposes or exclusively for the body's own benefit, or exclusively for a combination of those purposes and that benefit, the primary purpose of which is the raising of money, and which is promoted primarily for that purpose<sup>6</sup>.

1 See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 12 (as substituted); and heads (1)-(3) in the text. For the meaning of 'exempt supply' see PARA 155 ante.

2 For these purposes, 'charity' includes a body corporate that is wholly owned by a charity, if that body has agreed in writing (whether not contained in a deed) to transfer its profits (from whatever source) to a charity, or its profits (from whatever source) are otherwise payable to a charity: *ibid* Sch 9 Pt II Group 12 note (2) (Sch 9 Pt II Group 12 substituted by the Value Added Tax (Fund-Raising Events by Charities and Other Qualifying Bodies) Order 2000, SI 2000/802, arts 2, 3). Two charities are connected if one is a charity for the purposes of these provisions only because it is such a body and the other is the charity which owns it, or each is such a body and the two of them are owned by the same charity: Value Added Tax Act 1994 Sch 9 Pt II Group 12 note (10) (as so substituted).

3 See *ibid* Sch 9 Pt II Group 12 item 1, note (1) (as substituted (see note 2 *supra*); note (1) amended by the Communications Act 2003 s 406(1), Sch 17 para 129(1), (3)); and see note 6 *infra*.

4 For these purposes a 'qualifying body' is: (1) a non-profit making organisation mentioned in the Value Added Tax Act 1994 Sch 9 Pt II Group 9 item 1 (as amended) (see PARA 168 ante); (2) any body which is an eligible body for the purposes of Sch 9 Pt II Group 10 (as amended) (see PARA 169 ante) and the principal purpose of which is the provision of facilities for persons to take part in sport or physical education; or (3) any body that is an eligible body for the purposes of Sch 9 Pt II Group 13 item 2 (as added) (see PARA 172 post): Sch 9 Pt II Group 12 note (3) (as substituted: see note 2 *supra*).

5 *Ibid* Sch 9 Pt II Group 12 item 2 (as substituted: see note 2 *supra*); and see note 6 *infra*.

6 *Ibid* Sch 9 Pt II Group 12 item 3 (as substituted: see note 2 *supra*). These provisions do not include any supply in connection with an event if: (1) accommodation in connection with the event is provided to a person by means of a supply, or in pursuance of arrangements, made by the charity or any of the charities, or the qualifying body, organising the event, or a charity connected with any charity organising the event; and (2) the provision of the accommodation is not incidental to the event, ie if the accommodation so provided does not exceed two nights in total (whether or not consecutive) and is not to any extent provided by means of a supply to which an order under s 53 (tour operators' margin: see PARA 214 post) applies: Sch 9 Pt II Group 12 notes (8), (9) (as so substituted). Further, these provisions do not include any supply the exemption of which would be

likely to create distortions of competition such as to place a commercial enterprise carried on by a taxable person at a disadvantage: Sch 9 Pt II Group 12 note (11) (as so substituted).

Where in a financial year of a charity or qualifying body there are held at the same place more than 15 events involving the charity or body that are of the same kind, heads (1)-(3) of the text do not apply (or are to be treated as having not applied) to a supply in connection with any event involving the charity or body that is of that kind and is held in that financial year at that place (disregarding any event held in that place in a week during which the aggregate gross takings from such events do not exceed £1,000): Sch 9 Pt II Group 12 notes (4), (5) (as so substituted). Where the financial year is not a period of 12 months, the number of days in the year must be multiplied by 15, and the result divided by 365: Sch 9 Pt II Group 12 note (6) (as so substituted). The whole number nearest to the result is then substituted for '15' in applying the above provision: Sch 9 Pt II Group 12 note (6) (as so substituted). An event involves a charity if the event is organised by it or a connected charity, and it involves a qualifying body if it is organised by that body: Sch 9 Pt II Group 12 note (7) (as so substituted). 'Organised' means organised alone or jointly in any combination: Sch 9 Pt II Group 12 note (7) (as so substituted).

## **UPDATE**

### **171 Fund-raising events by charities and other qualifying bodies**

NOTE 4--See Case C-407/07 *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing v Staatssecretaris van Financien* [2009] STC 869, ECJ (no requirement that supplies made to every member of supplier).

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## **172. Cultural services etc.**

The supply<sup>1</sup> by a public body<sup>2</sup> or by an eligible body<sup>3</sup> of a right of admission to: (1) a museum, gallery, art exhibition or zoo<sup>4</sup>; or (2) a theatrical, musical or choreographic performance of a cultural nature<sup>5</sup>, is an exempt supply<sup>6</sup>. In the case of a supply by a public body, however, the exemption does not include any supply the exemption of which would be likely to create distortions of competition such as to place a commercial enterprise carried on by a taxable person<sup>7</sup> at a disadvantage<sup>8</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 For these purposes, 'public body' means: (1) a local authority; (2) a government department within the meaning of the Value Added Tax Act 1994 s 41(6) (as amended) (see PARA 208 note 4 post); or (3) a non-departmental public body which is listed in *Public Bodies* (Office of Public Service; 1995 Edn): Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 13 note (1) (Sch 9 Pt II Group 13 added by the Value Added Tax (Cultural Services) Order 1996, SI 1996/1256, art 2(b)). For the meaning of 'local authority' see PARA 64 note 25 ante. Cultural services provided by an individual performer are capable of being an exempt supply: Case C-144/00 *Criminal proceedings against Hoffmann* [2004] STC 740, ECJ.

3 For these purposes, 'eligible body' means any body, other than a public body, which: (1) is precluded from distributing, and does not distribute, any profit it makes; (2) applies any profits made from supplies of a description falling within the exemption to the continuance or improvement of the facilities made available by means of the supplies; and (3) is managed and administered on a voluntary basis by persons who have no direct or indirect financial interest in its activities: Value Added Tax Act 1994 Sch 9 Pt II Group 13 note (2) (as added: see note 2 supra). See *Glastonbury Abbey v Customs and Excise Comrs* [1996] V & DR 307 (museum managed and administered substantially, but not exclusively, by volunteers); Case C-267/00 *Customs and Excise Comrs v Zoological Society of London* [2002] All ER (EC) 465, ECJ (the requirement that a body is managed and administered on a voluntary basis applies to those persons who take the decisions of last resort concerning the policy of the body, particularly in the financial area, and carry out higher supervisory tasks); and *Bournemouth Symphony Orchestra v Customs and Excise Comrs* [2005] EWHC 1566 (Ch) (orchestra operated as a company in which not all directors participated on a voluntary basis, but this did not mean the management was not 'essentially voluntary', which depended on the management structure as a whole).

4 Value Added Tax Act 1994 Sch 9 Pt II Group 13 item 1(a) (in relation to public bodies); Sch 9 Pt II Group 13 item 2(a) (in relation to eligible bodies) (both as added: see note 2 supra).

5 Ibid Sch 9 Pt II Group 13 item 1(b) (in relation to public bodies); Sch 9 Pt II Group 13 item 2(b) (in relation to eligible bodies) (both as added: see note 2 supra). Schedule 9 Group 13 item 1(b) (as added) includes the supply of a right of admission to a performance only if the performance is provided exclusively by one or more public bodies, one or more eligible bodies or any combination of public bodies and eligible bodies: Sch 9 Pt II Group 13 note (4) (as so added).

6 Ibid Sch 9 Pt II Group 13 (as added: see note 2 supra). For the meaning of 'exempt supply' see PARA 155 ante.

7 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

8 Value Added Tax Act 1994 Sch 9 Pt II Group 13 note (3) (as added: see note 2 supra).

## **UPDATE**

## **172 Cultural services etc**

NOTE 3--*Bournemouth*, cited, affirmed: [2006] EWCA Civ 1281, [2006] All ER (D) 101 (Oct). A person does not have a disqualifying financial interest in a body where he

assumes its financial liabilities at the risk of his own impoverishment: *Longborough Festival Opera v Revenue and Customs Comrs* [2006] EWHC 40 (Ch), [2006] STC 818.

NOTE 5--Head (2) of the text does not include films: *Chichester Cinema at New Park Ltd v HMRC Comrs* (2005) VAT Decision 19344, [2006] STI 516.



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### **173. Supplies of goods where input tax cannot be recovered.**

A supply of goods is an exempt supply<sup>1</sup> if: (1) there is input tax of the person making the supply ('the relevant supplier'), or of any predecessor of his, that has arisen or will arise on the supply to, or acquisition or importation by, the relevant supplier or any such predecessor of goods<sup>2</sup> used for the supply made by the relevant supplier<sup>3</sup>; (2) the only such input tax is non-deductible input tax<sup>4</sup>; and (3) the supply made by the relevant supplier is not a supply which would otherwise be exempt<sup>5</sup>.

1 For the meaning of 'exempt supply' see PARA 155 ante.

2 In relation to any goods or anything comprised in any goods, a person is a predecessor of another ('the putative successor') only if, in relation to those goods or that thing: (1) the putative successor is a person to whom he has transferred assets of his business (including those goods or that thing) by a transfer of that business (or part of it) as a going concern, and that transfer falls by virtue of an order made under the Value Added Tax Act 1994 s 5(3) (see PARA 27 ante) to be treated as neither a supply of goods nor a supply of services; or (2) (in relation to a body corporate) those goods or that thing (a) formed part of the assets of the business of that body at a time when it became a member of a group of which the putative successor was at that time the representative member; (b) formed part of the assets of the business of that body corporate, or of any other body corporate which was a member of the same group as that body, at a time when that body was succeeded as the representative member of the group by the putative successor; or (c) formed part of the assets of the putative successor at a time when it ceased to be a member of a group of which the body corporate in question was at the time the representative member: Sch 9 Pt II Group 14 notes (11)-(13) (Sch 9 Pt II Group 14 added by the Value Added Tax (Supplies of Goods where Input Tax cannot be recovered) Order 1999, SI 1999/2833, art 2(1), (3)). References to a person's predecessors include references to their predecessors through any number of such transactions and events: Value Added Tax Act 1994 Sch 9 Pt II Group 14 note (11) (as so added). For these purposes, references to a body corporate being or becoming or ceasing to be a member of a group or the representative member of a group are references to its falling to be so treated for the purposes of the Value Added Tax Act 1994 s 43 (as amended) (see PARA 75 ante); and the references to anything comprised in other goods are taken, in relation to any supply consisting in or arising from the grant of a major interest in land, to include anything the supply, acquisition or importation of which is, by virtue of the provisions in note 3 infra relating to a major interest in land, taken to be a supply, acquisition or importation of goods used for making the supply so consisting or arising: Sch 9 Pt II Group 14 notes (14), (15) (as so added).

3 In relation to any supply of goods by the relevant supplier, the goods used for the supply are the goods supplied and any goods used in the process of producing the supplied goods so as to be comprised in them: *ibid* Sch 9 Pt II Group 14 note (1) (as added: see note 2 supra). In relation to a supply by any person consisting in or arising from the grant of a major interest in land ('the relevant supply') any supply consisting in or arising from a previous grant of a major interest in the land is a supply of goods used for the relevant supply, and subject to this, the goods used for the relevant supply are any goods used in the construction of a building or civil engineering work so as to become part of the land: Sch 9 Pt II Group 14 note (2) (as so added). For the meaning of 'grant' see PARA 156 note 2 ante (definition applied by Sch 9 Pt II Group 14 note (16) (as so added)).

4 Non-deductible input tax is input tax which: (1) disregarding *ibid* Sch 9 Pt II Group 14 (as added and amended) and the Value Added Tax Regulations 1995, SI 1995/2518, reg 106 (de minimis rule: see PARA 230 post) is not, and will not become attributable to supplies to which the Value Added Tax Act 1994 s 26(2) (see PARA 217 post) applies; (2) disregarding Sch 9 Pt II Group 14 (as added and amended) and the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, arts 5-7 (as amended) (see PARAS 221-223 post) the relevant supplier or a predecessor of his has or will become entitled to credit for the whole part of the amount of that input tax; and (3) the effect (disregarding these provisions) of one or more of the provisions of the Value Added Tax (Input Tax) Order 1992, SI 1992/3222 (as amended) (see PARAS 220-224 post) is that neither the relevant supplier nor any predecessor of his has or will become entitled to credit for any part of that amount: Value Added Tax Act 1994 Sch 9 Pt II Group 14 notes (3)-(6) (as added: see note 2 supra). The input tax of any person is deemed to include any VAT which has arisen or will arise on a supply to, or acquisition or importation by, that person, and which would fall to be treated as his input tax but for its arising when that person is not a taxable person; but input tax arising on a supply, acquisition or importation of goods is disregarded in determining whether the conditions in head (1) or head (2) in the text are satisfied if, at a time after that supply, acquisition or

importation but before the supply by the relevant supplier, a supply of the goods or of anything in which they are comprised is treated under or by virtue of any provision of the Value Added Tax Act 1994 as having been made by the relevant supplier or any predecessor of his to himself: Sch 9 Group 14 notes (7), (10) (as so added). The input tax that is taken to be non-deductible input tax includes any VAT which is so deemed to be input tax, and would be input tax within the above provisions if it were input tax of the person concerned, and in the case of the person to whom s 39 (see PARA 308 post) applies, if his business were carried on in the United Kingdom: Sch 9 Pt II Group 14 note (8) (as so added). Non-deductible input tax does not, however, include any VAT that has arisen or will arise on a supply to, or acquisition or importation by, any person of any goods used for a supply of goods ('the relevant supply') if that VAT or any other VAT arising on the supply to, or acquisition or importation by, that person or any predecessor of his or any goods used for the relevant supply, has been or will be refunded under s 33 (as amended) (see PARA 304 post), s 33A (as added) (see PARA 305 post), s 39 (see PARA 308 post) or s 41 (as amended) (see PARA 208 post): Sch 9 Pt II Group 14 note (9) (as so added; and amended by the Finance Act 2001 s 98(1), (9)).

5 Value Added Tax Act 1994 Sch 9 Pt II Group 14 item 1 (as added: see note 2 supra), referring to exemption under Sch 9 Pt II Group 1 item 1 (see PARA 156 ante) but for an election under Sch 10 para 2 (as amended) (see PARA 157 ante).

## **UPDATE**

### **173 Supplies of goods where input tax cannot be recovered**

NOTE 5--Reference to an election under the Value Added Tax Act 1994 Sch 10 para 2 is now to an option to tax any land under Sch 10 Pt 1 (paras 1-34): Sch 9 Pt II Group 14 item 1(c) (amended by SI 2008/1146).

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## **(2) ZERO-RATED SUPPLIES**

### **(i) In general**

#### **174. Meaning of 'zero-rated supply'; zero-rated groups of supplies.**

Where a taxable person<sup>1</sup> supplies goods or services and the supply<sup>2</sup> is zero-rated, then, whether or not value added tax would otherwise be chargeable, no VAT is charged on the supply, but it is in all other respects treated as a taxable supply<sup>3</sup>, and accordingly the rate at which VAT is treated as charged on the supply is nil<sup>4</sup>. A supply of goods or services is zero-rated if the goods or services are of a description for the time being specified in Schedule 8 to the Value Added Tax Act 1994<sup>5</sup> or the supply is of a description for the time being so specified<sup>6</sup>. A supply by a person of services which consist of applying a treatment or process to another person's goods is also zero-rated if by doing so it produces goods and either those goods are of a specified description<sup>7</sup> or a supply by him of those goods to the person to whom he supplies the services would be of such a description<sup>8</sup>.

The following groups of supplies are zero-rated: (1) food<sup>9</sup>; (2) sewerage services and water<sup>10</sup>; (3) books etc<sup>11</sup>; (4) talking books for the blind and handicapped and wireless sets for the blind<sup>12</sup>; (5) construction of buildings etc<sup>13</sup>; (6) protected buildings<sup>14</sup>; (7) international services<sup>15</sup>; (8) transport<sup>16</sup>; (9) caravans and houseboats<sup>17</sup>; (10) gold; (11) bank notes<sup>18</sup>; (12) drugs, medicines, aids for the handicapped, etc<sup>19</sup>; (13) imports, exports etc<sup>20</sup>; (14) charities etc<sup>21</sup>; and (15) clothing<sup>22</sup> and footwear<sup>23</sup>. Certain supplies, acquisitions and importations not specified within these groups are also zero-rated<sup>24</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

4 Value Added Tax Act 1994 s 30(1). As zero-rated supplies are still taxable supplies, the taxable person may claim to deduct or recover input tax attributable to them in accordance with s 26 (see PARA 217 post); and unless the supplier is exempted from registration he must be registered for VAT in the ordinary way: see s 3(2), Sch 1 para 14; and PARA 66 ante. Where the grant of any interest, right, licence or facilities gives rise to supplies made at different times after the making of the grant, and a question whether any of those supplies is zero-rated or exempt (see PARA 155 et seq ante) falls to be determined according to whether the description specified in Sch 8 (as amended) or Sch 9 (as amended) or Sch 10 para 2(2) or 2(3) (as amended), that question is to be determined according to whether the description is applicable as at the time of the supply (see PARA 35 ante) rather than by reference to the time of the grant: s 96(10A) (added by the Finance Act 1997 s 35(1), (4)). See Case C-62/00 *Marks & Spencer plc v Customs and Excise Comrs* [2002] STC 1036; *Marks & Spencer plc v Customs and Excise Comrs*, *University of Sussex v Customs and Excise Comrs* [2003] EWCA Civ 1448, [2004] STC 1; and PARA 311 post. For the meaning of 'input tax' see PARAS 4 ante, 215 post.

5 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pts I, II (as amended); heads (1)-(15) in the text; and PARA 175 et seq post. The Treasury may by order vary Sch 8 (as amended) by adding to or deleting from it any description for the time being specified in it: s 30(4). In exercise of the power so conferred, the Treasury has made the following orders: the Value Added Tax (Transport) Order 1994, SI 1994/3014 (see PARA 183 post); the Value Added Tax (Construction of Buildings) Order 1995, SI 1995/280 (see PARA 179 post); the Value Added Tax (Protected Buildings) Order 1995, SI 1995/283 (see PARA 181 post); the Value Added Tax (Supply of Pharmaceutical Goods) Order 1995, SI 1995/652 (see PARA 186 post); the Value Added Tax (Transport) Order 1995, SI 1995/653 (see PARA 183 post); the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039 (see PARA 183 post); the Value Added Tax (Anti-avoidance (Heating)) Order 1996, SI 1996/1661 (see PARA 176 post);

and the Value Added Tax (Abolition of Zero-rating for Tax-Free Shops) Order 1999, SI 1999/1642. As to the power to make such orders see PARA 14 ante. The Treasury's power by order under the Value Added Tax Act 1994 s 30 (as amended) to vary Sch 8 (as amended) includes power to apply any variation made by the order for the purposes of s 35 (as amended) (see PARA 306 post) and power to make such consequential modifications of s 35 (as amended) as it may think fit: s 35(5) (added by the Finance Act 1996 s 30(3)).

6 Value Added Tax Act 1994 s 30(2).

7 le a description for the time being specified in ibid Sch 8 (as amended): see heads (1)-(15) in the text; and PARA 175 et seq post.

8 Ibid s 30(2A) (added by the Finance Act 1996 s 29(1), (2), (5) in relation to supplies made on or after 1 January 1996).

9 See PARA 175 post.

10 See PARA 176 post.

11 See PARA 177 post.

12 See PARA 178 post.

13 See PARA 179 post.

14 See PARA 181 post.

15 See PARA 182 post.

16 See PARA 183 post.

17 See PARA 184 post.

18 See PARA 185 post.

19 See PARA 186 post.

20 See PARA 187 post.

21 See PARA 188 post. As to exports by charities see PARA 191 post.

22 See PARA 189 post.

23 These descriptions of groups are for ease of reference only, and do not affect the interpretation of the descriptions of items in those groups: Value Added Tax Act 1994 s 96(10). Schedule 8 (as amended) is to be interpreted in accordance with the notes contained in it; and accordingly the powers conferred by the Value Added Tax Act 1994 to vary Sch 8 (as amended) (see note 5 supra) include a power to add to, delete or vary those notes: see s 96(9).

24 See PARA 190 et seq post.

## **UPDATE**

### **174 Meaning of 'zero-rated supply'; zero-rated groups of supplies**

TEXT AND NOTES--The supply of an emissions allowance is also a zero-rated supply: see PARA 189A.

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EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/175. Food.

## **(ii) Specified Supplies**

### **175. Food.**

Supplies<sup>1</sup> of the majority of foodstuffs, and the animals and plants from which they are made ('general items'<sup>2</sup>), are zero-rated<sup>3</sup> unless they constitute a supply in the course of catering<sup>4</sup>. Certain categories of foodstuffs ('excepted items') are not zero-rated<sup>5</sup> but may contain within them particular foodstuffs ('items overriding the exceptions') which are zero-rated<sup>6</sup>.

Under this scheme the following are zero-rated:

- 500 (1) food<sup>7</sup> of a kind used for human consumption<sup>8</sup>;
- 501 (2) animal<sup>9</sup> feeding stuffs<sup>10</sup>;
- 502 (3) seeds or other means of propagation of plants comprised in heads (1) and (2) above<sup>11</sup>;
- 503 (4) live animals of a kind generally used as, or yielding or producing, food for human consumption<sup>12</sup>.

Additionally, preparations and extracts of meat, yeast or egg are items overriding the exceptions and thus zero-rated<sup>13</sup>.

The following are excepted items:

- 504 (a) ice cream, ice lollies, frozen yoghurt, water ices and similar frozen products, and prepared mixes and powders for making such products<sup>14</sup>, but not yoghurt unsuitable for immediate consumption when frozen<sup>15</sup>;
- 505 (b) confectionery<sup>16</sup>, not including cakes or biscuits (other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance)<sup>17</sup> or drained cherries or candied peels<sup>18</sup>;
- 506 (c) beverages chargeable with any duty of excise specifically charged on spirits, beer, wine or made-wine and preparations thereof<sup>19</sup>;
- 507 (d) other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages<sup>20</sup>, but not including tea, maté, herbal teas and similar products and preparations and extracts thereof<sup>21</sup>, cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof<sup>22</sup> or milk and preparations and extracts thereof<sup>23</sup>, but not including preparations and extracts of yeast, meat and egg<sup>24</sup>;
- 508 (e) any of the following when packaged for human consumption without further preparation: potato crisps, potato sticks, potato puffs, and similar products made from the potato, or from potato flour, or from potato starch, and savoury food products obtained by the swelling of cereals or cereal products, and salted or roasted nuts other than nuts in shell<sup>25</sup>;
- 509 (f) pet foods (canned, packaged or prepared), packaged foods (not being pet foods) for birds other than poultry or game, and biscuits and meal for cats and dogs<sup>26</sup>;
- 510 (g) goods described in heads (1), (2) and (3) above which are canned, bottled, packaged or prepared for use in the domestic brewing of any beer, the domestic

making of any cider or perry or the domestic production of any wine or made-wine<sup>27</sup>.

Supplies in the course of catering are not zero-rated<sup>28</sup>. Such supplies include: (i) a supply of anything for consumption on the premises on which it is supplied; and (ii) any supply of hot food<sup>29</sup> for consumption off those premises<sup>30</sup>.

1 Any supply described in the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 1 (as amended) also includes a supply of services described in s 5(1), Sch 4 para 1(1) (ie any supply of services consisting in the transfer of the undivided share of the property in goods, or the transfer of possession of goods: see PARA 30 ante); Sch 8 Pt II Group 1 note (7). For the meaning of 'supply' see PARA 27 ante. The United Kingdom has decided to exercise the option given by EC Council Directive 95/7 (OJ L102, 5.5.95, p 18) to retain the zero-rating of process work on materials which results in zero-rated goods: see Customs and Excise Business Brief 23/95 [1995] STI 1662.

2 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 1 general items, items 1-4; and heads (1)-(4) in the text.

3 For the meaning of 'zero-rated supply' see PARA 174 ante.

4 See the Value Added Tax Act 1994 Sch 8 Pt II Group 1.

5 Ibid Sch 8 Pt II Group 1: see Sch 8 Pt II Group 1 excepted items, items 1-7; and heads (a)-(g) in the text.

6 Ibid Sch 8 Pt II Group 1: see Sch 8 Pt II Group 1 items overriding the exceptions, items 1-7; the text to note 13 infra; and heads (a)-(g) in the text.

7 'Food' includes drink: ibid Sch 8 Pt II Group 1 note (1). In order to be food a product need not be supplied in edible form nor fit for immediate use, provided that it consists substantially of items of nutritional value and is used in manufacturing other food: *Customs and Excise Comrs v Macphie & Co (Glenbervie) Ltd* [1992] STC 886 (supply of ingredient for the in-store baking of bread rolls); *Soni v Customs and Excise Comrs* [1980] VATTR 9 (chewing preparation called paan zero-rated as it had a measurable nutritive effect). Cf *Marfleet Refining Co Ltd v Customs and Excise Comrs* [1974] VATTR 289 (cod liver oil tablets not food). A sale of a tin of biscuits, where the cost of the packing exceeded the cost of the contents, was nevertheless a composite zero-rated supply of food: *Customs and Excise Comrs v United Biscuits (United Kingdom) Ltd (t/a Simmers)* [1992] STC 325. As to composite and separate supplies generally see PARA 31 ante.

8 Value Added Tax Act 1994 Sch 8 Pt II Group 1 general items, item 1.

9 'Animal' includes bird, fish, crustacean and mollusc: ibid Sch 8 Pt II Group 1 note (2).

10 Ibid Sch 8 Pt II Group 1 general items, item 2. As to the treatment of a 'grass livery' service offered to owners of horses see *Fidler (t/a Holt Manor Farm Partners)* (1995) VAT Decision 12892, [1995] STI 420. 'Animal feeding stuffs' does not mean anything which is edible and of nutritional value to animals; the phrase takes its colour from its context, and in particular from the manner in which it is sold or supplied: *Fluff Ltd (t/a Mag-it) v Customs and Excise Comrs* [2001] STC 674 (maggots used as food on fish farms could not be treated as animal feeding stuffs when supplied as bait to anglers). Livery services may be ancillary to the exempt supply of stabling: see *Leander International Pet Foods Ltd v Customs and Excise Comrs* (2005) VAT Decision 18870, [2005] STI 310 (occupation of separate accommodation for dogs and cats in connection with secure quarantining and boarding ancillary to the supply of the latter).

11 Value Added Tax Act 1994 Sch 8 Pt II Group 1 general items, item 3. A supply of a kit for growing mushrooms, consisting of a bucket containing a mushroom spore-infused growing medium in a mixture of lime and peat, a label and an instruction leaflet was zero-rated as a supply within Sch 8 Pt II Group 1 general items, item 3, save as to the bucket, which was standard-rated: *Cheshire Mushroom Farm v Customs and Excise Comrs* [1974] VATTR 87. Cf *Customs and Excise Comrs v United Biscuits (United Kingdom) Ltd (t/a Simmers)* [1992] STC 325; and note 7 supra.

12 Value Added Tax Act 1994 Sch 8 Pt II Group 1 general items, item 4. For a case where the issue arose whether the animals in question were of a kind generally used as food for human consumption see *Customs and Excise Comrs v Lawson-Tancred* [1988] STC 326n (Dinksbuhl and Scaly carp).

13 Value Added Tax Act 1994 Sch 8 Pt II Group 1 items overriding the exceptions, item 7.

14 Ibid Sch 8 Pt II Group 1 excepted items, item 1. The words 'similar frozen products' refer to similarity to any of the items previously mentioned and not merely to similarity to water ices, as contended by the appellant in *Ross Young Holdings Ltd v Customs and Excise Comrs* (1996) VAT Decision 13972, [1996] STI 941. 'Frozen' means below the freezing point of water: *Meschia's Frozen Foods v Customs and Excise Comrs* [2001] STC 1 (frozen yoghurt supplied not in a frozen solid state, but as whipped ice cream, excepted from zero rating).

15 Value Added Tax Act 1994 Sch 8 Pt II Group 1 items overriding the exceptions, item 1; Sch 8 Pt II Group 1 note (4).

16 'Confectionery' includes chocolates, sweets and biscuits; drained, glacé or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers: *ibid* Sch 8 Pt II Group 1 note (5). This provision reverses *Customs and Excise Comrs v Quaker Oats Ltd* [1987] STC 683. 'Biscuit' must be given its ordinary meaning: *United Biscuits (UK) Ltd v Customs and Excise Comrs* [2004] V & DR 201.

17 Value Added Tax Act 1994 Sch 8 Pt II Group 1 excepted items, item 2.

18 Ibid Sch 8 Pt II Group 1 items overriding the exceptions, items 2, 3; Sch 8 Pt II Group 1 note (5).

19 Ibid Sch 8 Pt II Group 1 excepted items, item 3. A 'beverage' is a liquid characteristically taken to increase bodily liquid levels, to slake the thirst, to fortify or to give pleasure; and it does not therefore encompass a 'health drink' sold as a food supplement with (in the words of the VAT and duties tribunal) 'an unpleasant taste' which 'would not have been consumed for pleasure': *Bioconcepts Ltd v Customs and Excise Comrs* (1993) VAT Decision 11287, [1993] STI 1621; cf *Smith Kline Beecham plc v Customs and Excise Comrs* (1995) VAT Decision 13674, [1995] STI 2028.

20 Value Added Tax Act 1994 Sch 8 Pt II Group 1 excepted items, item 4. 'Other products for the preparation of beverages' is to be construed ejusdem generis with 'syrups, concentrates, essences, powders, crystals' and although this is not an exhaustive list of the types of product used in such preparation, it does not include a package of herbs specifically for use in making mulled wine: *McCormick (UK) plc v Customs and Excise Comrs* (1997) VAT Decision 15202, [1997] STI 1599.

21 Value Added Tax Act 1994 Sch 8 Pt II Group 1 items overriding the exceptions, item 4; Sch 8 Pt II Group 1 note (6). An iced tea product marketed as tea but not made or flavoured in a traditional way was held not to be 'tea' for these purposes in *Snapple Beverage Corp'n (now Quaker Oats Ltd)* (1995) VAT Decision 13690, [1995] STI 2031.

22 Value Added Tax Act 1994 Sch 8 Pt II Group 1 items overriding the exceptions, item 5; Sch 8 Pt II Group 1 note (6).

23 Ibid Sch 8 Pt II Group 1 items overriding the exceptions, item 6; Sch 8 Pt II Group 1 note (6). For the meaning of 'extracts' of milk see *Rivella (UK) Ltd v Customs and Excise Comrs* (1999) VAT Decision 16382, [2000] STI 319.

24 Value Added Tax Act 1994 Sch 8 Pt II Group 1 items overriding the exceptions, item 7; Sch 8 Pt II Group 1 note (6) (amended by the Finance Act 1999 s 14).

25 Value Added Tax Act 1994 Sch 8 Pt II Group 1 excepted items, item 5.

26 Ibid Sch 8 Pt II Group 1 excepted items, item 6. 'Pet foods' are foodstuffs offered by the supplier as being food primarily intended for pets (ie animals kept primarily for affection or ornament), irrespective of the recipient's intention: *Popes Lane Pet Food Supplies Ltd v Customs and Excise Comrs* [1986] VATTR 221; cf *Peters and Riddles (t/a Mill Lane Farm Shop) v Customs and Excise Comrs* (1995) VAT Decision 12937, [1995] STI 533. Similarly the sale of minced chicken for working dogs was properly zero-rated: *Norman Riding Poultry Farm Ltd v Customs and Excise Comrs* [1989] VATTR 124. An additive solely serving to aid digestion is not a 'feeding stuff' since it is not a nutrient: *Chapman & Frearson Ltd v Customs and Excise Comrs* (1990) VAT Decision 4428, [1990] STI 161.

27 Value Added Tax Act 1994 Sch 8 Pt II Group 1 excepted items, item 7.

28 Ibid Sch 8 Pt II Group 1(a). Such supplies therefore attract VAT at the standard rate: see PARA 5 ante. A 'supply in the course of catering' can be a supply of food for consumption off the premises if the supply is incidental to another activity, eg of a sporting, business, entertainment or social character: *Customs and Excise Comrs v Cope* [1981] STC 532 at 538 (sale of seafood from stalls at a race-ground). Where a sandwich bar prepared sandwich platters in varying sizes, and sold them under the rubric 'for meetings' it did not necessarily follow that the sales were supplies in the course of catering, since the bar was not concerned whether the food was consumed at a function or not: *Out to Lunch (a firm) v Customs and Excise Comrs* (1995) VAT Decision 13031, [1995] STI 711. The sale of food from buffets around a football ground is a sale of food for consumption on the premises (ie the football ground) and is therefore a supply in the course of catering: *Bristol City Football*

*Supporters Club v Customs and Excise Comrs* [1975] VATTR 93; but cf *Travellers Fare Ltd v Customs and Excise Comrs* (1995) VAT Decision 13482, [1995] STI 1586 (sales of cold food on railway station premises not supplies in the course of catering). When drinks are sold from vending machines, the premises are the premises in which the machine is situated: *Macklin Services (Vending) West Ltd v Customs and Excise Comrs* [1979] VATTR 31. The sale of food from a kiosk in a shopping centre is not a sale of food for consumption on the premises unless there is a delineated area capable of constituting the premises: *Armstrong v Customs and Excise Comrs* [1984] VATTR 53; cf *Crownlion (Seafood) Ltd v Customs and Excise Comrs* [1985] VATTR 188 (where a specific area was set aside in the shopping centre for tables at which food purchased from a number of kiosks could be consumed). Where a trader sold doughnuts from a van at agricultural shows or horse-race meetings, the sales were of food for consumption on the premises of the show-ground or the racecourse, as the case might be; but when the same trader sold similar food from his van in Battersea Park, the supplies were not in the course of catering, since the park could not constitute premises: *Skilton and Gregory v Customs and Excise Comrs* (1994) VAT Decision 11723, [1994] STI 511; *Fresh Sea Foods Barry Ltd v Customs and Excise Comrs* [1991] VATTR 388. Sales of sandwiches from a snack bar operating out of one room in an office block did not constitute supplies of food to be consumed on the premises, notwithstanding that the majority of the food was consumed in offices within the building, since the relevant premises were simply the room from which the sandwiches were sold: *R v Customs and Excise Comrs, ex p Sims (t/a Supersonic Snacks)* [1988] STC 210.

The word 'for' in 'for consumption on the premises' is purposive: *R v Customs and Excise Comrs, ex p Sims (t/a Supersonic Snacks)* supra (obiter), following *John Pimblett & Sons Ltd v Customs and Excise Comrs* [1987] STC 202; and followed on this point in *Zeldaline Ltd v Customs and Excise Comrs* [1989] VATTR 191 (sales of sandwiches from baskets in hallways of office blocks were not made 'for consumption on the premises' when the vendor had no intention as to whether the food would be so consumed). A person cannot be said so to supply food unless he has some right or licence to be on the premises in question: *Zeldaline Ltd v Customs and Excise Comrs* supra. Sales of 'party trays' by a supermarket, in a form convenient for entertaining, were held not to be a supply in the course of catering in *Customs and Excise Comrs v Safeway Stores plc* [1997] STC 163, disapproving the earlier tribunal decision in *Chasney Ltd v Customs and Excise Comrs* [1989] VATTR 152, having regard, inter alia, to the fact that the food was not delivered, the trays were non-returnable and the advertising did not mention catering as such; a supply in the course of catering usually involved something more in the nature of a personal relationship than that involved on the facts before the tribunal. See also *Carpenter and Hayles (t/a Carpenter Catering) v Customs and Excise Comrs* (2002) VAT Decision 17851, [2003] STI 604 (supply of cold food to postgraduate medical centre common room, used by staff and students of two universities, staff of an NHS trust and other NHS staff, with use by public being tolerated if not encouraged: not a supply to a defined class of persons and, therefore, not a supply in the course of catering).

29 'Hot food' means food which: (1) has been heated for the purposes of enabling it to be consumed at a temperature above the ambient air temperature; and (2) is above that temperature at the time it is provided to the customer: Value Added Tax Act 1994 Sch 8 Pt II Group 1 note (3)(i), (ii) (amended by the Value Added Tax (Food) Order 2004, SI 2004/3343, art 2). See *Malik v Customs and Excise Comrs* [1998] STC 537 (dominant purpose of heating food). The purposes in head (1) supra are those of the supplier and not those of the customer. A bakery that heated pies in order to attract customers with their smell was held not to have heated them for the purpose of enabling them to be consumed at a temperature above the ambient air temperature simply because it was aware that some of them would be so eaten: *John Pimblett & Sons Ltd v Customs and Excise Comrs* [1988] STC 358, CA (distinguished in *Domino's Pizza Group v Customs and Excise Comrs* [2005] STI 308); *Stewarts Supermarket Ltd v Customs and Excise Comrs* (1995) VAT Decision 13338, [1995] STI 1253; *Three Cooks Ltd v Customs and Excise Comrs* (1995) VAT Decision 13352, [1995] STI 1273.

30 Value Added Tax Act 1994 Sch 8 Pt II Group 1 note (3)(a), (b). As to 'consumption on the premises' for these purposes, and the extent of the relevant premises (in this case an airport departure area), see *Whitbread Group plc v Customs and Excise Comrs* [2005] EWHC 418 (Ch), [2005] STC 539.

## UPDATE

### 175 Food

NOTE 16--See also *Revenue and Customs Comrs v Premier Foods Ltd* [2007] EWHC 3134 (Ch), [2008] STC 176 (fruit bar constituted confectionery).

NOTE 19--It is a question of the ordinary use of English words as to whether an item can be both a liquid food and a beverage; the ultimate question is always a question of fact: *Kalron Foods Ltd v Revenue and Customs Comrs* [2007] EWHC 695 (Ch), [2007] STC 1100.

NOTE 23--As to the meaning of 'milk' see *R Twining & Co Ltd v HMRC Comrs* (2007) VAT Decision 20230, [2007] STI 2255.



NOTE 25--For an exhaustive examination of the meaning of head (e) of the TEXT, see *Procter & Gamble UK v Revenue and Customs Comrs* [2009] EWCA Civ 407, [2009] STC 1990.

NOTE 30--See *Revenue and Customs Comrs v Compass Contract Services UK Ltd* [2006] EWCA Civ 730, [2006] STC 1999 (supplies of sandwiches from retail outlets for consumption elsewhere not supplied in course of catering).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/176. Sewerage services and water.

## **176. Sewerage services and water.**

The following are zero-rated supplies<sup>1</sup>:

- 511 (1) services of: (a) reception, disposal or treatment of foul water or sewage in bulk<sup>2</sup>; and (b) emptying of cesspools, septic tanks or similar receptacles which are used otherwise than in connection with the carrying on, in the course of a business<sup>3</sup>, of a relevant industrial activity<sup>4</sup>; and
- 512 (2) the supply, for use otherwise than in connection with the carrying on, in the course of a business, of a relevant industrial activity, of water<sup>5</sup> other than: (a) distilled water, deionised water and water of similar purity; (b) water comprised in any of the categories of foodstuffs which are excepted items<sup>6</sup> for the purposes of exemption from value added tax; and (c) water which has been heated so that it is supplied at a temperature higher than that at which it was before it was heated<sup>7</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 2 (as amended); and heads (1)-(2) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante.

2 Ibid Sch 8 Pt II Group 2 item 1(a).

3 For the meaning of 'business' see PARA 23 ante.

4 Value Added Tax Act 1994 Sch 8 Pt II Group 2 item 1(b). A 'relevant industrial activity' is any activity described in the Central Statistical Office Standard Industrial Classification (1980 Edn) Divisions 1-5: Value Added Tax Act 1994 Sch 8 Pt II Group 2 note.

5 Ibid Sch 8 Pt II Group 2 item 2. Where water is supplied as an integral part of the provision of launderette facilities there is no supply of goods but a supply of services which is taxable at the standard rate: *Mander Laundries v Customs and Excise Comrs* [1973] VATTR 136. As to composite and separate supplies generally see PARA 31 ante; and as to the standard rate of VAT see PARA 5 ante.

6 Ie the excepted items set out in the Value Added Tax Act 1994 Sch 8 Pt II Group 1 excepted items, items 1-7: see PARA 175 heads (a)-(g) ante.

7 Ibid Sch 8 Pt II Group 2 items 2(a)-(c) (Sch 8 Group 2 item 2(a) amended, item 2(c) added, by the Value Added Tax (Anti-avoidance (Heating)) Order 1996, SI 1996/1661, art 2). Supplies of heated water are chargeable at the standard rate for 'non qualifying use' and at the reduced rate for 'qualifying use': Value Added Tax Act 1994 s 29A, Sch 7A (added by the Finance Act 2001 s 99, Sch 31 Pt 1 para 1). According to the Commissioners, supplies of steam are considered to be supplies of heated water: see Customs and Excise Public Notice 701/16 *Water and Sewerage Services* (March 2002) PARA 4.2. See also Customs and Excise Public Notice 701/19 *Fuel and Power* (January 2002) PARAS 8.2, 8.3. For the reduced rate see PARA 7 ante.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/177. Books and other published material.

### 177. Books and other published material.

Supplies<sup>1</sup> of the following descriptions which are not drawings for industrial, architectural engineering, commercial or similar purposes<sup>2</sup> are zero-rated<sup>3</sup>:

- 513 (1) books<sup>4</sup>, booklets<sup>5</sup>, brochures, pamphlets and leaflets<sup>6</sup>;
- 514 (2) newspapers, journals and periodicals<sup>7</sup>;
- 515 (3) children's picture books and painting books<sup>8</sup>;
- 516 (4) music (printed, duplicated or manuscript)<sup>9</sup>;
- 517 (5) maps, charts<sup>10</sup> and topographical plans<sup>11</sup>;
- 518 (6) covers, cases and other articles supplied with items within the above heads and not separately accounted for<sup>12</sup>;
- 519 (7) supplies of services<sup>13</sup> by way of the transfer of any undivided share of the property in, or of the possession of, goods comprised in the above heads<sup>14</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 3 note (a).

3 See *ibid* Sch 8 Pt II Group 3; and heads (1)-(7) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante. The provision of camera-ready copy to a publisher in return for a share of the profits from the publication has been held to be a standard-rated sale of rights: *International Institute for Strategic Studies v Customs and Excise Comrs* (1995) VAT Decision 13551, [1995] STI 1685. As to the standard rate of VAT see PARA 5 ante. The supply of printed material to students from which they prepared their assignments and studied for their examinations was held not to be a supply of goods separate from the supply of the education service: *College of Estate Management v Customs and Excise Comrs* [2005] UKHL 62, [2005] STC 1597.

4 'Books' do not include an article intended in due course to form part of a book unless the article when supplied can be said, without anything further being done to it, to form a part of an existing or specific book: *Butler & Tanner Ltd v Customs and Excise Comrs* [1974] VATTR 72. Binders for weekly parts of a work are not component parts of a book: *Fabbri & Partners Ltd v Customs and Excise Comrs* [1973] VATTR 49; *Marshall Cavendish Ltd v Customs and Excise Comrs* [1973] VATTR 65; *International Master Publishers Ltd v Customs and Excise Comrs* (1992) VAT Decision 8807, [1992] STI 984. Diaries and address books whose main purpose is to be written in are neither books nor booklets for the purposes of the Value Added Tax Act 1994 Sch 8 Pt II Group 3, since the minimum characteristic of a book is that it is to be read or looked at: *Customs and Excise Comrs v Colour Offset Ltd* [1995] STC 85. The supply of an album of wedding photographs was not zero-rated as the supply of a book: *Draper v Customs and Excise Comrs* (1981) VAT Decision 1107 (unreported).

A children's book of 16 pages containing four pages of text and 12 pages designed to be cut to make toys was a book: *WF Graham (Northampton) Ltd v Customs and Excise Comrs* (1980) VAT Decision 908 (unreported). Where a college supplied both books (which are zero-rated) and tuition (which in this instance was standard-rated) as parts of a correspondence course for which a single fee was charged, the supplies were found to be separate and severable and the consideration apportionable: *Rapid Results College Ltd v Customs and Excise Comrs* [1973] VATTR 197; *LSA (Full Time Courses) Ltd v Customs and Excise Comrs* [1983] VATTR 256; but cf *EW (Computer) Training Ltd v Customs and Excise Comrs* (1991) VAT Decision 5453, [1991] STI 63; and *International News Syndicate Ltd v Customs and Excise Comrs* (1996) VAT Decision 14425, [1996] STI 1724. Information transmitted in electronic form is not within head (1) or head (2) in the text: *Forexia (UK) Ltd v Customs and Excise Comrs* (1999) VAT Decision 16041, [1999] STI 1378.

5 A booklet containing vouchers entitling the holder to discounted admission to various facilities is not zero-rated as a booklet when it is merely a convenient means by which the vendor makes a supply of services: *Graham Leisure Ltd v Customs and Excise Comrs* [1983] VATTR 12; *Interleisure Club Ltd v Customs and Excise Comrs* (1992) VAT Decision 7458, [1992] STI 608.

6 Value Added Tax Act 1994 Sch 8 Pt II Group 3 item 1. A 'leaflet' is to be given its dictionary meaning, ie a small-sized leaf of paper which may be folded into leaves but not stitched, containing printed matter. A poster is

so large as to be outside the concept of a leaflet: *Cronsvale Ltd v Customs and Excise Comrs* [1983] VATTR 313. Packs of unfolded pre-school teaching 'dictionary cards' were neither books nor booklets; and A2 story sheets were not leaflets because (inter alia) they were not for general distribution: *Odhams Leisure Group Ltd v Customs and Excise Comrs* [1992] STC 332. Laminated recipe cards were not leaflets (*International Master Publishers Ltd v Customs and Excise Comrs* (1992) VAT Decision 8807, [1992] STI 984); and tax cards (glossy cards containing various items of information relating to tax rates) were not leaflets, since they were printed on stiff card and thus could not readily be folded whereas a leaflet is normally limp (*Tax Briefs Ltd v Customs and Excise Comrs* (1992) VAT Decision 9258 (unreported); following *Panini Publishing Ltd v Customs and Excise Comrs*, *Mirror Group Newspapers Ltd v Customs and Excise Comrs* (1989) VAT Decision 3876, [1989] STI 762). Having regard to modern printing techniques, the weight and finishes of the paper are not a determinative consideration; particular attention should be given to the purpose of the item concerned, its size, and its ephemeral nature: *GNP Booth Ltd v Customs and Excise Comrs* (2002) VAT Decision 17555, [2002] STI 967.

7 Value Added Tax Act 1994 Sch 8 Pt II Group 3 item 2. A monthly 'property guide' in newspaper form distributed free by estate agents which consisted mainly of advertising was not a newspaper since it contained no news, and it was not a periodical since it was not published for distribution and sale to the general public; it was therefore standard-rated: *Geoffrey E Snushall (a firm) v Customs and Excise Comrs* [1982] STC 537.

'Periodical' has its ordinary meaning. Theatre programmes in which advertising space is sold are not 'periodicals' within the ordinary meaning of the word: *Stilwell Darby & Co Ltd v Customs and Excise Comrs* [1973] VATTR 145. A racing information paper which was published on each day during the year on which a greyhound meeting was held was neither a newspaper (it contained no news), nor a journal (for the same reason and because it was not published on a daily basis) nor a periodical (because the frequency with which it appeared was determined by an event and not by time): *Evans & Marland Ltd v Customs and Excise Comrs* [1988] VATTR 125. A poster magazine which also contains text and special photographs may, however, be a periodical: *EMAP Consumer Magazines Ltd v Customs and Excise Comrs* (1995) VAT Decision 13322, [1995] STI 1173; *European Publishing Consultants Ltd v Customs and Excise Comrs* (1996) VAT Decision 13841, [1996] STI 643. See also *Telewest Communications plc v Customs and Excise Comrs* [2005] EWCA Civ 102, [2005] STC 481.

8 Value Added Tax Act 1994 Sch 8 Pt II Group 3 item 3.

9 Ibid Sch 8 Pt II Group 3 item 4.

10 'Charts' is to be read as limited to articles of the same genus as maps and topographical plans and does not extend to genealogical charts of the kings and queens of England: *Brooks Histrographic Ltd v Customs and Excise Comrs* [1984] VATTR 46.

11 Value Added Tax Act 1994 Sch 8 Pt II Group 3 item 5.

12 Ibid Sch 8 Pt II Group 3 item 6.

13 Ie supplies of the services described in ibid s 5(1), Sch 4 para 1(1): see PARA 30 ante.

14 Ibid Sch 8 Pt II Group 3 note (b).

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**178. Talking books for the blind and handicapped; wireless sets for the blind.**

The following are zero-rated supplies<sup>1</sup>:

- 520 (1) the supply, including the letting on hire<sup>2</sup>, to the Royal National Institute for the Blind, the National Listening Library or other similar charities of:
- 7
- 15. (a) magnetic tape specially adapted for the recording and reproduction of speech for the blind or severely handicapped;
  - 16. (b) apparatus designed or specially adapted for the making on a magnetic tape, by way of the transfer of recorded speech from another magnetic tape, of a recording described in head (f) below;
  - 17. (c) apparatus designed or specially adapted for transfer to magnetic tapes of a recording made by apparatus described in head (b) above;
  - 18. (d) apparatus for rewinding magnetic tape described in head (f) below;
  - 19. (e) apparatus designed or specially adapted for the reproduction from recorded magnetic tape of speech for the blind or severely handicapped which is not available for use otherwise than by the blind or severely handicapped;
  - 20. (f) magnetic tape upon which has been recorded speech for the blind or severely handicapped, such recording being suitable for reproduction only in the apparatus mentioned in head (e) above;
  - 21. (g) apparatus solely for the making on a magnetic tape of a sound recording which is for use by the blind or severely handicapped;
  - 22. (h) parts and accessories (other than a magnetic tape for use with apparatus described in head (g) above) for goods comprised in heads (a) to (g) above;
  - 23. (i) the supply of a service of repair or maintenance of any goods comprised in heads (a) to (h) above<sup>3</sup>;
- 8
- 521 (2) the supply, including the letting on hire<sup>4</sup>, to a charity of wireless receiving sets or apparatus solely for the making and reproduction of a sound recording on a magnetic tape permanently contained in a cassette, being goods solely for gratuitous loan to the blind<sup>5</sup>.

<sup>1</sup> See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 4; and heads (1)-(2) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante.

<sup>2</sup> Ibid Sch 8 Pt II Group 4 note.

<sup>3</sup> Ibid Sch 8 Pt II Group 4 item 1.

<sup>4</sup> Ibid Sch 8 Pt II Group 4 note.

<sup>5</sup> Ibid Sch 8 Pt II Group 4 item 2.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/179. Construction of buildings etc.

### **179. Construction of buildings etc.**

The following are zero-rated supplies<sup>1</sup>:

- 522 (1) the first<sup>2</sup> grant<sup>3</sup> of a major interest<sup>4</sup> in, or in any part of, the relevant building, dwelling or its site<sup>5</sup>, by a person:  
9
- 24. (a) constructing<sup>6</sup> a building<sup>7</sup> which is designed as a dwelling or number of dwellings<sup>8</sup> or intended for use solely for a relevant residential purpose<sup>9</sup> or a relevant charitable<sup>10</sup> purpose<sup>11</sup>; or
- 25. (b) converting a non-residential building or a non-residential part of a building<sup>12</sup> into a building designed as a dwelling or number of dwellings or a building intended solely for a relevant residential purpose<sup>13</sup>;  
10
- 523 (2) the supply of any services related to the relevant construction (other than the services of an architect, surveyor or any person acting as consultant or in a supervisory capacity) in the course of the construction<sup>14</sup> of:  
11
- 26. (a) a building designed as a dwelling or number of dwellings or intended<sup>15</sup> for use solely for a relevant residential purpose or a relevant charitable purpose<sup>16</sup>; or
- 27. (b) any civil engineering work<sup>17</sup> necessary for the development of a permanent park for residential caravans<sup>18</sup>;  
12
- 524 (3) the supply to a relevant housing association<sup>19</sup> of any services related to the relevant conversion (other than the services of an architect, surveyor or any person acting as consultant or in a supervisory capacity) in the course of conversion of a non-residential building or a non-residential part of a building<sup>20</sup> into:  
13
- 28. (a) a building or part of a building designed as a dwelling or a number of dwellings<sup>21</sup>; or
- 29. (b) a building or part of a building intended for use solely for a relevant residential purpose<sup>22</sup>; and  
14
- 525 (4) the supply of building materials<sup>23</sup> to a person to whom the supplier is supplying services within head (2) or head (3) above which include the incorporation of the materials into the building (or its site) in question<sup>24</sup>.

The grant of an interest in, or in any part of, either a building designed as a dwelling or number of dwellings, or the site of such a building, is not within head (1) above if the interest granted is such that the grantee is not entitled to reside in the building, or part, throughout the year<sup>25</sup>. Nor is it within that head if residence there throughout the year, or the use of the building or part as the grantee's principal private residence, is prevented by the terms of a covenant, statutory planning consent or similar permission<sup>26</sup>.

Where part of a building that is constructed is designed as a dwelling or number of dwellings or is intended for use solely for a relevant residential purpose or relevant charitable purpose and part is not, or part of a building that is converted is designed as a dwelling or number of dwellings or is used solely for a relevant residential purpose and part is not, then a grant or

other supply relating only to the part so designed or intended for that use (or its site) is treated as relating to a building so designed or intended for such use<sup>27</sup>. A grant or other supply relating only to the part neither so designed nor intended for such use (or its site) is not so treated<sup>28</sup>. In the case of any other grant or other supply relating to, or to any part of, the building (or its site), an apportionment is made to determine the extent to which it is to be so treated<sup>29</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 5 (as substituted and amended); and the text and notes 2-29 infra. As to the interpretation of the Value Added Tax Act 1994 Sch 8 Pt II Group 5 (as substituted and amended) by the Commissioners for Her Majesty's Revenue and Customs see Customs and Excise Public Notice 708 *Buildings and Construction* (July 2002). The Value Added Tax Act 1994 s 30(3) (see PARAS 174 ante, 190 post) does not apply to goods forming part of a description of supply in Sch 8 Pt II Group 5 (as substituted and amended): Sch 8 Pt II Group 5 note (24) (Sch 8 Pt II Group 5 substituted by the Value Added Tax (Construction of Buildings) Order 1995, SI 1995/280, art 2). For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 The inclusion in the Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 1 (as substituted) of the word 'first' reverses earlier authority to the effect that zero-rating was available when a building was sold after having been first let.

3 'Grant' includes an assignment or surrender: *ibid* Sch 8 Pt II Group 5 note (1) (as substituted: see note 1 supra).

4 For the meaning of 'major interest' see PARA 30 note 2 ante. Where the major interest granted is a tenancy or lease, then: (1) if a premium is payable, the grant falls within head (1) in the text only to the extent that it is made for consideration in the form of the premium; and (2) if a premium is not payable, the grant falls within that head only to the extent that it is made for consideration in the form of the first payment of rent due under the tenancy or lease: *ibid* Sch 8 Pt II Group 5 note (14) (as substituted: see note 1 supra). The grant of a 'time share' entitling the holder to occupy property during specified weeks of each year for a period of 80 years in England is not the grant of a major interest in land: *Cottage Holiday Associates Ltd v Customs and Excise Comrs* [1983] QB 735, [1983] STC 278; and as to Scotland see *American Real Estate (Scotland) Ltd v Customs and Excise Comrs* [1980] VATTR 88. As to the exclusion of such grants from exemption under the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II Group 1 (as amended) see PARA 156 note 18 ante. For the meaning of 'consideration' generally see PARA 95 ante.

5 *Ibid* Sch 8 Pt II Group 5 item 1 (as substituted: see note 1 supra). A 'site' does not refer to the whole acreage of a development site in relation to a single building constructed thereon but only to a reasonable plot of land surrounding the building: *Stapenhill Developments Ltd v Customs and Excise Comrs* [1984] VATTR 1 at 10.

6 The construction of a building does not include: (1) the conversion, reconstruction, or alteration of an existing building; or (2) any enlargement of, or extension to, an existing building except to the extent that the enlargement or extension creates an additional dwelling or dwellings; or (3) the construction of an annex to an existing building unless the whole or part of the annex is intended for use solely for a relevant charitable purpose and: (a) the annex is capable of functioning independently of the existing building; and (b) the only access or, where there is more than one means of access, the main access to the annex is not via the existing building and the main access to the existing building is not via the annex: Value Added Tax Act 1994 Sch 8 Pt II Group 5 notes (16), (17) (as substituted (see note 1 supra); Sch 8 Pt II Group 5 note (17) amended by the Value Added Tax (Construction of Buildings) Order 2002, SI 2002/1101, art 2(a)). The provisions excluding from zero-rating enlargements, extensions and annexes are not mutually exclusive, but operate as a series of sieves. If the effect of the construction is to make an existing building larger, it must be an enlargement of, or extension to, the existing building. It is then necessary to determine whether the enlargement or extension is such as to constitute an annex, for which the principal criterion (where there is a physical connection between the buildings) is the degree of integration between the old and new buildings. 'Annex' implies a lesser building supplementing a greater one: *Grace Baptist Church v Customs and Excise Comrs* (1999) VAT Decision 16093, [1999] STI 1444.

Whether completed building works amount to the enlargement, or the construction of an extension or annex to an original building is to be asked as at the date of the supply. What is in the course of construction at that date is, in any ordinary case, the building subsequently constructed. Further, the answer has to be given after an objective examination of the physical characters of the building or buildings at the two points in time, having regard to similarities and differences in appearance, the layout and how the building or buildings are equipped to function: *Cantrell (t/a Foxearth Lodge Nursing Home) v Customs and Excise Comrs* [2000] STC 100. An annexe is an adjunct or accessory to something else, such as a document; when used in relation to a building it

is referring to a supplementary structure, be it a room, a wing or a separate building: *Cantrell (t/a Foxearth Lodge Nursing Home) v Customs and Excise Comrs (No 2)* [2003] EWHC 404 (Ch), [2003] STC 486.

A building only ceases to be an existing building when: (i) demolished completely to ground level; or (ii) the part remaining above ground level consists of no more than a single facade (or, where a corner site, a double facade), the retention of which is a condition or requirement of statutory planning consent or similar permission: Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (18) (as so substituted).

Although there has been considerable litigation since the introduction of VAT as to the meanings of 'construction', 'reconstruction', 'alteration', 'enlargement' and related phrases and as to what is an 'existing building', most of the authorities relate to equivalent predecessor provisions to Sch 8 Pt II Group 5 (as substituted and amended), which have taken substantially different forms since 1973. Many such authorities may, therefore, be of little relevance in interpreting the meaning of the same words in the context of the present Sch 8 Pt II Group 5 (as substituted and amended *Customs and Excise Comrs v London Diocesan Fund, Customs and Excise Comrs v Elliot, Customs and Excise Comrs v Penwith Property Co Ltd* [1993] STC 369. 'Construction of a building' involves more than site preparation, the alteration of vehicular access and the digging of trenches: *Cameron New Homes Ltd v Customs and Excise Comrs* (2001) VAT Decision 17309, [2002] STI 68. As to the earlier authorities which remain relevant see notes 7-22 infra.

7 As to the meaning of 'person constructing a building' see *Monsell Youell Developments Ltd v Customs and Excise Comrs* [1978] VATTR 1 (a speculative land dealer which sold plots of land having laid out the surrounding infrastructure was not a 'person constructing a building' for the purposes of the equivalent predecessor provisions of the Value Added Tax Act 1994 Sch 8 Pt II Group 5 (as substituted and amended)); *Hulme Educational Foundation v Customs and Excise Comrs* [1978] VATTR 179 at 189 (the words should be given their everyday meaning and encompass both the person who constructs the building itself, in the sense of putting brick upon brick, and the person who, by himself or through an agent, enters into a contract or arrangement with another under which that other puts brick upon brick for him); *David Wickens Properties Ltd v Customs and Excise Comrs* [1982] VATTR 143 (a person converting a house into offices is not a 'person constructing a building'); *Customs and Excise Comrs v Link Housing Association Ltd* [1992] STC 718 (the phrase included a person who had constructed a completed building).

In determining whether there has been a 'conversion, reconstruction, or alteration of an existing building' within the meaning of the Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (16)(a) (as substituted) (see note 6 head (1) supra), the building as it presently stands is compared with the building as it stood before any work, whether of demolition or construction, began in order to ask whether the work amounted to the conversion, reconstruction, or alteration of the original building in the sense in which those words are commonly used or whether the end result is, in fact, a new building. If a number of buildings existed before the work began, the test is to ask whether the work amounted to the conversion, reconstruction or alteration of one or more of them: see *Customs and Excise Comrs v London Diocesan Fund, Customs and Excise Comrs v Elliot, Customs and Excise Comrs v Penwith Property Co Ltd* [1993] STC 369 at 380 per McCullough J; *Customs and Excise Comrs v Lewis* [1994] STC 739.

'Reconstruction' connotes replication of what was once, but is no longer, there (*Wimpey Group Services Ltd v Customs and Excise Comrs* [1988] STC 625, CA); but the 'new building' test in *Customs and Excise Comrs v London Diocesan Fund, Customs and Excise Comrs v Elliot, Customs and Excise Comrs v Penwith Property Co Ltd* supra is not satisfied (so that zero-rating will not be granted) if it could reasonably be said that the original building still exists although it has been transformed into a new building (see *Customs and Excise Comrs v Marchday Holdings Ltd* [1995] STC 898 per Laws J; affd [1997] STC 272, CA). Where a new building is constructed which is wholly independent in every way from an adjoining building, apart from the fact that there is a party wall, the new building cannot properly be described as an enlargement of the existing building; but the position might well be different where the two buildings were connected by a door and the planning permission required the new building to be an extension of the original: *Customs and Excise Comrs v Perry* [1983] STC 383. Where, however, the new building had an entirely different function from the existing building there was no enlargement: *Customs and Excise Comrs v Great Shelford Free Church (Baptist)* [1987] STC 249; cf *Charles Gray (Builders) Ltd v Customs and Excise Comrs* [1990] STC 650, where an entirely separate and independent house, which was so constructed as to appear to be an enlargement of an existing house, was held to be an enlargement, having regard to the terms of the planning permission. It may be, however, that the decisions in *Customs and Excise Comrs v Perry* supra and *Customs and Excise Comrs v Great Shelford Free Church (Baptist)* supra have been overtaken by the subsequent amendments to the legislation, in particular by the introduction of the Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (16)(b) (as substituted); and that *Customs and Excise Comrs v London Diocesan Fund, Customs and Excise Comrs v Elliot, Customs and Excise Comrs v Penwith Property Co Ltd* supra and the subsequent authorities must now be read in the context of the Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (18) (as substituted): see note 6 supra.

8 A building is designed as a dwelling or a number of dwellings where, in relation to each dwelling, the following conditions are satisfied: (1) the dwelling consists of self-contained living accommodation; (2) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling; (3) the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and (4) statutory planning consent has been granted in respect of the dwelling and its construction or conversion has been carried out in accordance with that consent: *ibid* Sch 8 Pt II Group 5



note (2) (as substituted: see note 1 supra). These provisions are intended to ensure that 'granny flats' and similar extensions to existing houses should not qualify for zero-rating: Customs and Excise Public Notice 708 *Buildings and Construction* (July 2002) PARA 3.2.2. The question whether a refurbished building was designed as a dwelling or number of dwellings was to be considered in relation to the building as it was when originally constructed: *University of Bath v Customs and Excise Comrs* (1996) VAT Decision 14235, [1996] STI 1492. A building falls within head (3) if the relevant provision prohibits either the separate use or the separate disposal of the premises: *Wiseman v Customs and Excise Comrs* (2001) VAT Decision 17374, [2002] STI 360.

Bed-sits with shared kitchen and bathroom facilities constitute 'dwellings': *Amicus Group Ltd v Customs and Excise Comrs* (2002) VAT Decision 17693, [2003] STI 186 (provision of private kitchens and bathrooms relevant to question whether a dwelling 'separate'), not following *Look Ahead Housing Association v Customs and Excise Comrs* (2000) VAT Decision 16816, [2001] STI 158. See *Oldrings Development Kingsclere Ltd v Customs and Excise Comrs* (2002) VAT Decision 17769, [2003] STI 309 (self-contained, detached studio room a dwelling). See also *Agudas Israel Housing Association Ltd v Customs and Excise Comrs* (2004) VAT Decision 18798, [2005] STI 116 (units with own front door to which the handicapped resident held the key, en-suite bathing facilities, and ability to cook with microwave oven and kettle: self-contained). Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (3) (as substituted) cannot be read disjunctively to zero-rate the construction of a garage at the same time as conversion works unless those works are themselves zero-rated: *RJ Jowitt v Customs and Excise Comrs* VAT Decision 18103, [2003] STI 1433.

The construction of, or conversion of a non-residential building to, a building designed as a dwelling or a number of dwellings includes the construction of, or conversion of a non-residential building to, a garage provided that the dwelling and the garage are constructed or converted at the same time and that the garage is intended to be occupied with the dwelling or one of the dwellings: Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (3) (as so substituted). References to a non-residential building or a non-residential part of a building do not include a reference to a garage occupied together with a dwelling: Sch 8 Pt II Group 5 note (8) (as so substituted). As to non-residential buildings see note 12 infra.

9 'Use for a relevant residential purpose' means use as: (1) a home or other institution providing residential accommodation for children; (2) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder; (3) a hospice; (4) residential accommodation for students or school pupils; (5) residential accommodation for members of any of the armed forces; (6) a monastery, nunnery or similar establishment; or (7) an institution which is the sole or main residence of at least 90% of its residents, except use as a hospital, a prison or similar institution or an hotel, inn or similar establishment: *ibid* Sch 8 Pt II Group 5 note (4) (as substituted: see note 1 supra).

Where a number of buildings are constructed at the same time and on the same site, and they are intended to be used together as a unit solely for a relevant residential purpose, then each of those buildings, to the extent that it would not otherwise be so regarded, is to be treated as intended for use solely for a relevant residential purpose: Sch 8 Pt II Group 5 note (5) (as so substituted). This avoids the difficulty which otherwise would arise in relation to ancillary buildings which themselves do not satisfy the strict conditions required in Sch 8 Pt II Group 5 note (4) (as substituted). 'Residential accommodation' means lodging, sleeping or overnight accommodation, and no minimum period of occupation is implied: *Urdd Gobaith Cymru v Customs and Excise Comrs* [1997] V & DR 273. A student accommodation block which contained no kitchen or catering facilities was held to be a residential building: *Denman College v Customs and Excise Comrs* [1998] V & DR 399. 'Solely for a relevant residential purpose' means, in relation to student accommodation, solely in term time: *R (on application of Greenwich Property Ltd) v Customs and Excise Comrs* [2001] EWHC Admin 230, [2001] STC 618. A boarding school does not fall within head (4) or head (7) supra and is accordingly not used for a relevant residential purpose: *Jacobs v Customs and Excise Comrs* VAT Decision 18489, [2004] STI 1303.

The characteristics of a 'hospital' in this context include the provision of a range of medical treatments, diagnostic facilities, in-patient facilities, and a high proportion of medically-qualified staff: *General Healthcare Group Ltd v Customs and Excise Comrs* [2001] V & DR 328. If an institution is provided for the reception and treatment of 'incurables' it is a hospital, but if it is provided only for their reception and care, it is not: *Minister of Health v General Committee of the Royal Midland Counties Home for Incurables at Leamington Spa* [1954] Ch 530 (applied in *Fenwood Developments Ltd v Customs and Excise Comrs* (2005) VAT Decision 18975, [2005] STI 879).

10 'Use for a relevant charitable purpose' means use by a charity in either or both of the following ways, ie: (1) otherwise than in the course or furtherance of a business; (2) as a village hall or similarly in providing social or recreational facilities for a local community: Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (6) (as substituted: see note 1 supra). The construction of a classroom for a fee-paying school was not for a relevant charitable purpose, since the provision of education in such circumstances amounts to a business: *Leighton Park School v Customs and Excise Comrs* (1993) VAT Decision 9392, [1993] STI 313. The construction, at the expense of a charity, of a building to house a scanner to be used by a hospital was not for a relevant charitable purpose since the hospital itself was not a charity: *League of Friends of Kingston Hospital v Customs and Excise Comrs* (1995) VAT Decision 12764, [1995] STI 68; and see *Royal Academy of Music v Customs and Excise Comrs* (1994) VAT Decision 11871, [1994] STI 655. For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante; and *Newtownbutler Playgroup Ltd v Customs and Excise Comrs*

(1995) VAT Decision 13741, [1996] STI 254. A sports hall and fitness centre run on a commercial basis by a charity, and used by workers in, as well as residents of, a large metropolitan area was held to be insufficiently similar to a village hall to qualify for zero-rating in *Jubilee Hall Recreation Centre Ltd v Customs and Excise Comrs*, *Customs and Excise Comrs v St Dunstan's Educational Foundation* [1999] STC 381, CA. See also *South Molton Swimming Pool Trustees v Customs and Excise Comrs* (2000) VAT Decision 16495, [2000] STI 836; and *Ledbury Amateur Dramatic Society v Customs and Excise Comrs* (2000) VAT Decision 16845, [2001] STI 229; *Southwick Community Association v Customs and Excise Comrs* (2002) VAT Decision 17601, [2002] STI 1198. In *Sport in Desford v Customs and Excise Comrs* (2005) VAT Decision 18914, [2005] STI 319 it was held: (a) that registration as a charity is not a prerequisite for charitable status; (b) the provision of sports facilities is beneficial to the community and for the public benefit (constituting 'social and recreational facilities'); (c) the fact that the majority of the activities in a building were of a sporting nature was immaterial in deciding whether the building was similar to a village hall; and (d) the facts that membership was required and a small fee payable did not prevent it from being so similar.

A garage was still provided for a relevant charitable purpose although the cars contained within it were occasionally used for personal reasons: *St Dunstan's Roman Catholic Church, Southborough v Customs and Excise Comrs* [1998] V & DR 264. An office block occupied by a publicly-funded and controlled housing association was held not to be used in the course or furtherance of a business in *Cardiff Community Housing Association Ltd v Customs and Excise Comrs* [2000] V & DR 346. The construction of an annex to a residential care home was not for relevant charitable purposes since its facilities were intended for a wider community than the local community: *Beth Johnson Housing Association Ltd v Customs and Excise Comrs* [2001] V & DR 167. A purpose-built building let by a children's charity to a playgroup at a low rent was not so let in the course or furtherance of a business, since the lease was only brought into being to satisfy the requirements of lottery funding, and constituted a relatively informal arrangement between two closely-connected organisations in conformity with their respective aims: *Customs and Excise Comrs v Yarburgh Children's Trust* [2002] STC 207. The use of a part of a charity's premises as a children's day nursery, for the use of which fees sufficient to cover running costs only were charged, was a use which was 'otherwise than in the course or furtherance of a business' for these purposes: *Customs and Excise Comrs v St Pauls Community Project Ltd* [2004] EWHC 2490 (Ch), [2005] STC 95. See also Customs and Excise Business Brief 02/05 [2005] STI 217. For an extra-statutory concession permitting a limited amount of business use see Customs and Excise Business Brief 8/00 [2000] STI 831.

11 Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 1(a) (as substituted: see note 1 supra).

12 For the purposes of *ibid* Sch 8 Pt II Group 5 item 1(b) (as substituted), and for the purposes of the notes so far as having effect for the purposes of Sch 8 Pt II Group 5 item 1(b) (as substituted), a building or a part of a building is 'non-residential' if it is: (1) neither designed, nor adapted, for use as a dwelling or number of dwellings, or for a relevant residential purpose; or (2) it is designed, or adapted for such use but it was constructed more than ten years before the grant of the major interest, and no part of it has, in the period of ten years immediately preceding the grant, been used as a dwelling or for a relevant residential purpose: Sch 8 Pt II Group 5 note (7) (Sch 8 Pt II Group 5 note (7) substituted by the Value Added Tax (Conversion of Buildings) Order 2001, SI 2001/2305, arts 2, 3). See *Halacro-Johnston v Customs and Excise Comrs* [2001] V & DR 335 (conversion ofcroft house did not create additional dwelling). The conversion, other than to a building designed for a relevant residential purpose, of a non-residential part of a building which already contains a residential part is not included within head (1)(b) or head (3) in the text unless the result of that conversion is to create an additional dwelling or dwellings: Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (9) (as substituted: see note 1 supra). A garage occupied with a building is not a non-residential building or part of a building (see note 8 supra); its conversion or subsequent sale will not, therefore, qualify for zero-rating.

13 *Ibid* Sch 8 Pt II Group 5 item 1(b) (as substituted: see note 1 supra).

14 *Ibid* Sch 8 Pt II Group 5 item 2 (as substituted: see note 1 supra). Where a service falling within the description in head (2) or head (3) in the text is supplied in part in relation to the construction or conversion of a building and in part for other purposes, an apportionment may be made to determine the extent to which the supply is to be treated as falling within that head: Sch 8 Pt II Group 5 note (11) (as so substituted). Services are supplied 'in the course of the construction of a building' where the services are supplied contemporaneously or consecutively in relation to a new building and they have a substantial connection with the new building, as when, for example, off-site civil engineering works are carried out for the benefit of the new building as well as for existing buildings: *Customs and Excise Comrs v Rannoch School Ltd* [1993] STC 389, Ct of Sess.

Heads (2) and (3) in the text do not include the supply of services described in the Value Added Tax Act 1994 s 5(1), Sch 4 para 1(1) (transfer of an undivided share in land, or of the possession of land: see PARA 30 ante) or Sch 4 para 5(4) (deemed supply which occurs when a person puts land forming part of a business to private use, or makes the land available to any person for use for any purpose other than a purpose of the business: see PARA 24 ante): Sch 8 Pt II Group 5 note (20) (as so substituted). In *Customs and Excise Comrs v St Mary's Roman Catholic High School* [1996] STC 1091, it was held that the words 'in the course of construction' gave a wider scope to the services included in the Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 2 (as substituted) than those relating to the construction of the building itself; but that there must still be a relation between them and the construction of the building; either the services must facilitate the construction of the building or they

must produce in their finished result one whole with the building; and this connection must be both functional (which test the school playground in issue satisfied) and temporal; a playground constructed 13 years after the building it was to service failed the latter test.

15 Where all or part of a building is intended for use solely for a relevant residential purpose or a relevant charitable purpose: (1) a supply relating to the building (or any part of it) is not taken for these purposes or the purposes of head (4) in the text as relating to a building intended for such use unless it is made to a person who intends to use the building (or part) for such a purpose (see *League of Friends of Kingston Hospital v Customs and Excise Comrs* (1995) VAT Decision 12764, [1995] STI 68); and (2) a grant or other supply relating to the building (or part of it) is not taken as relating to a building intended for such use unless, before it is made, the person to whom it is made has given to the person making it a certificate in such form as may be specified in a notice published by the Commissioners stating that the grant or other supply (or a specified part of it) so relates: Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (12) (as substituted: see note 1 supra). The relevant form is set out in Customs and Excise Public Notice 708 *Buildings and Construction* (July 2002) PARA 18.2. The Commissioners allow for apportionment between qualifying and non-qualifying parts of a building: see PARA 3.5.

There may be a claw-back from the recipient of the VAT which would have been charged on the supplies relating to the building if there is a change of use, or disposal, of the building within ten years: see PARA 180 post. See also PARA 19 ante.

16 Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 2(a) (as substituted: see note 1 supra). The lease of a pool which was constructed for charitable purposes to the local community for a nominal fee prevents any supplies made in the course of its construction from being zero-rated: *London Federation of Clubs for Young People v Customs and Excise Comrs* [2002] V & DR 501.

17 This reference to the construction of a civil engineering work does not include a reference to the conversion, reconstruction, alteration or enlargement of a work: Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (15) (as substituted: see note 1 supra). As to the ambit of these words see note 7 supra.

18 Ibid Sch 8 Pt II Group 5 item 2(b) (as substituted: see note 1 supra). A caravan is not a residential caravan if residence in it throughout the year is prevented by the terms of a covenant, statutory planning consent or similar permission: Sch 8 Pt II Group 5 note (19) (as so substituted); and see *Customs and Excise Comrs v Barratt* [1995] STC 661n.

19 Ie a registered social landlord within the meaning of the Housing Act 1996 Pt I (ss 1-64) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 67), a registered housing association within the meaning of the Housing Association Act 1985 (Scottish housing association) or corresponding Northern Ireland legislation: Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 3, note (21) (as substituted (see note 1 supra); and amended by the Value Added Tax (Registered Social Landlords) Order 1997, SI 1997/50, art 2).

20 For the purposes of the Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 3 (as substituted and amended) (or, where applicable, s 35 (as amended) (see PARA 306 post)), and for the purposes of the notes so far as having effect for the purposes of Sch 8 Pt II Group 5 item 3 (as substituted and amended), a building or part of a building is 'non-residential' if: (1) it is neither designed, nor adapted for use (a) as a dwelling or number of dwellings, or (b) for a relevant residential purpose; or (2) it is designed, or adapted, for such use but (a) it was constructed more than ten years before the commencement of the works of conversion, and (b) no part of it has, in the period of ten years immediately preceding the commencement of those works, been used as a dwelling or for a relevant residential purpose, and (c) (other than for the purposes of s 35 (as amended)) no part of it is being so used: s 35(4), (4A), Sch 8 Pt II Group 5 note (7A) (s 35(4) added by the Finance Act 1996 s 30(3); Value Added Tax Act 1994 s 35(4) amended, s 35(4A), Sch 8 Pt II Group 5 note (7A) added, by the Value Added Tax (Conversion of Buildings) Order 2001, SI 2001/2305, arts 2, 3, (4)(a)). The conversion, other than to a building designed for a relevant residential purpose, of a non-residential part of a building which already contains a residential part is not included unless the result of that conversion is to create an additional dwelling or dwellings: see the Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (9) (as substituted: see note 1 supra); and note 12 supra. See also note 7 supra.

21 Ibid Sch 8 Pt II Group 5 item 3(a) (as substituted: see note 1 supra).

22 Ibid Sch 8 Pt II Group 5 item 3(b) (as substituted: see note 1 supra).

23 'Building materials', in relation to any description of a building, means goods of a description ordinarily incorporated by builders in a building of that description or its site (see *Customs and Excise Comrs v Smitmit Design Centre Ltd*, *Customs and Excise Comrs v Sharp's Bedroom Design Ltd* [1982] STC 525), but does not include:

91 (1) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;

92 (2) materials for the construction of fitted furniture, other than kitchen furniture;

- 93 (3) electrical or gas appliances, unless the appliance is an appliance which is: (a) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification or dust extraction; (b) intended for use in a building designed as a number of dwellings and is a door entry system, a waste disposal unit or a machine for compacting waste; (c) a burglar alarm, fire alarm, or fire safety equipment, or designed solely for the purpose of enabling aid to be summoned in an emergency; or (d) a lift or hoist;

- 94 (4) carpets or carpeting material,

and for these purposes the 'incorporation' of goods in a building includes their installation as fittings: Value Added Tax Act 1994 Sch 8 Pt II Group 5 notes (22), (23) (as substituted: see note 1 supra). In head (3), 'electrical appliances' includes electrically operated gates: *McCarthy & McCarthy (t/a Croft Homes) v Customs and Excise Comrs* (2000) VAT Decision 16789, [2001] STI 29.

The undertaking of joinery work off-site, to be delivered to the site where it would be installed by a third party builder, did not constitute the supply of building materials within the equivalent predecessor provision to Sch 8 Pt II Group 5 item 4 (as substituted) (see the text and note 24 infra) merely because the joiner was obliged to rectify the work on-site if it proved to be defective: *Customs and Excise Comrs v Jeffs (t/a J & J Joinery)* [1995] STC 759. The expression 'fitted furniture' should be given its ordinary popular meaning: *Customs and Excise Comrs v McLean Homes Midland Ltd* [1993] STC 335. The requirement that the building materials be supplied to the person to whom the supplier is also supplying services reverses the decision in *Customs and Excise Comrs v John Willmott Housing Ltd* [1987] STC 692 at 696.

24 Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 4 (as substituted: see note 1 supra). For the meaning of 'intended for use' as applied to head (2) in the text see Sch 8 Pt II Group 5 note (12) (as substituted); and note 15 supra.

25 Ibid Sch 8 Pt II Group 5 note (13)(a), (b), (i) (as substituted: see note 1 supra). This provision has been criticised as being discriminatory and as exceeding the limitation on the exemption for land imposed by EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(b)(1); and the VAT and duties tribunal refused to apply it where the taxpayer was prohibited from occupying property which was not accommodation in the 'hotel sector or in a sector with a similar function': *Ashworth v Customs and Excise Comrs* (1995) VAT Decision 12924, [1995] STI 478. See *Livingstone Homes UK Ltd v Customs and Excise Comrs* (2000) VAT Decision 16649, [2000] STI 1313 (the restriction to use a holiday dwelling did not prevent building being used as a grantee's principal private residence). The case was held to have been wrongly decided in *Loch Tay Highland Lodges Ltd v Customs and Excise Comrs* (2002) VAT Decision 18785, [2005] STI 305 (in which the opposite conclusion was reached).

26 Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (13)(a), (b), (ii) (as substituted: see note 1 supra).

27 Ibid Sch 8 Pt II Group 5 note (10)(a), (b), (i) (as substituted: see note 1 supra).

28 Ibid Sch 8 Pt II Group 5 note (10)(a), (b), (ii) (as substituted: see note 1 supra).

29 Ibid Sch 8 Pt II Group 5 note (10)(a), (b), (iii) (as substituted: see note 1 supra).

## UPDATE

### 179 Construction of buildings etc

TEXT AND NOTES--If one or more relevant zero-rated supplies relating to a building (or part of a building) have been made to a person and (1) within the period of ten years beginning with the day on which the building is completed, the person grants an interest in, right over or licence to occupy (a) the building or any part of it, or (b) the building of any part of it including, consisting of or forming part of the part to which the relevant zero-related supply or supplies related; and (2) after the grant (a) the whole or part of the building or of the part to which the grant relates, or (b) the whole of the building or of the part to which the grant relates, or any part of it including, consisting of or forming part of the part to which the relevant zero-rated supply or supplies related, is not intended for uses solely for a relevant residential purpose or a relevant charitable purpose, then (3) so far as the grant relates to so much of the building as (a) by reason of its intended use gave rise to the relevant zero-rated supply or supplies, and (b) is not intended for use solely for a relevant residential purpose or a relevant charitable purpose after the grant, is taken to be a taxable supply in the course or

furtherance of a business which is not zero-rated as a result of the Value Added Tax Act 1994 Sch 8 Pt II Group 5: Sch 10 para 36 (Sch 10 substituted by SI 2008/1146). If one or more relevant zero-rated supplies relating to a building or part of a building have been made to a person and, within the period of ten years beginning with the day on which the building is completed, the person uses the building or any part of it, or the building or any part of it including, consisting of or forming part of the part to which the relevant zero-rated supply or supplies related, for a purpose which is neither a relevant residential purpose nor a relevant charitable purpose, then the person's interest in, right over or licence to occupy so much of the building as (i) by reason of its intended use gave rise to the relevant zero-rated supply or supplies, and (ii) is used otherwise than for a relevant residential purpose or a relevant charitable purpose is treated for the purposes of the Value Added Tax Act 1994 as supplied to the person for the purposes of a business carried on by him, and supplied by him in the course or furtherance of the business when the person first so uses it: Sch 10 para 37(1)-(3). The supply is taken to be a taxable supply which is not zero-rated as a result of Sch 8 Pt II Group 5; and the value of that supply is taken to be the amount obtained by the formula:

$$A \times \left( \frac{10 - B}{10} \right)$$

where A is the amount that yields an amount of VAT chargeable on it equal to the VAT which could have been chargeable on the relevant zero-rated supply (or, if there was more than one supply, the aggregate amount of the VAT which would have been chargeable on the supplies), had so much of the building not been intended for use solely for a relevant residential purpose or a relevant charitable purpose; B is the number of whole years since the day the building was completed for which the building or part concerned has been used for either purpose: Sch 10 para 37. For this purpose, a 'relevant zero-rated supply' is a grant or other supply which relates to a building (or part of a building) intended for use solely for a relevant residential purpose or for a relevant charitable purpose, and which is zero-rated (in whole or in part) as a result of Sch 8 Group 5: Sch 10 para 35.

NOTE 7--A 'building' must enclose space which has a function; accordingly, a bridge is not a building (*Upper Don Walk Trust v HMRC Comrs* (2006) VAT Decision 19476; [2006] STI 1417); nor is a mere boundary wall (*Adath Yisroel Synagogue v Revenue and Customs Comrs* (2008) VAT Decision 20809, [2008] SWTI 2513).

NOTE 8--For the importance of the wording of the planning permission in a case to which head (3) is to apply, see *Nicholson v HMRC Comrs* (2006) VAT Decision 19412, [2006] STI 1361; and *Cartagena v HMRC Comrs* (2006) VAT Decision 19454, [2006] STI 1375.

NOTE 9--*Fenwood*, cited, affirmed: [2005] EWHC 2954 (Ch), [2006] STC 644. A building in the grounds of a hospital may nevertheless be used for a relevant residential purpose: *St Andrews Property Management Ltd v Revenue and Customs Comrs* (2007) VAT Decision 20499, [2008] SWTI 1067.

NOTE 12--A building declared unfit for human habitation is not a non-residential building: *Johnson v Revenue and Customs Comrs* (2007) VAT Decision 20506, [2008] SWTI 1068.

NOTE 16--See also *Riverside Housing Association Ltd v Revenue and Customs Comrs* [2005] EWHC 2382; [2006] STC 2072 (divisional headquarters of housing association not constructed for relevant charitable purpose).

NOTE 23--Goods normally incorporated may include a swimming pool and its electronic retractable cover, but not a movable floor installed with such a pool: *Rainbow Pools London Ltd v Revenue and Customs Comrs* (2008) VAT Decision 20800, [2008] SWTI 2512 (electronic retractable cover not excluded as an electrical appliance); not following *Leisure Contracts Ltd v Revenue and Customs Comrs* (2006) VAT Decision 1358, [2006] SWTI 1358.

NOTE 25--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

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### **180. Residential and charitable buildings; change of use etc.**

Where a person receives a supply which is wholly or partly zero-rated<sup>1</sup> because it relates to a building (or a part of a building) which is intended for use solely for a relevant residential purpose<sup>2</sup> or a relevant charitable purpose<sup>3</sup>, the scope of zero-rating may be reduced if one of a number of events occurs within ten years of the completion<sup>4</sup> of the building<sup>5</sup>. Thus, where:

- 526 (1) one or more relevant zero-rated supplies<sup>6</sup> relating to a building (or part of a building) have been made to any person<sup>7</sup>;
- 527 (2) within the period of ten years beginning with the day on which the building is completed, the person grants an interest in, right over or licence to occupy the building or any part of it (or the building or any part of it including, consisting of or forming part of the part to which the relevant zero-rated supply or supplies related); and
- 528 (3) after the grant the whole or any part of the building, or the part to which the grant relates (or the whole of the building or of the part to which the grant relates, or any part of it including, consisting of or forming part of the part to which the relevant zero-rated supply or supplies related) is not intended for use solely for a relevant residential purpose or a relevant charitable purpose<sup>8</sup>,

then to the extent that the grant relates to so much of the building as: (a) by reason of its intended use gave rise to the relevant zero-rated supply or supplies; and (b) is not intended for use solely for a relevant residential purpose or a relevant charitable purpose after the grant, it is taken to be a taxable supply<sup>9</sup> in the course or furtherance of a business<sup>10</sup> which is not zero-rated<sup>11</sup>, if it would not otherwise be such a supply<sup>12</sup>. Where:

- 529 (i) one or more relevant zero-rated supplies relating to a building (or part of a building) have been made to any person; and
- 530 (ii) within the period of ten years beginning with the day on which the building is completed, the person uses the building or any part of it (or the building or any part of it including, consisting of or forming part of the part to which the relevant zero-rated supply or supplies related) for a purpose which is neither a relevant residential purpose nor a relevant charitable purpose<sup>13</sup>,

his interest in, right over or licence to occupy so much of the building as: (A) by reason of its intended use gave rise to the relevant zero-rated supply or supplies; and (B) is used otherwise than for a relevant residential purpose or a relevant charitable purpose, is treated for the purposes of the Value Added Tax Act 1994 as supplied to him for the purpose of a business carried on by him and supplied by him in the course or furtherance of the business when he first uses it for a purpose which is neither a relevant residential purpose nor a relevant charitable purpose<sup>14</sup>.

<sup>1</sup> For the meaning of 'zero-rated supply' generally see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante. See also note 6 infra.

2 For the meaning of 'use for a relevant residential purpose' see the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 5 notes (4), (5) (as substituted); and PARA 179 note 9 ante (applied by s 51(1), Sch 10 para 9 (amended by the Value Added Tax (Buildings and Land) Order 1995, SI 1995/279, arts 2, 9)).

3 For the meaning of 'use for a relevant charitable purpose' see the Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (6) (as substituted); and PARA 179 note 10 ante (applied by Sch 10 para 9 (as amended: see note 2 supra)).

4 As to when a building is complete see *ibid* s 31(1), Sch 9 Pt II Group 1 note (2); and see PARA 156 note 6 ante (applied by Sch 10 para 9 (as amended: see note 2 supra)).

5 See *ibid* Sch 10 para 1 (as amended); and the text and notes 6-14 *infra*.

6 For these purposes, 'relevant zero-rated supply' means a grant or other supply taking place on or after 1 April 1989 which: (1) relates to a building intended for use solely for a relevant residential purpose or a relevant charitable purpose or part of such a building; and (2) is zero-rated, in whole or in part, by virtue of *ibid* Sch 8 Pt II Group 5 (as substituted and amended) (see PARA 179 ante); Sch 10 para 1(1). As to the meaning of 'grant' see Sch 9 Pt II Group 1 notes (1), (1A) (as substituted and added); and PARAS 156 note 2, 179 note 3 ante (applied by Sch 10 para 9 (as amended: see note 2 supra)).

7 It would seem that, if an event within *ibid* Sch 10 para 1 (as amended) occurs, it is only the recipient of the zero-rated supply (the 'any person' to whom the zero-rated supply has been made) who suffers 'claw-back' of VAT; and that if, therefore, that person assigns his interest in the land to another person who intends to use the building for a relevant residential or relevant charitable purpose, and an event within Sch 10 para 1 (as amended) occurs, that assignee will not suffer 'claw-back' of VAT.

8 *Ibid* Sch 10 para 1(2).

9 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

10 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

11 *Ie* by virtue the Value Added Tax Act 1994 Sch 8 Pt II Group 5 (as substituted and amended): see PARA 179 ante.

12 *Ibid* Sch 10 para 1(3).

13 *Ibid* Sch 10 para 1(4).

14 *Ibid* Sch 10 para 1(5). Where this provision applies, the supply is taken to be a taxable supply which is not zero-rated by virtue of Sch 8 Pt II Group 5 (as substituted and amended) (see PARA 179 ante) if it would not otherwise be such a supply, and the value of that supply is taken to be such amount as is obtained by using the formula:

$$\frac{Ax(10-B)}{10}$$

where A is the amount that yields an amount of VAT chargeable on it equal to the VAT which would have been chargeable on the relevant zero-rated supply (or, where there was more than one supply, the aggregate amount which would have been chargeable on them) had so much of the building as is mentioned in Sch 10 para 1(5) not been intended for use solely for a relevant residential purpose or a relevant charitable purpose; and B is the number of whole years since the day the building was completed for which the building or part concerned has been used for a relevant residential purpose or a relevant charitable purpose: Sch 10 para 1(6) (amended by the Value Added Tax (Building and Land) Order 2002, SI 2002/1102, art 2).



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### **181. Protected buildings.**

The following are zero-rated supplies<sup>1</sup>:

- 531 (1) the first<sup>2</sup> grant<sup>3</sup> by a person substantially reconstructing<sup>4</sup> a protected building<sup>5</sup>, of a major interest<sup>6</sup> in, or in any part of, the building or its site<sup>7</sup>;
- 532 (2) the supply, in the course of an approved<sup>8</sup> alteration<sup>9</sup> of a protected building, of any services<sup>10</sup> other than the services of an architect, surveyor or any person acting as consultant or in a supervisory capacity<sup>11</sup>;
- 533 (3) the supply of building materials<sup>12</sup> to a person to whom the supplier is supplying services within head (2) above which include the incorporation<sup>13</sup> of the materials into the building or its site<sup>14</sup>.

A protected building means a building which is designed to remain as or become a dwelling or number of dwellings<sup>15</sup> or is intended for use solely for a relevant residential purpose<sup>16</sup> or a relevant charitable purpose<sup>17</sup> after the reconstruction or alteration and which in either case is a listed building<sup>18</sup> or a scheduled<sup>19</sup> monument<sup>20</sup>.

When part of a protected building that is substantially reconstructed is designed to remain as or become a dwelling or a number of dwellings, or is intended for use solely for a relevant residential or relevant charitable purpose, and part is not:

- 534 (a) a grant or other supply relating only to the part so designed or intended for such use, or its site, is treated as relating to a building so designed or intended for such use;
- 535 (b) a grant or other supply relating only to the part neither so designed nor intended for such use, or its site, is not so treated; and
- 536 (c) in the case of any other grant or other supply relating to, or to any part of, the building, or its site, an apportionment is made to determine the extent to which it is to be so treated<sup>21</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 6 (as substituted and amended); and the text and notes 2-21 infra. The Value Added Tax Act 1994 s 30(3) (see PARAS 174 ante, 190 post) does not apply to goods forming part of a description of supply in Sch 8 Pt II Group 6 (as substituted and amended): see Sch 8 Pt II Group 5 note (24) (as substituted); and PARA 179 note 1 ante (applied by Sch 8 Pt II Group 6 note (3) (Sch 8 Pt II Group 6 substituted by the Value Added Tax (Protected Buildings) Order 1995, SI 1995/283, art 2). For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante. As to the interpretation by the Commissioners for Her Majesty's Revenue and Customs of the Value Added Tax Act 1994 Sch 8 Pt II Group 6 (as substituted and amended) see Customs and Excise Public Notice 708 *Buildings and Construction* (July 2002). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 The inclusion of the word 'first' modifies earlier authority to the effect that zero-rating was available when a building was sold after having been first let; as to that earlier authority see *Customs and Excise Comrs v Link Housing Association Ltd* [1992] STC 718. See *Lordsregal Ltd v Customs and Excise Comrs* (2004) VAT Decision 18353, [2004] STI 1308.

3 'Grant' includes an assignment or surrender: see the Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (1) (as substituted); and PARA 179 note 3 ante (applied by Sch 8 Pt II Group 6 note (3) (as substituted: see note 1 supra)).

4 The present participle 'reconstructing' does not exclude from this provision a grant which takes place after the reconstruction has been completed: *Customs and Excise Comrs v Link Housing Association Ltd* [1992] STC 718; but see note 2 supra.

For the purposes of the Value Added Tax Act 1994 Sch 8 Pt II Group 6 item 1 (as substituted) a protected building is not regarded as substantially reconstructed unless the reconstruction is such that at least one of the following conditions is fulfilled when the reconstruction is completed: (1) that, of the works carried out to effect the reconstruction, at least three-fifths, measured by reference to cost, are of such a nature that the supply of services, other than excluded services (ie the services of an architect, surveyor or other person acting as consultant or in a supervisory capacity), materials and other items to carry out the works, would, if supplied by a taxable person, be within either Sch 8 Pt II Group 6 item 2 (as substituted) or Sch 8 Pt II Group 6 item 3 (as substituted) (see heads (2)-(3) in the text); and (2) that the reconstructed building incorporates no more of the original building (ie the building as it was before the reconstruction began) than the external walls, together with other external features of architectural or historic interest: Sch 8 Pt II Group 6 note (4) (as substituted: see note 1 supra). For the meaning of 'protected building' see the text and notes 15-20 infra.

5 See the text and notes 15-20 infra.

6 For the meaning of 'major interest' see PARA 30 note 2 ante.

7 Value Added Tax Act 1994 Sch 8 Pt II Group 6 item 1 (as substituted: see note 1 supra). As to the meaning of 'site' see *Stapenhill Developments Ltd v Customs and Excise Comrs* [1984] VATTR 1 at 10; and PARA 179 note 5 ante.

8 'Approved alteration' means: (1) in the case of a protected building which is an ecclesiastical building to which the Planning (Listed Buildings and Conservation Areas) Act 1990 s 60 applies (see TOWN AND COUNTRY PLANNING), any works of alteration; and (2) in any other case, works of alteration which may not, or but for the existence of a Crown interest or Duchy interest could not, be carried out unless authorised under, or under any provision of: (a) Pt I (ss 1-68) (as amended) (see TOWN AND COUNTRY PLANNING); or (b) the Ancient Monuments and Archaeological Areas Act 1979 Pt I (ss 1-32) (as amended) (see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1002 et seq), and for which, except in the case of a Crown interest or Duchy interest, consent has been obtained under any provision of that Part of the relevant Act; but 'approved alteration' does not include any works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of works of repairs or maintenance work: Value Added Tax Act 1994 Sch 8 Pt II Group 6 note (6) (as substituted: see note 1 supra). 'Crown interest' means an interest belonging to Her Majesty in right of the Crown, or belonging to a government department, and includes any estate or interest held in right of the Prince and Steward of Scotland; and 'Duchy interest' means an interest belonging to Her Majesty in right of the Duchy of Lancaster, or belonging to the Duchy of Cornwall: Ancient Monuments and Archaeological Areas Act 1979 s 50(4) (applied by the Value Added Tax Act 1994 Sch 8 Pt II Group 6 note (8) (as so substituted)). It does not follow from the fact that listed building consent was obtained for works carried out that those works necessarily constitute 'alterations' for the purpose of Sch 8 Pt II Group 6 item 2 (as substituted): *Mann v Customs and Excise Comrs* (1996) VAT Decision 14004, [1996] STI 962. Alterations which are the subject of retrospective planning permission are not approved for this purpose: *Wells v Customs and Excise Comrs* (1997) VAT Decision 15169, [1997] STI 1489, even if the alteration was carried out promptly to ensure the safety of the site: *Dart Major Works Ltd v Customs and Excise Comrs* (2004) VAT Decision 18781, [2004] STI 2575. Approval of the alterations must not be confused with the alterations themselves which, in order to be zero-rated, have to exclude repair or maintenance: *Customs and Excise Comrs v Morrish* [1998] STC 954. A direction under the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, art 4(2) (see TOWN AND COUNTRY PLANNING vol 46(1) (2005 Reissue) PARA 262) does not amount to the listing of a building under the Planning (Listed Buildings and Conservation Areas) Act 1990: see *McMillan v Customs and Excise Comrs; Cedar Homes (UK) Ltd v Customs and Excise Comrs* (2004) VAT Decision 18536, [2004] STI 1309.

A building which is used or which is available for use by a minister of religion wholly or mainly as a residence from which to perform the duties of his office is not an ecclesiastical building for the purposes of head (1) supra: Value Added Tax Act 1994 Sch 8 Pt II Group 6 note (7) (as so substituted). The word 'mainly' probably means 'more than half', though there is nothing here to indicate by reference to what this is calculated; cf *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 at 669, [1960] 3 All ER 503 at 512, HL, per Lord Morton of Henryton; and see also *Re Hatschek's Patents, ex p Zerennner* [1909] 2 Ch 68; *Miller v Otilie (Owners)* [1944] KB 188, [1944] 1 All ER 277; *Franklin v Gramophone Co Ltd* [1948] 1 KB 542 at 555, [1948] 1 All ER 353 at 358, CA, per Somervell LJ; and *Berthelemey v Neale* [1952] 1 All ER 437, 96 Sol Jo 165, CA.

9 As to the meaning of 'alteration' see PARA 179 notes 6-7 ante. The construction of a building separate from, but in the curtilage of, a protected building does not constitute an alteration of the protected building for these purposes: Value Added Tax Act 1994 Sch 8 Pt II Group 6 note (10) (as substituted: see note 1 supra). A barn connected to a protected building by a covered walkway was not separate from the protected building within the meaning of Sch 8 Pt II Group 6 note (10) (as substituted), so that alterations to the barn qualified for zero-rating: *Customs and Excise Comrs v Arbib* [1995] STC 490. In *ACT Construction Ltd v Customs and Excise Comrs* [1982] 1 All ER 84, [1982] STC 25, HL (relating to previous legislation, now repealed) works of underpinning were held to be new work, converting short-life buildings into buildings with a long life and, as such, incapable

of falling within the classification of 'repair or maintenance', which was a single, composite phrase, in which the words used were not antithetical (and which might, in some cases, overlap with 'structural alteration'); see also *Customs and Excise Comrs v Windflower Housing Association* [1995] STC 860. In *Wilson v Customs and Excise Comrs* (1998) VAT Decision 15803, [1999] STI 238, a garage was added to a building which was not then listed, in 1936. On the demolition and reconstruction of the garage in 1997, listed building consent was required, the original garage having been within the curtilage of a listed building on 1 July 1948. It was held that the demolition and reconstruction was within the Value Added Tax Act 1994 Sch 8 Pt II Group 6 item 2 (as substituted), and could not, accordingly, be zero-rated.

10 These services do not include those described in *ibid* s 5(1) Sch 4 paras 1(1), 5(4) (see PARA 30 ante): Sch 8 Pt II Group 6 note (11) (as substituted: see note 1 supra).

11 *Ibid* Sch 8 Pt II Group 6 item 2 (as substituted: see note 1 supra). Where a service is supplied in part in relation to an approved alteration of a building, and in part for other purposes, an apportionment may be made to determine the extent to which the supply is to be treated as falling within Sch 8 Pt II Group 6 item 2 (as substituted): Sch 8 Pt II Group 6 note (9) (as so substituted).

12 For the meaning of 'building materials' see *ibid* Sch 8 Pt II Group 5 note (22) (as substituted); and PARA 179 note 23 ante (applied by Sch 8 Pt II Group 6 note (3) (as substituted: see note 1 supra)).

13 'Incorporation' includes the installation of the goods as fittings: see *ibid* Sch 8 Pt II Group 5 note (23) (as substituted); and PARA 179 note 23 ante (applied by Sch 8 Pt II Group 6 note (3) (as substituted: see note 1 supra)). Head (3) in the text applies only if the building materials are supplied by the contractor who is supplying services which include the incorporation of the materials into the building: *Seaton Parochial Church Council v Customs and Excise Comrs* (2004) VAT Decision 18742, [2004] STI 2564 (heating equipment bought by building owner who then paid a contractor to install it, not zero-rated).

14 Value Added Tax Act 1994 Sch 8 Pt II Group 6 item 3 (as substituted: see note 1 supra). The undertaking of joinery work off-site, to be delivered to the site where it would be installed by a third party builder, did not constitute the supply of building materials within the equivalent predecessor provisions to Sch 8 Pt II Group 6 item 3 (as substituted) merely because the joiner was obliged to rectify the work on-site if it proved to be defective: *Customs and Excise Comrs v Jeffs (t/a J & J Joinery)* [1995] STC 759.

15 For these purposes, a building is designed to remain as or become a dwelling or number of dwellings where in relation to each dwelling the following conditions are satisfied: (1) the dwelling consists of self-contained living accommodation; (2) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling; and (3) the separate use or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision; and includes a garage (occupied together with a dwelling) either constructed at the same time as the building or, where the building has been substantially reconstructed, at the same time as that reconstruction: Value Added Tax Act 1994 Sch 8 Pt II Group 6 note (2) (as substituted: see note 1 supra). See also Sch 8 Pt II Group 5 notes (13), (14) (as substituted); and PARA 179 notes 4, 25 ante (applied with the necessary modifications by Sch 8 Pt II Group 6 note (3) (as so substituted)). The limitation that a building must be designed to remain as a dwelling refers to its purpose and not to its use: *Mann v Customs and Excise Comrs* (1996) VAT Decision 14004, [1996] STI 962. By concession, developers of buildings which were granted a certificate of immunity from listing as a protected building issued by the Secretary of State for National Heritage prior to 16 April 1996, and which, on the grant of a major interest following substantial reconstruction, are to be used solely for a non-business charitable purpose, are given a status equivalent to that for protected buildings, with the result that the works carried out will be zero-rated if (but for the certificate) they would have fallen within the Value Added Tax Act 1994 Sch 8 Pt II Group 6 (as substituted and amended): Customs and Excise News Release 25/96 (16 April 1996) [1996] STI 761. However, the exemption is not available in respect of certificates granted after that date; and developers will be expected to decide on the relative merits of immunity from listing and the zero-rating of their works. In *Morfee v Customs and Excise Comrs* (1996) VAT Decision 13816, [1996] STI 469, it was held that the zero-rating afforded to a dwelling which was a protected building could extend to other buildings (such as a barn) which formed part of the dwelling. See *Clamp v Customs and Excise Comrs* [1999] V & DR 520 (building works on a barn within the curtilage of a protected building found to be standard rated as barn was not a domestic building or part of the dwelling). See also *Hopewell-Smith v Customs and Excise Comrs* (2000) VAT Decision 16725, [2000] STI 1534 (barn, converted for use as accommodation ancillary to Grade II listed farmhouse and physically capable of being used as self-contained living accommodation, but used only by family occupying main house, held to be a building designed to be part of dwelling consisting of self-contained living accommodation, alternatively (despite planning condition prohibiting separate use but not separate disposal), as a building consisting of self-contained living accommodation).

16 For the meaning of 'relevant residential purpose' see the Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (4) (as substituted); and PARA 179 note 9 ante (applied by Sch 8 Pt II Group 6 note (3) (as substituted: see note 1 supra)). See also Sch 8 Pt II Group 5 note (12) (as substituted); and PARA 179 note 15 ante.

17 For the meaning of 'relevant charitable purpose' see *ibid* Sch 8 Pt II Group 5 note (6) (as substituted); and PARA 179 note 10 ante (applied by Sch 8 Pt II Group 6 note (3) (as substituted: see note 1 supra)). See also Sch 8 Pt II Group 5 note (12) (as substituted); and PARA 179 note 15 ante (as so applied, with the necessary modifications).

18 Ie a listed building within the meaning of the Planning (Listed Buildings and Conservation Areas) Act 1990: see TOWN AND COUNTRY PLANNING. See *Customs and Excise Comrs v Zielinski Baker & Partners Ltd* [2004] UKHL 7, [2004] 2 All ER 141 (building works on outbuilding within curtilage of listed house not zero-rated); *Customs and Excise Comrs v Tinsley* [2005] EWHC 1508 (Ch), [2005] STC 1612 (works carried out on garden of listed building could be zero-rated but in the instant case were not).

19 Ie a scheduled monument within the meaning of the Ancient Monuments and Archaeological Areas Act 1979: see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1010.

20 Value Added Tax Act 1994 Sch 8 Pt II Group 6 note (1) (as substituted: see note 1 supra). The intention is that 'granny flats' and similar extensions to existing houses should not qualify for zero-rating: Customs and Excise Public Notice 708 *Buildings and Construction* (July 2002) PARA 3.2.2.

21 Value Added Tax Act 1994 Sch 8 Pt II Group 5 note (5) (as substituted: see note 1 supra).

## UPDATE

### 181 Protected buildings

TEXT AND NOTES--See also *Wanklin (on behalf of Haresfield Court Tenants' Association) v HMRC Comrs* (2007) VAT Decision 20133, [2007] STI 2239.

NOTE 15--'Separate use' refers to a use that is separate from that of the main building, so a use that has to be incidental or ancillary to the use of the main building cannot be a separate use: *Revenue and Customs Comrs v Lunn* [2009] UKUT 244 (TCC), [2010] STC 486.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/182. International services.

## 182. International services.

The following are zero-rated supplies<sup>1</sup>:

- 537 (1) the supply of services of work carried out on goods which, for that purpose, have been obtained or acquired in, or imported into, any of the member states and which are intended to be, and in fact are, subsequently exported to a place outside the member states<sup>2</sup>:
- 15
- 30. (a) by or on behalf of the supplier<sup>3</sup>; or
- 31. (b) where the recipient of the services belongs in a place outside the member states, by or on behalf of the recipient<sup>4</sup>;
- 16
- 538 (2) the supply of services consisting of the making of arrangements for: (a) the export of any goods to a place outside the member states<sup>5</sup>; (b) a supply of services of the description specified in head (1) above<sup>6</sup>; or (c) any supply of services which is made outside the member states<sup>7</sup>.

Exempt supplies of services of insurance<sup>8</sup> and finance<sup>9</sup> are excluded from zero-rating under heads (1) and (2) above<sup>10</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 7; and heads (1)-(2) in the text. By concession, the United Kingdom zero-rates supplies of services of valuation of goods or work on goods performed in the United Kingdom for customers who belong in other member states: see Customs and Excise Business Brief 26/93 [1993] STI 1217; and as to supplies of work on goods to businesses in other member states see Customs and Excise Public Notice 744D *International Services: Zero-Rating* (March 2002) PARA 2.2. For the reverse charge see PARA 33 ante. Training services supplied to overseas governments are zero-rated by concession: para 4. As to work on goods to be exported from the European Union see PARA 2.

2 As to the territories included in, or excluded from, the member states for the purposes of VAT see PARA 16 ante.

3 Value Added Tax Act 1994 Sch 8 Pt II Group 7 item 1(a).

4 Ibid Sch 8 Pt II Group 7 item 1(b).

5 Ibid Sch 8 Pt II Group 7 item 2(a).

6 Ibid Sch 8 Pt II Group 7 item 2(b).

7 Ibid Sch 8 Pt II Group 7 item 2(c).

8 Ie supplies of services of insurance falling within ibid s 31(1), Sch 9 Pt II Group 2 (as substituted and amended): see PARA 160 ante.

9 Ie supplies of services of finance falling within ibid Sch 9 Pt II Group 5 (as amended): see PARA 163 ante.

10 Ibid Sch 8 Pt II Group 7 note.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3.  
EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/183. Transport.

### **183. Transport.**

The following are zero-rated supplies<sup>1</sup>:

- 539 (1) the supply, repair or maintenance of a qualifying ship<sup>2</sup> or the modification or conversion of any such ship, provided that when so modified or converted it will remain a qualifying ship<sup>3</sup>, including the letting on hire of such goods as this head includes<sup>4</sup>;
- 540 (2) the supply, repair or maintenance of a qualifying aircraft<sup>5</sup> or the modification or conversion of any such aircraft, provided that when so modified or converted it will remain a qualifying aircraft<sup>6</sup>, including the letting on hire of such goods as this head includes<sup>7</sup>;
- 541 (3) the supply of parts and equipment, of a kind ordinarily installed or incorporated in, and to be installed or incorporated in, the propulsion, navigation or communication systems or the general structure of a qualifying ship or qualifying aircraft<sup>8</sup>, including the letting on hire of such goods as this head includes<sup>9</sup> but not including the supply of parts and equipment to a government department unless certain conditions are fulfilled<sup>10</sup>;
- 542 (4) the supply of life jackets, life rafts, smoke hoods and similar safety equipment for use in a qualifying ship or qualifying aircraft<sup>11</sup>, including the letting on hire of such goods as this head includes<sup>12</sup> but not including the supply of parts and equipment to a government department unless certain conditions are fulfilled<sup>13</sup>;
- 543 (5) the supply to, and repair or maintenance for, a charity providing rescue or assistance at sea of: (a) any lifeboat<sup>14</sup>; (b) carriage equipment designed solely for the launching and recovery of lifeboats; (c) tractors for the sole use of the launching and recovery of lifeboats; (d) winches and hauling equipment for the sole use of the recovery of lifeboats<sup>15</sup>, including the letting on hire of such goods as this head includes<sup>16</sup>;
- 544 (6) the construction, modification, repair or maintenance for a charity providing rescue or assistance at sea of slipways used solely for the launching and recovery of lifeboats<sup>17</sup>, including the letting on hire of such goods as this head includes<sup>18</sup>;
- 545 (7) the supply of spare parts or accessories to a charity providing rescue or assistance at sea for use in, or with goods comprised in, head (5) above or slipways comprised in head (6) above<sup>19</sup>, and the supply of equipment that is to be installed, incorporated or used in a lifeboat and is of a kind ordinarily so installed, incorporated or used<sup>20</sup>, including the letting on hire of such goods as this head includes<sup>21</sup>;
- 546 (8) transport of passengers<sup>22</sup>: (a) in any vehicle, ship or aircraft designed or adapted to carry no fewer than ten passengers including the transport of passengers in a vehicle (i) which is designed, or substantially and permanently adapted, for the safe carriage of a person in a wheelchair or two or more such persons, and (ii) which, if it were not so designed or adapted, would be capable of carrying no fewer than ten persons<sup>23</sup>; (b) by the Post Office company<sup>24</sup>; (c) on any scheduled flight; or (d) from a place within to a place outside the United Kingdom, or vice versa, to the extent that those services are supplied in the United Kingdom<sup>25</sup>;
- 547 (9) the transport of goods from a place within to a place outside the member states, or vice versa, to the extent that those services are supplied within the United Kingdom<sup>26</sup>;

- 548 (10) any services provided for: (a) the handling of ships or aircraft in a port, customs and excise airport<sup>27</sup> or outside the United Kingdom; or (b) the handling or storage (i) in a port, (ii) on land adjacent to a port, (iii) in a customs and excise airport, or (iv) in a transit shed, of goods carried in a ship or aircraft<sup>28</sup>; but not including the letting on hire of goods<sup>29</sup>;
- 549 (11) air navigation services<sup>30</sup>;
- 550 (12) pilotage services<sup>31</sup>;
- 551 (13) salvage or towage services<sup>32</sup>;
- 552 (14) any services supplied for, or in connection with, the surveying of any ship or aircraft or the classification of any ship or aircraft for the purposes of any register<sup>33</sup>;
- 553 (15) the making of arrangements for: (a) the supply of, or of space in, any ship or aircraft<sup>34</sup>; (b) the supply of any service included in heads (1) and (2), (5) to (14) above and (16) and (17) below<sup>35</sup>; or the supply of any goods of a description falling within head (3) or head (4) above<sup>36</sup>;
- 554 (16) the supply of services consisting of: (a) the handling or storage of goods at, or their transport to or from, a place at which they are to be exported to, or have been imported from, a place outside the member states; or (b) the handling or storage of such goods in connection with such transport<sup>37</sup>;
- 555 (17) the supply, to a person who receives the supply for the purpose of a business carried on by him and who belongs outside the United Kingdom, of services of a description specified in heads (10)(a), (11), (14) or (15)(a) above<sup>38</sup>;
- 556 (18) the supply of a designated travel service<sup>39</sup> to be enjoyed outside the European Community, to the extent to which the supply is so enjoyed<sup>40</sup>; and
- 557 (19) intra-Community transport services<sup>41</sup> supplied in connection with the transport of goods to or from the Azores or Madeira or between those places, to the extent that the services are treated as supplied in the United Kingdom<sup>42</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 8 (as amended); and heads (1)-(19) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante.

2 A 'qualifying ship' is any ship of a gross tonnage of not less than 15 tons which is neither designed nor adapted for use for recreation or pleasure: *ibid* Sch 8 Pt II Group 8 note (A1)(a) (Sch 8 Pt II Group 8 note (A1) added by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(e)). For these purposes, the supply of a qualifying ship or, as the case may be, aircraft (see head (2) in the text) includes the supply of services under a charter of that ship or aircraft except where the services supplied under such a charter consist wholly of one or more of the following: (1) transport of passengers; (2) accommodation; (3) entertainment; (4) education, and are services wholly performed in the United Kingdom: Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (1) (amended by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(f), (g)). A qualifying ship must be fully equipped and capable of self-propulsion, and must be fit for navigation at sea or on the waterways for which it is designed: *QED Marine v Customs and Excise Comrs* [2001] V & DR 534. 'Designed' means intended for use having regard to the current function of the vessel concerned; and in the case of an adaptation the focus should be on the function of the vessel and the use to which it is put by the end user: *Revenue and Customs Comrs v Cirdan Sailing Trust* [2004] STI 1062, [2005] All ER (D) 61 (Jun). As to the meaning of 'ship' see PARA 19 note 7 ante; and for the meaning of 'United Kingdom' see PARA 4 note 3 ante.

3 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 1 (substituted by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(a)). As to the meaning of repair and maintenance in this context see *A & P Appledore (Falmouth) Ltd v Customs and Excise Comrs* [1992] VATTR 22.

4 Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (2).

5 A 'qualifying aircraft' is any aircraft of a weight of not less than 8,000 kg which is neither designed nor adapted for use for recreation or pleasure: *ibid* Sch 8 Pt II Group 8 note (A1)(b) (as added: see note 2 supra).

6 *Ibid* Sch 8 Pt II Group 8 item 2 (substituted by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(b)); and see note 3 supra.

7 Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (2).

8 *Ibid* Sch 8 Pt II Group 8 item 2A (Sch 8 Pt II Group 8 items 2A, 2B added by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(c)).

9 Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (2) (amended by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(g)).

10 Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (2A) (added by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(h)). The conditions are that: (1) the parts and equipment are installed or incorporated in the course of a supply which is treated as being made in the course or furtherance of a business carried on by the department; or (2) they are to be installed or incorporated in ships or aircraft used for the purpose of providing rescue or assistance at sea: Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (2A) (as so added). For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

11 Ibid Sch 8 Pt II Group 8 item 2B (as added: see note 8 supra).

12 See note 9 supra.

13 See note 10 supra.

14 'Lifeboat' means any vessel used or to be used solely for rescue or assistance at sea: Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (4).

15 Ibid Sch 8 Pt II Group 8 item 3(a). Heads (5)-(7) in the text do not apply unless, before the supply is made, the recipient of the supply gives to the person making the supply a certificate stating the name and address of the recipient and that the supply is of a description specified in those heads: Sch 8 Pt II Group 8 note (3).

16 Ibid Sch 8 Pt II Group 8 note (2).

17 Ibid Sch 8 Pt II Group 8 item 3(b); and see note 15 supra.

18 Ibid Sch 8 Pt II Group 8 note (2).

19 Ibid Sch 8 Pt II Group 8 item 3(c); and see note 15 supra.

20 Ibid Sch 8 Pt II Group 8 item 3(d) (added by the Value Added Tax Equipment in Lifeboats) Order 2002, SI 2002/456, art 2(a)).

21 Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (2).

22 The 'transport of passengers' signifies the carriage of passengers from one place to another and excludes travel on an amusement device, such as a 'big dipper', where movement is in effect confined to one spot: *Customs and Excise Comrs v Blackpool Pleasure Beach Co* [1974] 1 All ER 1011, [1974] STC 138. Round trips provided for groups of disadvantaged people who were expected to help out with catering, cleaning etc, in ships with professional crews constituted the transport of passengers (as unlike in *Customs and Excise Comrs v Blackpool Pleasure Beach Co* supra the ships did move, even if they did return to the same port): *Revenue and Customs Comrs v Cirdan Sailing Trust* [2004] STI 1062, [2005] All ER (D) 61 (Jun). The supply of an identity card enabling the holder to obtain railway tickets at reduced price is a payment in advance for 'transport' within the Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 4: *British Railways Board v Customs and Excise Comrs* [1977] 2 All ER 873, [1977] 1 WLR 588, CA.

23 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 4(a), note (4D) (Sch 8 Pt II Group 8 item 4(a) amended, and note (4D) added, by the Value Added Tax (Passenger Vehicles) Order 2001, SI 2001/753, arts 2, 3). 'Design' includes not only physical characteristics but also legal capability (*Revenue and Customs Comrs v Cirdan Sailing Trust* [2004] STI 1062, [2005] All ER (D) 61 (Jun): ship physically capable of carrying more than ten passengers but certified only to carry nine was within the Value Added Tax Act 1994 item 4(a) (as amended)).

24 Ibid Sch 8 Pt II Group 8 item 4(b) (amended by the Postal Services Act 2000 s 127(4), Sch 8 Pt II para 22(3)). Consignia plc has been nominated as the Post Office company for the purposes of the Postal Services Act 2000 by the Post Office Company (Nomination and Appointed Day) Order 2001, SI 2001/8, art 3.

25 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 4 (as amended: see notes 23-24 supra). This head does not include the transport of passengers: (1) in any vehicle to, from or within a place of entertainment, recreation or amusement, or to, from or within a place of cultural, scientific, historical or similar interest, by the person, or a person connected with him, who supplies a right of admission to, or a right to use the facilities at, such a place; (2) in a motor vehicle (ie any mechanically propelled vehicle intended or adapted for use on the roads) between a car park, or land adjacent thereto, and an airport passenger terminal (or land adjacent thereto) by the person, or a person connected with him, who supplies facilities for the parking of vehicles in that car park; or (3) in an aircraft where the flight is advertised or held out to be for the purpose of providing



entertainment, recreation or amusement or the experience of flying, or the experience of flying in that particular aircraft, and not primarily for the purpose of transporting passengers from one place to another: Sch 8 Pt II Group 8 notes (4A), (4C) (Sch 8 Pt II Group 8 notes (4A)-(4C) added by the Value Added Tax (Transport) Order 1994, SI 1994/3014, arts 2, 3). For these purposes, any question whether a person is connected with another is to be determined in accordance with the Income and Corporation Taxes Act 1988 s 839 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258): Value Added Tax Act 1994 s 96(1), Sch 8 Pt II Group 8 note (4B) (as so added).

The word 'recreation' does not include use as a home, so that the supply of a houseboat capable of self-propulsion is zero-rated under this head: *Everett and London Tideway Harbour Co Ltd v Customs and Excise Comrs* (1994) VAT Decision 11736, [1994] STI 539. The supply of a travel card conferring the right to reduced-price rail travel is zero-rated as a part-payment in advance for the travel: *British Railways Board v Customs and Excise Comrs* [1977] 2 All ER 873, [1977] 1 WLR 588, CA. The provision of in-flight catering is an integral part of the supply of transport: *British Airways plc v Customs and Excise Comrs* [1990] STC 643, CA. Membership fees paid to a travel club entitling members to discounted travel are zero-rated: *UK Travel Agent Ltd v Customs and Excise Comrs* (1995) VAT Decision 12861, [1995] STI 369. The provision of a limousine to take a passenger to and from the airport was part of the supply of the transport of passengers 'from a place within the United Kingdom . . .' etc within the Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 4(d): *Virgin Atlantic Airways Ltd v Customs and Excise Comrs, Canadian Airlines International Ltd v Customs and Excise Comrs* [1995] STC 341. As to the Commissioners' views on the tax treatment of airline passenger 'perks' see Customs and Excise Business Brief 4/96 [1996] STI 482. The supply for consideration of vouchers exchangeable for air travel is zero-rated as part of the arrangements for such travel: *Facthaven Incentive Marketing Ltd v Customs and Excise Comrs* (1991) VAT Decision 6443, [1991] STI 880. A pleasure cruise is (or is capable of being) a zero-rated supply of transport services, to which the hedonistic elements are merely incidental: *Customs and Excise Comrs v Peninsular and Oriental Steam Navigation Co Ltd* [1996] STC 698; *Virgin Atlantic Airways Ltd v Customs and Excise Comrs* (1996) VAT Decision 13840, [1996] STI 575; and see *Ashton (t/a Country Hotel Narrowboats) v Customs and Excise Comrs* (1996) VAT Decision 14197 [1996] STI 1381 (narrow boat cruises on canals may be zero-rated as supplies of passenger transport). See also Customs and Excise Business Brief 14/96 [1996] STI 1247, setting out the tests the Commissioners will apply in determining whether or not a pleasure cruise constitutes a single zero-rated supply of transport. The provision of food on a luxury train is a separate supply of catering and not part of the supply of transport: *Sea Containers Services Ltd v Customs and Excise Comrs* [2000] STC 82. See also Customs and Excise Business Brief 10/99 [1999] STI 828.

26 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 5. As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

27 'Port' and 'customs and excise airport' have the same meanings as in the Customs and Excise Management Act 1979 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 935, 942): Value Added Tax Act 1994 s 96(1), Sch 8 Pt II Group 8 note (6) (amended by the Value Added Tax (Transport) Order 2002, SI 2002/1173, art 2(b)).

28 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 6 (amended by the Value Added Tax (Transport) Order 2002, SI 2002/1173, art 2(a)). Except for the purposes of heads (16)-(17) in the text, head (10)(a) in the text only includes the supply of services where the ships or aircraft referred to in that head are qualifying ships or qualifying aircraft: Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (7) (amended by the Value Added Tax (Transport) Order 1995, SI 1995/653, art 6; Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(i)). 'Transit shed' has the same meaning as in the Customs and Excise Management Act 1979 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 940): Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (6) (as amended: see note 27 supra).

29 Ibid Sch 8 Pt II Group 8 note (5).

30 Ibid Sch 8 Pt II Group 8 item 6A (added by the Value Added Tax (Transport) Order 1995, SI 1995/653, art 3). 'Air navigation services' has the same meaning as in the Civil Aviation Act 1982 (see AIR LAW vol 2 (2008) PARA 55): Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (6A) (added by the Value Added Tax (Transport) Order 1995, SI 1995/653, arts 2, 5). Except for the purposes of heads (16)-(17) in the text, head (11) in the text only includes the supply of any services where the ships or aircraft referred to in that head are qualifying ships or qualifying aircraft: Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (7) (amended by the Value Added Tax (Transport) Order 1995, SI 1995/653, arts 2, 6; and by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(ii)).

31 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 7. 'Pilotage' means the conduct of a ship (see the Pilotage Act 1987; and SHIPPING AND MARITIME LAW) and does not include the services of a helicopter pilot: *Medical Aviation Services Ltd v Customs and Excise Comrs* (1998) VAT Decision 15308, [1998] STI 596.

32 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 8.

33 Ibid Sch 8 Pt II Group 8 item 9. Except for the purposes of heads (16)-(17) in the text, head (14) in the text only includes the supply of any services where the ships or aircraft referred to in that head are qualifying ships or qualifying aircraft: Sch 8 Pt II Group 8 note (7) (as amended: see note 28 supra).

34 Ibid Sch 8 Pt II Group 8 item 10(a) (Sch 8 Pt II Group 8 item 10(a), (b) amended by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(d)). Except for the purposes of heads (16)-(17) in the text, head (15)(a) in the text only includes the supply of any services where the ships or aircraft referred to in that head are qualifying ships or qualifying aircraft: Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (7) (as amended: see note 28 supra). As to the making of arrangements see *Société Internationale de Télécommunications Aéronautiques v Customs and Excise Comrs* [2003] EWHC 3039 (Ch), [2004] STC 950 (telecommunications network used by people in business of transporting passengers by air not supply provided 'for' transport).

35 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 10(b) (as amended: see note 34 supra).

36 Ibid Sch 8 Pt II Group 8 item 10(c) (added by the Value Added Tax (Ships and Aircraft) Order 1995, SI 1995/3039, art 2(d)).

37 Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 11(a).

38 Ibid Sch 8 Pt II Group 8 item 11(b) (amended by the Value Added Tax (Transport) Order 1995, SI 1995/653, arts 2, 4).

39 For these purposes, 'designated travel service' has the same meaning as in the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806 (see PARA 37 note 17 ante): Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (8). As to the tour operators' margin scheme see PARA 214 post.

40 Ibid Sch 8 Pt II Group 8 item 12. This provision affords zero-rating to goods and services bought in by a tour operator to be supplied on to a traveller which are enjoyed outside the European Community; but to the extent that the goods or services are enjoyed within the Community they are standard-rated. As to the standard rate of VAT see PARA 5 ante.

41 'Intra-Community transport services' means: (1) the intra-Community transport of goods within the meaning of the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121 (as amended) (see PARA 59 note 7 ante); (2) ancillary transport services within the meaning of that order (see PARA 59 note 5 ante) which are provided in connection with the intra-Community transport of goods; or (3) the making of arrangements for the supply by or to another person of a supply within head (1) or head (2) supra or any other activity which is intended to facilitate the making of such a supply, and, for this purpose only, the Azores and Madeira are each treated as a separate member state: Value Added Tax Act 1994 Sch 8 Pt II Group 8 note (9).

42 Ibid Sch 8 Pt II Group 8 item 13.

## UPDATE

### 183 Transport

TEXT AND NOTES--Also, head (20) the supply of fuel to a charity providing rescue or assistance at sea where the fuel is for use in a lifeboat: Value Added Tax Act 1994 Sch 8 Pt II Group 8 item 3(e) (added by SI 2006/1750).

NOTES 2, 22, 23--*Cirdan Sailing Trust*, cited, reported at [2005] EWHC 2999 (Ch), [2006] STC 185.

NOTE 2--A boat designed for residential use is not designed for use for recreation or pleasure: *Stone v Revenue and Customs Comrs, The Kei* [2008] EWHC 1249 (Ch), [2008] STC 2501. As to the calculation of tonnage see *Fee (t/a Swiftcraft Boats) v Revenue and Customs Comrs* (2007) VAT Decision 20489, [2008] STI 490.

NOTES 22-25--See *Thamesdown Transport Ltd v HMRC Comrs* (2006) VAT Decision 19386; [2005] STI 1356 (capital payment for purchase of buses, by means of which transport provided at full fares, not a payment for supply of transport; there could be no 'arrangements' by recipient of payment, since no intermediary involved).

NOTE 28--See *Revenue and Customs Comrs v EB Central Services Ltd* [2008] EWCA Civ 486, [2008] STC 2209.

NOTES 34-36--See *Thamesdown Transport Ltd v HMRC Comrs*, NOTES 22-25.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/184. Caravans and houseboats.

#### **184. Caravans and houseboats.**

The following supplies are zero-rated<sup>1</sup>:

- 558 (1) caravans exceeding the limits of size for the time being permitted for the use on roads of a trailer drawn by a motor vehicle having an unladen weight of less than 2,030 kilogram<sup>2</sup>;
- 559 (2) houseboats, being boats or other floating decked structures designed or adapted for use solely as places of permanent habitation and not having means of, or capable of being readily adapted for, self-propulsion<sup>3</sup>; and
- 560 (3) the supply of services consisting of the transfer of any undivided share of the property in, or of the possession of <sup>4</sup>, such a caravan or houseboat or the supply of such a caravan or houseboat for private<sup>5</sup> use<sup>6</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 9; and heads (1)-(3) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante. Schedule 8 Pt II Group 9 does not include: (1) removable contents other than certain specified goods; or (2) the supply of accommodation in a caravan or houseboat: Sch 8 Pt II Group 9 note (a), (b). The goods specified for the purposes of head (1) supra are 'goods of a kind mentioned in Sch 8 Pt II Group 5 item 3'; but no such goods are mentioned in that item as substituted by the Value Added Tax (Construction of Buildings) Order 1995, SI 1995/280: see PARA 179 ante. The reference is presumably intended to be to either the Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 3 as originally enacted (builders' materials) or Sch 8 Pt II Group 5 item 4 (as substituted) (building materials: see PARA 179 head (4) ante). Head (1) is a clear exception to the general rule (see PARA 31 ante) that the rate applicable to the principal element of a composite supply (in this case that of the caravan or houseboat) also applies to the ancillary elements (the items mentioned in head (1) supra) of a composite supply. Accordingly, items within head (1) supra must be taxed at the rate appropriate to them: *Talacre Beach Caravan Sales Ltd v Customs and Excise Comrs* [2004] EWHC 165 (Ch), [2004] STC 817.

2 Value Added Tax Act 1994 Sch 8 Pt II Group 9 item 1. The purpose of this provision is to ensure that caravans intended as residential accommodation are treated in the same way as are other permanent dwellings, and in order to qualify a caravan must therefore provide a range of facilities similar to those found in a house: temporary sleeping units hired for the short-term accommodation of students which provided no cooking, eating or washing facilities accordingly did not qualify as 'caravans' for these purposes: see *University of Kent v Customs and Excise Comrs* [2004] V & DR 372.

3 Value Added Tax Act 1994 Sch 8 Pt II Group 9 item 2. See *Roberts v Customs and Excise Comrs* [1992] VATTR 30 (a temporarily unseaworthy yacht falls within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(k) (see PARA 156 ante), which does not require the vessel to be capable of navigation; and is not within Sch 8 Pt II Group 9 if not designed or adapted solely for use as a place of permanent habitation).

4 The services of the kind described in *ibid* s 5(1), Sch 4 para 1(1): see PARA 30 ante.

5 The services of the kind described in *ibid* Sch 4 para 5(4): see PARA 30 ante. The wording of Sch 8 Pt II Group 9 item 3 refers to Sch 4 para 5(3), but it is thought that this reference is intended to be to Sch 4 para 5(4), as the equivalent predecessor provision to Sch 8 Pt II Group 9 item 3 in the Value Added Tax Act 1983 referred to the equivalent predecessor provision in that Act of the Value Added Tax Act 1994 Sch 4 para 5(4); and Sch 4 para 5(3) refers to a supply of goods in the form of samples, and not to a supply of services. See also Sch 8 Pt II Group 6 note (11) (as substituted), referring to Sch 4 paras 1(1), 5(4); and PARA 181 note 10 ante.

6 *Ibid* Sch 8 Pt II Group 9 item 3.

#### **UPDATE**

#### **184 Caravans and houseboats**

NOTE 1--The fact that the supply of a caravan and its contents may be characterised as a single supply does not prevent the supply of the caravan being zero-rated and the contents being subject to the value added tax at the standard rate: Case C-251/05 *Talacre Beach Caravan Sales Ltd v Customs and Excise Comrs* [2006] STC 1671, ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/185. Gold and bank notes.

### **185. Gold and bank notes.**

The following are zero-rated supplies<sup>1</sup>:

- 561 (1) the supply, by a central bank to another central bank or a member of the London Gold Market, of gold<sup>2</sup> held in the United Kingdom<sup>3</sup>; and
- 562 (2) the supply, by a member of the London Gold Market to a central bank, of gold held in the United Kingdom<sup>4</sup>.

Supplies of gold in other circumstances are subject to VAT at the standard rate<sup>5</sup>.

The issue by a bank of a note payable to bearer on demand is a zero-rated supply<sup>6</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 10; and heads (1)-(2) in the text. Schedule 8 Group 10 includes: (1) the granting of a right to acquire a quantity of gold; and (2) any supply described therein which, by virtue of s 5(1), Sch 4 para 1 is a supply of services (ie the transfer of any undivided share of gold or of the possession of gold: see PARA 30 ante): Sch 8 Pt II Group 10 note (3). Section 30(3) (see PARAS 174 ante, 190 post) does not apply to goods forming part of a description of supply in Sch 8 Pt II Group 10 (Sch 8 Pt II Group 10 note (2)); but where gold (including, for this purpose, gold coins) is supplied to a central bank by a supplier in another member state, and the transaction involves the removal of the gold from that or some other member state to the United Kingdom, the taking possession of the gold by the central bank concerned is not treated as involving an acquisition of goods from another member state (and the transaction is therefore outside the scope of VAT): Value Added Tax (Treatment of Transactions) (No 2) Order 1992, SI 1992/3132, art 2; Interpretation Act 1978 s 17(2)(b). Similarly, the tax chargeable upon the importation of gold (including gold coins) from a place outside the member states is not payable where the importation is by a central bank: see the Value Added Tax (Imported Gold) Relief Order 1992, SI 1992/3124; and PARA 136 ante. For the meaning of 'United Kingdom' see PARA 4 note 3 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

2 'Gold' includes gold coins: Value Added Tax Act 1994 Sch 8 Pt II Group 10 note (1).

3 Ibid Sch 8 Pt II Group 10 item 1.

4 Ibid Sch 8 Pt II Group 10 item 2.

5 See Customs and Excise Public Notice 701/21 *Gold* (March 2002). Because of the opportunity for fraud, a compulsory special accounting and payment system exists for gold transactions. Where a taxable person makes a supply of gold to a person who: (1) is himself a taxable person at the time when the supply is made; and (2) is supplied in connection with the carrying on by him of any business, it is for the person supplied, on the supplier's behalf, to account for and pay tax on the supply, and not for the supplier: see the Value Added Tax Act 1994 s 55(2); and PARA 32 ante.

6 Ibid Sch 8 Pt II Group 11.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/186. Drugs, medicines, aids for the handicapped etc.

### **186. Drugs, medicines, aids for the handicapped etc.**

The following are zero-rated supplies<sup>1</sup>:

- 563 (1) the supply of any qualifying goods, or of services of letting on hire of any qualifying goods<sup>2</sup>, dispensed, by a person registered in the register of pharmaceutical chemists<sup>3</sup>, on the prescription of a person registered in the register of medical practitioners, the register of medical practitioners with limited registration<sup>4</sup> or the dentists<sup>5</sup> register<sup>6</sup> to an individual for his personal use where the dispensing is by a person registered<sup>7</sup>;
  - 564 (2) the supply of any goods, or of services of letting on hire of any goods<sup>8</sup>, in accordance with a requirement or authorisation under certain regulations<sup>9</sup> by a person registered in the register of medical practitioners or the register of medical practitioners with limited registration<sup>10</sup>;
  - 565 (3) the supply to a handicapped<sup>11</sup> person for domestic or his personal use<sup>12</sup>, or to a charity for making available to handicapped persons, by sale or otherwise, for domestic or their personal use, of, or of services of letting on hire of<sup>13</sup>:
- 17
32. (a) medical or surgical appliances designed solely for the relief of a severe abnormality or severe injury<sup>14</sup>;
  33. (b) electrically or mechanically adjustable beds designed for invalids<sup>15</sup>;
  34. (c) commode chairs, commode stools, devices incorporating a bidet jet and warm air drier and frames or other devices for sitting over or rising from a sanitary appliance<sup>16</sup>;
  35. (d) chair lifts or stair lifts designed for use in connection with invalid wheelchairs<sup>17</sup>;
  36. (e) hoists and lifters designed for use by invalids<sup>18</sup>;
  37. (f) motor vehicles designed or substantially and permanently adapted for the carriage of a person in a wheelchair or on a stretcher and of no more than 11 other persons; and the supply of a qualifying motor vehicle: (i) to a handicapped person who usually uses a wheelchair or who is usually carried on a stretcher, for domestic or his personal use; or (ii) to a charity for making available to such a handicapped person by sale or otherwise, for domestic or his personal use<sup>19</sup>;
  38. (g) equipment and appliances not included in heads (a) to (f) above designed solely for use by a handicapped person<sup>20</sup>;
  39. (h) parts and accessories designed solely for use in or with goods described in heads (a) to (g) above<sup>21</sup>; and
  40. (i) boats designed or substantially and permanently adapted for use by handicapped persons<sup>22</sup>;
- 18
- 566 (4) the supply to a handicapped person of services of adapting goods to suit his condition<sup>23</sup>;
  - 567 (5) the supply to a charity of services of adapting goods to suit the condition of a handicapped person to whom the goods are to be made available, by sale or otherwise, by the charity<sup>24</sup>;
  - 568 (6) the supply to a handicapped person or to a charity of a service of repair or maintenance of any goods specified in head (3) above or in head (7), head (19) or head (20) below and supplied as described in the relevant head<sup>25</sup>;

- 569 (7) the supply of goods in connection with a supply described in head (4), head  
(5) or head (6) above<sup>26</sup>;
- 570 (8) the supply to a handicapped person or to a charity of services necessarily  
performed in the installation of equipment or appliances (including parts and  
accessories therefor) specified in head (3) above and supplied as described in that  
head<sup>27</sup>;
- 571 (9) the supply to a handicapped person of a service of constructing ramps or  
widening doorways or passages for the purpose of facilitating his entry to or  
movement within his private residence<sup>28</sup>;
- 572 (10) the supply to a charity of a service described in head (9) above for the  
purpose of facilitating a handicapped person's entry to or movement within any  
building<sup>29</sup>;
- 573 (11) the supply to a handicapped person of a service of providing, extending or  
adapting a bathroom, washroom or lavatory in his private residence where such  
provision, extension or adaptation is necessary by reason of his condition<sup>30</sup>;
- 574 (12) the supply to a charity of a service of providing, extending or adapting a  
bathroom, washroom or lavatory for use by handicapped persons in residential  
accommodation, or in a day-centre where at least 20 per cent of the individuals  
using the centre are handicapped persons, where such provision, extension or  
adaptation is necessary by reason of the condition of the handicapped persons<sup>31</sup>;
- 575 (13) the supply to a charity of a service of providing, extending or adapting a  
washroom or lavatory for use by handicapped persons in a building, or any part of a  
building, used principally by a charity for charitable purposes where such provision,  
extension or adaptation is necessary to facilitate the use of the washroom or  
lavatory by handicapped persons<sup>32</sup>;
- 576 (14) the supply of goods in connection with a supply described in heads (9), (10),  
(11) or head (12) above<sup>33</sup>;
- 577 (15) the letting on hire of a motor vehicle for a period of not less than three  
years to a handicapped person in receipt of a disability living allowance<sup>34</sup> by virtue  
of entitlement to the mobility component or of mobility supplement<sup>35</sup> where the  
lessor's business<sup>36</sup> consists predominantly of the provision of motor vehicles to such  
persons<sup>37</sup>;
- 578 (16) the sale of a motor vehicle which had been let on hire in the circumstances  
described in head (15) above where such sale constitutes the first supply of the  
vehicle after the end of the period of such letting<sup>38</sup>;
- 579 (17) the supply to a handicapped person of services necessarily performed in the  
installation of a lift for the purpose of facilitating his movement between floors  
within his private residence<sup>39</sup>;
- 580 (18) the supply to a charity providing a permanent or temporary residence or  
day-centre for handicapped persons of services necessarily performed in the  
installation of a lift for the purpose of facilitating the movement of handicapped  
persons between floors within that building<sup>40</sup>;
- 581 (19) the supply of goods in connection with a supply described in head (17) or  
head (18) above<sup>41</sup>;
- 582 (20) the supply to a handicapped person for domestic or his personal use, or to a  
charity for making available to handicapped persons by sale or otherwise for  
domestic or their personal use, of an alarm system designed to be capable of  
operation by a handicapped person, and to enable him to alert directly a specified  
person or a control centre<sup>42</sup>; and
- 583 (21) the supply of services necessarily performed by a control centre in receiving  
and responding to calls from an alarm system specified in head (19) above<sup>43</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 12 (as amended); and heads (1)-(21) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante.



Section 30(3) (see PARAS 174 ante, 190 post) does not apply to goods forming part of a description of supply in head (1) or head (2) in the text, nor to other goods forming part of a description of supply in Sch 8 Pt II Group 12 (as amended), except where those other goods are acquired from another member state or imported from a place outside the member states by a handicapped person for domestic or his personal use, or by a charity for making available to handicapped persons, by sale or otherwise, for domestic or their personal use: Sch 8 Pt II Group 12 note (1) (amended by the Value Added Tax (Supply of Pharmaceutical Goods) Order 1995, SI 1995/652, arts 2, 4). For the meaning of 'another member state' see PARA 4 note 15 ante; and as to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

2 Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (5).

3 le the register kept under the Pharmacy Act 1954: see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 884 et seq.

4 As to these registers see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 34 et seq.

5 As to this register see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 417 et seq.

6 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 1. For the purposes of this item, a person who is not registered in the visiting EC practitioners list in the register of medical practitioners at the time he performs services in an urgent case as mentioned in the Medical Act 1983 s 18(3) (as amended) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 100) is to be treated as being registered in that list where he is entitled to be registered in accordance with s 18 (as amended): Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (2). The provision to a patient of a stock drug kept on the ward of a private hospital is zero-rated because it is supplied by a pharmacist on the prescription of a registered medical practitioner: *Customs and Excise Comrs v Wellington Private Hospital* [1997] STC 445 at 448, CA.

7 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 1 (amended by the Value Added Tax (Drugs, Medicines and Aids for the Handicapped) Order 1997, SI 1997/2744, art 3). 'Qualifying goods' means any goods designed or adapted for use in connection with any medical or surgical treatment except: (1) hearing aids; (2) dentures; and (3) spectacles and contact lenses: Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (2A) (added by the Value Added Tax (Drugs, Medicines and Aids for the Handicapped) Order 1997, SI 1997/2744, art 5). The reference to personal use does not include any use which is, or involves a use by or in relation to an individual while that individual, for the purposes of being provided (whether or not by the person making the supply) with medical or surgical treatment, or with any form of care, is an in-patient or resident in a relevant institution which is a hospital or nursing home, or is attending at the premises of a relevant institution which is a hospital or nursing home: Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (5A) (notes (5A)-(5I) added by the Value Added Tax (Drugs, Medicines and Aids for the Handicapped) Order 1997, SI 1997/2744, art 7). A 'relevant institution' is an institution (whether a hospital, nursing home or other institution) which provides care or medical or surgical treatment and is either approved, licensed or registered in accordance with the provisions of any enactment or exempted from such approval, licence or registration: Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (5I) (as so added).

8 Ibid Sch 8 Pt II Group 12 note (5) (amended by the Value Added Tax (Supply of Pharmaceutical Goods) Order 1995, SI 1995/652, arts 2, 5). The goods so supplied must be qualifying goods (see note 7 supra): Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 1A (added by the Value Added Tax (Supply of Pharmaceutical Goods) Order 1995, SI 1995/652, arts 2, 3; and amended by the Value Added Tax (Drugs, Medicines and Aids for the Handicapped) Order 1997, SI 1997/2744, art 4). The treatment of a patient under the National Health Service (Pharmaceutical Services) Regulations 1992, SI 1992/635, reg 19 was a supply of qualifying goods within the meaning of the Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 1A (as added and amended): *Woodings v Customs and Excise Comrs* [1999] V & DR 294. See also HEALTH SERVICES vol 54 (2008) PARAS 404-410.

9 le the National Health Service (Pharmaceutical Services) Regulations 2005, SI 2005/641, reg 60: see HEALTH SERVICES vol 54 (2008) PARA 404.

10 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 1A (as added: see note 8 supra).

11 'Handicapped' means chronically sick or disabled: ibid Sch 8 Pt II Group 12 note (3). This has been held to include persons suffering chronic pain (usually lasting three months or more): *Neen Design Ltd v Customs and Excise Comrs* (1994) VAT Decision 11782, [1994] STI 589 (devices designed for the relief of such chronic pain are zero-rated, notwithstanding that when they are supplied to other persons they are taxed at the standard rate).

12 'Domestic or personal use' does not include any such use which is, or involves, a use by or in relation to a handicapped person while that person, for the purposes of being provided (whether or not by the person making the supply) with a medical or surgical treatment, or with any form of care is an in-patient or resident in a relevant institution or is attending at the premises of a relevant institution: Value Added Tax Act 1994 Sch 8

Pt II Group 12 note (5B) (as added: see note 7 supra). This definition does not apply for the purpose of determining whether any of the following supplies falls within Sch 8 Pt II Group 12 item 2 (as amended), ie a supply to a charity and a supply of an invalid wheelchair or invalid carriage (or of any parts or accessories designed solely for use with it) by: (1) a strategic health authority or special health authority in England; (2) a health authority, special health authority or local health board in Wales; (3) an NHS trust established under the National Health Service and Community Care Act 1990 Pt I (as amended) (see *HEALTH SERVICES* vol 54 (2008) PARA 155 et seq); (4) an NHS foundation trust; (5) a primary care trust established under the National Health Service Act 1977 s 16A (as added and amended); (6) the Scottish, Northern Irish and Manx equivalents of bodies within heads (1)-(5) supra; and (7) any person not falling within any of heads (1)-(6) supra who is engaged in the carrying on of any activity in respect of which a relevant institution is required to be approved, licensed, or registered or, as the case may be, would be so required if not exempt: Value Added Tax Act 1994 Sch 8 Pt II Group 12 notes (5C), (5H) (as so added; Sch 8 Pt II Group 12 note (5H) amended by the Health and Social Care (Community Standards) Act 2003 s 34, Sch 4 paras 97, 98; the Value Added Tax (Drugs, Medicines, Aids for the Handicapped and Charities Etc) Order 2000, SI 2000/503, arts 2, 3; and the Value Added Tax (Drugs, Medicines, Aids for the Handicapped and Charities Etc) Order 2002, SI 2002/2813, arts 2, 3). The definition applies to goods supplied by other persons only if those goods are goods falling within the Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 2(a) (see the text and note 14 infra), parts and accessories designed solely for use in or with such goods, or incontinence products or wound dressings: Sch 8 Pt II Group 12 note (5D) (as so added).

13 Ibid Sch 8 Pt II Group 12 note (5) (amended by the Value Added Tax (Vehicles Designed or Adapted for Handicapped Persons) Order 2001, SI 2001/754, art 5).

14 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 2(a); and see note 22 infra.

15 Ibid Sch 8 Pt II Group 12 item 2(b); and see note 22 infra. A person is an invalid for this purpose if he is ill, unwell or infirm, whether permanently or temporarily, as a result of some medical condition: *Niagara Holdings Ltd v Customs and Excise Comrs* (1994) VAT Decision 11400, [1994] STI 116.

16 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 2(c); and see note 22 infra.

17 Ibid Sch 8 Pt II Group 12 item 2(d); and see note 22 infra.

18 Ibid Sch 8 Pt II Group 12 item 2(e); and see note 22 infra.

19 See ibid Sch 8 Pt II Group 12 items 2(f), 2A (Sch 8 Pt II Group 12 item 2(f) amended, and Sch 8 Pt II Group 12 item 2A added, by the Value Added Tax (Vehicles Designed or Adapted for Handicapped Persons) Order 2001, SI 2001/754, arts 1, 2); and see note 22 infra. A 'qualifying motor vehicle' is a motor vehicle (other than a motor vehicle capable of carrying more than 12 persons including the driver): (1) that is designed or substantially and permanently adapted to enable such a handicapped person to enter, and drive or be otherwise carried in, the motor vehicle; or (2) that by reason of its design, or being substantially and permanently adapted, includes features the design of which is such that their sole purpose is to allow a wheelchair used by a handicapped person to be carried in or on the motor vehicle: Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (5L) (added by the Value Added Tax (Vehicles Designed or Adapted for Handicapped Persons) Order 2001, SI 2001/754, art 6).

20 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 2(g); and see note 22 infra. An appliance is 'designed solely for use by a handicapped person' for this purpose if it is specifically designed for handicapped persons, even though it is also capable of being used by persons who are not handicapped: *Hobden v Customs and Excise Comrs* LON/85/82 (VAT Decision 1875); *Foxer Industries v Customs and Excise Comrs* (1996) VAT Decision 13817, [1996] STI 470; *Tempur Pedic (UK) Ltd v Customs and Excise Comrs* (1996) VAT Decision 13744, [1996] STI 255; cf *Princess Louise Scottish Hospital v Customs and Excise Comrs* [1983] VATTR 191. A fire escape made large enough to hold persons in wheelchairs was not designed solely for use by the handicapped, nor was it an adaptation of 'goods' (supposedly, in this case, the building to which the fire escape was attached) to suit the condition of a handicapped person, since land is not 'goods' for this purpose: *Arthritis Care v Customs and Excise Comrs* (1996) VAT Decision 13974, [1996] STI 941. 'Equipment' may include an aerosol can containing a medicinal spray: *Medivac Healthcare Ltd v Customs and Excise Comrs* (2000) VAT Decision 16829, [2001] STI 181.

21 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 2(h); and see note 22 infra.

22 Ibid Sch 8 Pt II Group 12 item 2(i). Schedule 8 Group 12 item 2 (as amended) does not include hearing aids (except hearing aids designed for the auditory training of deaf children), dentures, spectacles and contact lenses, but is deemed to include: (1) clothing, footwear and wigs; (2) invalid wheelchairs and invalid carriages; and (3) renal haemodialysis units, oxygen concentrators, artificial respirators and other similar apparatus: Sch 8 Pt II Group 12 note (4) (amended by the Value Added Tax (Drugs, Medicines and Aids for the Handicapped) Order 1997, SI 1997/2744, art 6). It may extend to the provision of surgically implanted prostheses: *Customs and Excise Comrs v Wellington Private Hospital* [1997] STC 445 at 448. For an adapted vehicle to fall within

head (3)(f) in the text, the person to whom it is supplied must be able to sit in it in a wheelchair: *Oliver v Customs and Excise Comrs* (1993) VAT Decision 10579, [1993] STI 1185.

The Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 2 (as amended) does not include a supply made in accordance with any agreement, arrangement or understanding (whether or not legally enforceable) to which any of the persons mentioned in note 12 heads (1)-(7) supra is or has been a party otherwise than as the supplier; or any supply the whole or any part of the consideration for which is provided (whether directly or indirectly) by such a person: Sch 8 Pt II Group 12 note (5E) (as added: see note 7 supra). However, a supply to a handicapped person of an invalid wheelchair or invalid carriage is so excluded only if this provision applies by reference to a person falling within note 12 head (7) supra, or the whole of the consideration for the supply is provided (whether directly or indirectly) by a person falling within any of note 12 heads (1)-(6) supra: Sch 8 Pt II Group 12 note (5F) (as so added).

23 Ibid Sch 8 Pt II Group 12 item 3. Where the goods are adapted in accordance with head (4) in the text prior to their supply to the handicapped person, an apportionment must be made to determine the supply of services which falls within that head: Sch 8 Pt II Group 12 note (8).

24 Ibid Sch 8 Pt II Group 12 item 4. Where the goods are adapted in accordance with head (5) in the text prior to their supply to the charity, an apportionment must be made to determine the supply of services which falls within that head: Sch 8 Pt II Group 12 note (8).

25 Ibid Sch 8 Pt II Group 12 item 5 (amended by the Value Added Tax (Vehicles Designed or Adapted for Handicapped Persons) Order 2001, SI 2001/754, art 4).

26 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 6.

27 Ibid Sch 8 Pt II Group 12 item 7.

28 Ibid Sch 8 Pt II Group 12 item 8.

29 Ibid Sch 8 Pt II Group 12 item 9.

30 Ibid Sch 8 Pt II Group 12 item 10.

31 Ibid Sch 8 Pt II Group 12 item 11 (substituted by the Value Added Tax (Charities and Aids for the Handicapped) Order 2000, SI 2000/805, arts 2, 3). 'Washroom' means a room that contains a lavatory or washbasin (or both) but does not contain a bath or a shower or cooking, sleeping or laundry facilities: Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (5J) (Sch 8 Pt II Group 12 notes (5J), (5K) added by the Value Added Tax (Charities and Aids for the Handicapped) Order 2000, SI 2000/805, arts 2, 4). 'Residential accommodation' means a residential home or self-contained living accommodation provided as a residence (whether on a permanent or temporary basis or both) for handicapped persons, but does not include an inn, hotel, boarding house or similar establishment or accommodation in any such type of establishment: Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (5K) (as so added). The installation of thermostatic valves on washbasins in bedrooms does not relate to a 'washroom': *Mid-Derbyshire Cheshire Home v Customs and Excise Comrs* (1990) VAT Decision 4512, [1990] STI 210.

32 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 12.

33 Ibid Sch 8 Pt II Group 12 item 13.

34 A 'disability living allowance' is a disability living allowance within the meaning of the Social Security Contributions and Benefits Act 1992 s 71 (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 102): Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (7)(a).

35 A 'mobility supplement' is a mobility supplement within the meaning of the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 1983, SI 1983/883, art 26A (as added and amended), the Personal Injuries (Civilians) Scheme 1983, SI 1983/686, art 25A (as added and amended) or the Motor Vehicles (Exemption from Vehicles Excise Duty) Order 1985, SI 1985/722, art 3: Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (7)(b).

36 For the meaning of 'business' see PARA 23 ante.

37 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 14. Head (15) in the text applies only: (1) where the vehicle is unused at the commencement of the period of letting; and (2) where the consideration for the letting consists wholly or partly of sums paid to the lessor by the Department of Work and Pensions or the Ministry of Defence on behalf of the lessee in respect of the mobility component of the disability living allowance or mobility supplement to which he is entitled: Sch 8 Pt II Group 12 note (6) (amended by the Secretaries of State for Education and Skills and Work and Pensions Order 2002, SI 2002/1397, art 12, Schedule Pt I para 12).

38 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 15.

39 Ibid Sch 8 Pt II Group 12 item 16.

40 Ibid Sch 8 Pt II Group 12 item 17. The phrase 'day-centre' emphasises provision of particular facilities for groups or for people who need them and does not merely indicate a place resorted to by handicapped persons during the day: *University of Warwick Students Union v Customs and Excise Comrs* (1996) VAT Decision 13821, [1996] STI 568.

41 Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 18.

42 Ibid Sch 8 Pt II Group 12 item 19. For these purposes, and the purposes of head (21) in the text, a 'specified person or control centre' is a person or centre who or which: (1) is appointed to receive directly calls activated by an alarm system described in the relevant head; and (2) retains information about the handicapped person to assist him in the event of illness, injury or similar emergency: Sch 8 Pt II Group 12 note (9).

43 Ibid Sch 8 Pt II Group 12 item 20.

## UPDATE

### 186 Drugs, medicines, aids for the handicapped etc

NOTE 2--See *Healthcare at Home Ltd v Revenue and Customs Comrs* (2007) VAT Decision 20379, [2008] STI 233.

NOTE 6--Value Added Tax Act 1994 Sch 8 Pt II Group 12 note (2) repealed: SI 2007/3101.

NOTE 8--Value Added Tax Act 1994 Sch 8 Pt II Group 12 item 1 further amended: SI 2007/3101.

NOTE 9--SI 2005/641 reg 60 amended: SI 2006/3373.

NOTE 12--1994 Act Sch 8 Pt II Group 12 note (5H) further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 174. In relation to Wales, references to a health authority are to be treated as references to a local health board: see the References to Health Authorities Order 2007, SI 2007/961.

NOTE 39--'Installation' includes the related services of design, project management and supervision: *Friends of the Elderly v HM Revenue and Customs* (2008) VAT Decision 20597, [2008] V & DR 169, [2008] SWTI 1260.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/187. Imports, exports etc.

### 187. Imports, exports etc.

The following are zero-rated supplies<sup>1</sup>:

- 584 (1) the supply, before the delivery of an entry<sup>2</sup> under an agreement requiring the purchaser to make such entry, of goods imported from a place outside the member states<sup>3</sup>;
- 585 (2) the supply to or by an overseas authority<sup>4</sup>, overseas body<sup>5</sup> or overseas trader<sup>6</sup>, charged with the management of any defence project which is the subject of an international collaboration arrangement<sup>7</sup> or under direct contract with any government or government-sponsored international body participating in a defence project under such an arrangement, of goods or services in the course of giving effect to that arrangement<sup>8</sup>; and
- 586 (3) the supply to an overseas authority, overseas body or overseas trader of jigs, patterns, templates, dies, punches and similar machine tools used in the United Kingdom solely for the manufacture of goods for export to places outside the member states<sup>9</sup>, except where that authority, body or trader is a taxable person<sup>10</sup>, another member state<sup>11</sup>, any part of or place in another member state, the government of any such member state, part or place, a body established in another member state or a person who carries on business, or has a place of business, in another member state<sup>12</sup>.

The various other reliefs from value added tax on importation are discussed elsewhere in this title<sup>13</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 13; and heads (1)-(3) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante.

2 I.e. an 'entry' within the meaning of the Customs Controls on Importation of Goods Regulations 1991, SI 1991/2724, reg 5 (as amended): see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 82.

3 Value Added Tax Act 1994 Sch 8 Pt II Group 13 item 1. As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

4 'Overseas authority' means any country other than the United Kingdom or any part of, or place in, such a country or the government of any such country, part or place: *ibid* Sch 8 Pt II Group 13 note (2). For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

5 'Overseas body' means a body established outside the United Kingdom: *ibid* Sch 8 Pt II Group 13 note (3).

6 'Overseas trader' means a person who carries on a business and has his principal place of business outside the United Kingdom: *ibid* Sch 8 Pt II Group 13 note (4). For the meaning of 'business' see PARA 23 ante.

7 An 'international collaboration arrangement' means any arrangement which: (1) is made between the United Kingdom government and the government of one or more other countries, or any government-sponsored international body for collaboration in a joint project of research, development or production; and (2) includes provision for participating governments to relieve the cost of the project from taxation: *ibid* Sch 8 Pt II Group 13 note (1).

8 *Ibid* Sch 8 Pt II Group 13 item 2.

9 *Ibid* Sch 8 Pt II Group 13 item 3.

- 10 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.
- 11 For the meaning of 'another member state' see PARA 4 note 15 ante.
- 12 Value Added Tax Act 1994 Sch 8 Pt II Group 13 note (5).
- 13 See PARAS 119 et seq ante, 190 et seq post.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/188. Charities.

## 188. Charities.

The following are zero-rated supplies<sup>1</sup>:

- 587 (1) the sale or letting on hire by a charity<sup>2</sup> of goods donated to it (or by a taxable person<sup>3</sup> who is a profits-to-charity person of goods donated to him) for sale, letting, sale or letting, sale or export, letting or export, or sale, letting or export<sup>4</sup>;
- 588 (2) the donation of any goods for any one or more of the following purposes: (a) sale by a charity or a taxable person who is a profits-to-charity person in respect of the goods; (b) export by a charity or such a taxable person; (c) letting by a charity or such a taxable person<sup>5</sup>;
- 589 (3) the export of any goods by a charity to a place outside the member states<sup>6</sup>;
- 590 (4) the supply of any relevant goods<sup>7</sup> for donation to a nominated eligible body<sup>8</sup> where the goods are purchased with funds provided by a charity or from voluntary contributions<sup>9</sup>, and the letting on hire of such goods<sup>10</sup>, unless the donee of the goods is not a charity and has contributed in whole or in part to the funds for the purchase of goods<sup>11</sup>;
- 591 (5) the supply of any relevant goods (including computer services by way of the provision of computer software solely for use in medical research, diagnosis or treatment<sup>12</sup>) to an eligible body which pays for them with funds provided by a charity or from voluntary contributions, or to an eligible body which is a charitable institution providing care or medical or surgical treatment for handicapped persons<sup>13</sup>, and the letting on hire of such goods<sup>14</sup>, unless the body to whom the goods are supplied is not a charity and has contributed in whole or in part to the funds for the purchase of the goods<sup>15</sup>;
- 592 (6) repair and maintenance of relevant goods owned by or let on hire to<sup>16</sup> an eligible body<sup>17</sup> where the supply is paid for with funds which have been provided by a charity or from voluntary contributions and, in a case where the owner of the goods repaired or maintained is not a charity, it has not contributed in whole or in part to those funds<sup>18</sup>;
- 593 (7) the supply of goods in connection with the supply described in head (6) above<sup>19</sup> where the supply is paid for as described in that head<sup>20</sup>;
- 594 (8) the supply to a charity of a right to promulgate an advertisement by means of a medium of communication with the public; a supply to a charity that consists in such promulgation; the supply to a charity of services of design or production of an advertisement that is, or was intended to be, so promulgated; and the supply to a charity of goods closely related to such design or production services<sup>21</sup>;
- 595 (9) the supply to a charity providing care or medical or surgical treatment for human beings or animals<sup>22</sup>, or engaging in medical or veterinary research, of a medicinal product<sup>23</sup> where the supply is solely for use by the charity in such care, treatment or research<sup>24</sup>;
- 596 (10) the supply to a charity of a substance directly used for synthesis or testing in the course of medical or veterinary research<sup>25</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 15 (as amended); and heads (1)-(10) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante.

2 'Charity' is not defined for the purposes of VAT (except to include a body wholly owned by a charity in ibid s 31(1), Sch 9 Pt II Group 12 note (2) (as substituted) (see PARA 171 note 2 ante)), but EC Council Directive

77/388 (OJ L145, 13.6.77, p 1) art 13(A)(1)(g) affords exemption to 'the supply of services and of goods linked to welfare and social security work . . . by . . . other organisations recognised as charitable by the member state concerned'. As to the essentials of charitable purposes generally see CHARITIES vol 8 (2010) PARA 1 et seq; and *CF Leisure Mobility Ltd v Customs and Excise Comrs* (2001) VAT Decision 16790, [2001] STI 30.

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 See the Value Added Tax Act 1994 Sch 8 Pt II Group 15 items 1, 1A (Sch 8 Pt II Group 15 item 1 substituted, and item 1A added, by the Value Added Tax (Charities and Aids for the Handicapped) Order 2000, SI 2000/805, arts 5, 6); and note 5 infra.

These provisions do not apply unless the sale or letting takes place as a result of the goods having been made available to two or more specified persons or to the general public for purchase or hire (whether so made available in a shop or elsewhere), and does not take place as a result of any arrangements (whether legally binding or not) relating to the goods and entered into, before the goods were made so available, by each of the parties to the sale or letting, or the donor of the goods and either or both of those parties: Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (1) (Sch 8 Pt II Group 15 note (1) substituted, and notes (1A)-(1F) added, by the Value Added Tax (Charities and Aids for the Handicapped) Order 2000, SI 2000/805, arts 5, 8). For this purpose, a specified person is a person who is handicapped and/or who is entitled to income support under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 176 et seq), housing benefit under Pt VII (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 140 et seq), council tax under Pt VII (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq), income-based jobseeker's allowance under the Jobseeker's Act 1995 s 1(4) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 258 et seq), any element of child tax credit other than the family element and working tax credit (see SOCIAL SECURITY AND PENSIONS): Value Added Tax Act 1994 Sch 8 Pt II Group 15 notes (1C), (1D) (as so added; and Sch 8 Pt II Group 15 note (1D) amended by the Tax Credits Act 2002 s 47, Sch 3 paras 47, 49).

Head (1) in the text does not include (and is treated as having not included) any sale, or letting on hire, of particular donated goods if the goods, at any time after they are donated but before they are sold, exported or disposed of as waste, are whilst unlet used for any purpose other than, or in addition to, that of being available for purchase, hire or export: Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (1B) (as so added).

5 Ibid Sch 8 Pt II Group 15 item 2 (substituted by the Value Added Tax (Charities and Aids for the Handicapped) Order 2000, SI 2000/805, arts 5, 6). For the purposes of heads (1), (2) in the text, goods (which do not include anything that is not goods even though provision is made by or under an enactment for a supply of that thing to be, or be treated as, a supply of goods) are donated for letting only if they are donated for letting and re-letting after the end of any first or subsequent letting, and all or any of sale, export or disposal as waste if not, or when no longer, used for letting: Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (1A) (as added: see note 4 supra). A taxable person is a 'profits-to-charity' person in respect of any goods if he has agreed in writing (whether or not contained in a deed) to transfer to a charity his profits from supplies and lettings of the goods, or his profits from such supplies and lettings are otherwise payable to a charity: Sch 8 Pt II Group 15 notes (1E), (1F) (as so added).

6 Ibid Sch 8 Pt II Group 15 item 3. 'Export' means removal from the United Kingdom: *International Planned Parenthood Foundation v Customs and Excise Comrs* [2000] V & DR 396. As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

7 'Relevant goods' means:

- 95 (1) medical, scientific, computer, video, sterilising, laboratory or refrigeration equipment for use in medical or veterinary research, training, diagnosis or treatment (Value Added Tax Act 1994 Sch 8 Pt II Group 14 note (3)(a));
- 96 (2) ambulances (Sch 8 Pt II Group 14 note (3)(b));
- 97 (3) parts or accessories for use in or with goods described in head (1) or head (2) supra (Sch 8 Pt II Group 14 note (3)(c));
- 98 (4) goods of a kind described in Sch 8 Pt II Group 12 item 2 (as amended) (ie aids for the handicapped: see PARA 186 ante) (Sch 8 Pt II Group 14 note (3)(d));
- 99 (5) motor vehicles (other than vehicles with more than 50 seats) designed or substantially and permanently adapted for the safe carriage of a handicapped person in a wheelchair provided that: (a) in the case of vehicles with more than 16 but fewer than 27 seats, such provision exists for at least two people; (b) in the case of vehicles with more than 26 but fewer than 37 seats, such provision exists for at least three people; (c) in the case of vehicles with more than 36 but fewer than 47 seats, such provision exists for at least four people; (d) in the case of vehicles with more than 46 seats, such provision exists for at least five people; (e) there is either a fitted



electrically or hydraulically operated lift or, in the case of vehicles with fewer than 17 seats, a fitted ramp to provide access for a passenger in a wheelchair (Sch 8 Pt II Group 14 note (3)(e));

- 100 (6) motor vehicles (with more than six but fewer than 51 seats) for use by an eligible body providing care for blind, deaf, mentally handicapped or terminally sick persons mainly to transport such persons (Sch 8 Pt II Group 14 note (3)(f));
- 101 (7) telecommunication, aural, visual, light-enhancing or heat-detecting equipment (not being equipment ordinarily supplied for private or recreational use) solely for use for the purpose of rescue or first aid services undertaken by a charitable institution providing such services (Sch 8 Pt II Group 15 note (3)(g)).

An item is not prevented from being an 'accessory' within the meaning of head (3) *supra* for use in or with medical equipment because it is regarded as necessary or essential by the consumer: *Royal Midland Counties Home for Disabled People v Customs and Excise Comrs* [2002] STC 395 (emergency generator, supplied to nursing home for disabled, an accessory for use with medical equipment, which could be acquired without the generator and functioned without it for virtually all of the time).

In determining whether goods are 'relevant goods' it must be asked: (i) whether the goods are medical; and (ii) whether they are supplied for use in medical diagnosis or treatment: *Customs and Excise Comrs v David Lewis Centre* [1995] STC 485 (where the installation of observation windows and the construction of a soft games area for the disabled were held not to involve supplies of relevant goods). As to the meaning of 'medical or scientific equipment' see *Clinical Computing Ltd v Customs and Excise Comrs* [1983] VATTR 121; and *Lancer UK Ltd v Customs and Excise Comrs* [1986] VATTR 112. 'Handicapped' means chronically sick or disabled: Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (5); and see PARA 186 note 11 *ante*. It does not include persons suffering from dyslexia: *Dyslexia Institute Ltd v Customs and Excise Comrs* (1994) VAT Decision 12654, [1994] STI 1339. For the meanings of 'aural equipment' and 'rescue services' see *Severnside Siren Trust Ltd v Customs and Excise Comrs* [2000] V & DR 497. 'Rescue' means plucking out from a physical danger: *Isabel Medical Charity v Customs and Excise Comrs* (2003) VAT Decision 18209, [2003] STI 1801. For the meaning of 'eligible body' see note 8 *infra*.

8 An 'eligible body' means: (1) a Strategic Health Authority or Special Health Authority in England; a Health Authority, Special Health Authority or Local Health Board in Wales; a Health Board in Scotland; or a Health and Social Services Board in Northern Ireland; (2) a hospital the activities of which are not carried on for profit; (3) a research institution the activities of which are not carried on for profit; (4) a charitable institution providing care or medical or surgical treatment for handicapped persons; (5) a charitable institution providing rescue or first-aid services; (6) the Common Services Agency for the Scottish Health Service, the Northern Ireland Central Services Agency for Health and Social Services, or the Isle of Man Health Services Board; (7) a National Health Service trust established under the National Health Service and Community Care Act 1990 Pt I (ss 1-26 (as amended)) (see HEALTH SERVICES vol 54 (2008) PARA 155 *et seq*); and (8) a Primary Health Care trust established under the National Health Service Act 1977 s 16A (as added and amended) (see HEALTH SERVICES vol 54 (2008) PARA 111 *et seq*): Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (4) (amended by the Value Added Tax (Drugs, Medicines, Aids for the Handicapped and Charities etc) Order 2000, SI 2000/503, arts 2, 4; and the Value Added Tax (Drugs, Medicines, Aids for the Handicapped and Charities etc) Order 2002, SI 2002/2813, arts 2, 4). 'Care' in head (4) *supra* involves a continuing role in supervising or looking after a person and not simply the donation of equipment and an attitude of concern or eagerness to help: *Medical Care Foundation v Customs and Excise Comrs* [1991] VATTR 28. A medical centre comprising a pharmacy, waiting room and office, several consulting rooms, dental treatment rooms and facilities for carrying out minor operations was held not to be a 'hospital' for the purposes of head (2) *supra*: *Medicare Français v Customs and Excise Comrs* (1996) VAT Decision 13929, [1996] STI 781.

9 Value Added Tax Act 1994 Sch 8 Pt II Group 15 item 4.

10 *Ibid* Sch 8 Pt II Group 15 note (9). References to the purchase or ownership of goods must therefore be read as including references to their hiring or possession: Sch 8 Pt II Group 15 note (9). The normal concept of letting on hire involves the granting of possession of a chattel to the hirer in return for a rent: *Medical Aviation Services Ltd v Customs and Excise Comrs* (1998) VAT Decision 15308, [1998] STI 596 (trust supplied with fully-equipped helicopter ambulance, with pilot and ancillary services, of which it had sole right of use, subject to safety requirements, which were pilot's responsibility; held to be a letting on hire).

11 Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (6).

12 *Ibid* Sch 8 Pt II Group 15 note (10).

13 *Ibid* Sch 8 Pt II Group 15 item 5. A charitable institution is not regarded as providing care or medical or surgical treatment for handicapped persons unless it provides care or medical or surgical treatment in a relevant establishment, and the majority of persons who receive care or medical or surgical treatment in that establishment are handicapped persons: Sch 8 Pt II Group 15 note (4A) (Sch 8 Pt II Group 15 notes (4A), (4B) added by the Finance Act 1997 s 34). A 'relevant establishment' is: (1) a day-centre, other than a day-centre

which exists primarily as a place for activities that are social or recreational or both; (2) an institution which is approved, licensed or registered in accordance with the provisions of any enactment or Northern Ireland legislation, or exempted by or under such provisions from any requirement to be approved, licensed or registered: Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (4B) (as so added).

14 Ibid Sch 8 Pt II Group 15 note (9); and see note 10 supra.

15 Ibid Sch 8 Pt II Group 15 note (7). 'Care' in this context connotes having charge or protection of someone or something and covers the provision of accommodation, providing for daily needs, safe transport and a secure daytime environment; however, care of the handicapped need not be a special function of the recipient body, nor need the care it provides be exclusively for handicapped persons: *Customs and Excise Comrs v Help the Aged* [1997] STC 406 ('permanently adapted' (see note 7 head (5) supra) means 'adapted for use for the indefinite future'); but see Customs and Excise Business Brief 18/96 [1996] STI 1439.

16 Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (9); and see note 10 supra.

17 Ibid Sch 8 Pt II Group 15 item 6.

18 Ibid Sch 8 Pt II Group 15 note (8).

19 Ibid Sch 8 Pt II Group 15 item 7.

20 Ibid Sch 8 Pt II Group 15 note (8). Heads (4)-(7) in the text do not apply where the eligible body falls within note 8 head (4) supra unless the relevant goods are or are to be used in a relevant establishment in which that body provides care or medical or surgical treatment to persons the majority of whom are handicapped: Sch 8 Pt II Group 15 note (5A) (Sch 8 Pt II Group 15 notes (5A), (5B) added by the Finance Act 1997 s 34). However, nothing in this provision (or in the Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (4A) (as added) (see note 13 supra) prevents a supply from falling within heads (4)-(7) of the text where: (1) the eligible body provides medical care to handicapped persons in their own homes; (2) the relevant goods fall within note (3)(a) (see note 7 supra) or are parts or accessories for use in or with goods described therein; and (3) those goods are or are to be used in or in connection with the provision of that care: Sch 8 Pt II Group 15 note (5B) (as so added). For an extra-statutory concession on the supply of relevant goods to charities see Customs and Excise Comrs Business Brief 13/97 [1997] STI 757.

21 Value Added Tax Act 1994 Sch 8 Pt II Group 15 items 8-8C (Sch 8 Pt II Group 15 item 8 substituted, items 8A-8C added, by the Value Added Tax (Charities and Aids for the Handicapped) Order 2000, SI 2000/805, arts 5, 7). A supply is excluded if: (1) any of the members of the public (whether individuals or other persons) who are reached through the medium are selected (by address, whether postal address, telephone number, e-mail address or other address for electronic communication purposes, or at random) by or on behalf of the charity; (2) if it is used to create, or contribute to, a website which is the charity's own (whether or not hosted by another person); or (3) if it is used directly by the charity to design or produce an advertisement: Value Added Tax Act 1994 Sch 8 Pt II Group 15 notes (10A)-(10C) (added by the Value Added Tax (Charities and Aids for the Handicapped) Order 2000, SI 2000/805, arts 5, 9). For the Commissioners' views on what kinds of supply of advertising provided to charities are zero-rated see Customs and Excise Public Notice 701/58 *Charity Advertising and Goods Connected with Collecting Donations* (March 2002).

22 'Animals' includes any species of the animal kingdom: Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (2).

23 For these purposes, a 'medicinal product' means any substance or article (not being an instrument, apparatus or appliance) which is for use wholly or mainly in either or both of the following ways: (1) by being administered (within the meaning of the Medicines Act 1968 s 130(9): see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 903) to one or more human beings or animals for a medicinal purpose (within the meaning of s 130(2): see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 8); or (2) as an ingredient in the preparation of a substance or article which is to be administered to one or more human beings or animals for a medicinal purpose: Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (11). For these purposes, 'substance' and 'ingredient' have the meanings assigned to them by the Medicines Act 1968 s 132 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 7): Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (12). As to the meaning of 'wholly or mainly' see PARA 181 note 8 ante.

24 Ibid Sch 8 Pt II Group 15 item 9.

25 Ibid Sch 8 Pt II Group 15 item 10.

## UPDATE

### 188 Charities

NOTE 2--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

TEXT AND NOTE 23--Now refers to a medicinal product or veterinary medicinal products: Value Added Tax Act 1994 Sch 8 Pt II Group 15 item 9 (amended by the Veterinary Medicines Regulations 2006, SI 2006/2407). 'Veterinary medicinal products' has the same meaning as in reg 2 (now replaced by Veterinary Medicines Regulations 2009, SI 2009/2297, reg 2: see MEDICINAL PRODUCTS vol 30(2) (Reissue) PARA 34A.1): Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (11) (amended by SI 2006/2407).

NOTE 23--In heads (1) and (2) words 'or animals' omitted: Value Added Tax Act 1994 Sch 8 Pt II Group 15 note (11) (amended by SI 2006/2407).

See *Pasante Healthcare v Revenue and Customs Comrs* (2006) VAT Decision 19724, [2006] STI 2579 (condoms are articles 'administered' by external application).

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### 189. Clothing and footwear.

The following are zero-rated supplies<sup>1</sup>:

- 597 (1) the supply of articles designed as clothing, including hats and other headgear<sup>2</sup>, or footwear for young children and not suitable for older persons<sup>3</sup>, but excluding certain articles made wholly or partly of fur skin<sup>4</sup>;
- 598 (2) the supply to a person for use otherwise than by employees of his of protective boots and helmets for industrial use<sup>5</sup>, provided that those goods satisfy the required<sup>6</sup> standards<sup>7</sup>;
- 599 (3) the supply of protective helmets for wear by a person driving or riding a motor bicycle or riding a pedal cycle<sup>8</sup> provided that they satisfy the required standards<sup>9</sup>; and
- 600 (4) the supply of certain services<sup>10</sup> in respect of the goods comprised in heads (1) to (3) above<sup>11</sup>.

1 See the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 16 (as amended); and heads (1)-(4) in the text. For the meaning of 'zero-rated supply' see PARA 174 ante; and for the meaning of 'supply' see PARA 27 ante.

2 Ibid Sch 8 Pt II Group 16 note (1); and see *Cassidy (t/a Balou) v Customs and Excise Comrs* (1991) VAT Decision 5760, [1991] STI 458. The question of design must be asked at the point of manufacture; later additions, such as sewn-on school badges, are disregarded: *Smart Alec Ltd v Customs and Excise Comrs* (2002) VAT Decision 17832, [2003] STI 511. See Customs and Excise Public Notice 714 *Zero Rating Young Children's Clothing and Footwear* (January 2002).

3 Value Added Tax Act 1994 Sch 8 Pt II Group 16 item 1. The pleating of material for skirts for girls has been held to be within Sch 8 Pt II Group 16 item 1, even though further work would have to be carried out before the articles could be worn: *Customs and Excise Comrs v Ali Baba Tex Ltd* [1992] 3 CMLR 725, [1992] STC 590 (having regard to the Value Added Tax Act 1994 s 5(1), Sch 4 para 2 (repealed): see now s 30(2A) (as added), which enables a supply of services to be zero-rated if it consists in the application of a treatment or process to another's goods, if, inter alia, by doing so he produces goods of a description for the time being specified in Sch 8 (as amended); and PARA 174 ante); cf *Warley Denim Services v Customs and Excise Comrs* (1993) VAT Decision 10396, [1993] STI 1080. The mere fact that goods are intended for use by children does not exclude the possibility that they might be suitable for older persons, such as might be the case with one-size fashion knitwear: *Jeffery Green & Co Ltd v Customs and Excise Comrs* [1974] VATTR 94. Goods are not suitable for older persons if, eg, they carry designs which would expose an adult to ridicule or contempt: *Charles Owen & Co (Bow) Ltd v Customs and Excise Comrs* [1993] VATTR 514. The Commissioners of Revenue and Customs take the view that a 'young child' for these purposes is a child up to his 14th birthday, and that the maximum permissible heights for which the clothing in question may be manufactured are 161 cm for girls and 163 cm for boys: see *H & M Hennes Ltd v Customs and Excise Comrs* [2005] All ER (D) 327 (Apr); and for a schedule of maximum sizes see Customs and Excise News Release 14/94 (15 March 1994). On the Commissioners' views as to what constitutes the maximum size for boys' footwear to be zero-rated see Customs and Excise Business Brief 8/96 [1996] STI 911. The sale of discount cards enabling holders to purchase children's clothing at a reduced price was zero-rated as falling within head (1) in the text: *Mothercare (UK) Ltd v Customs and Excise Comrs* [1993] VATTR 391, following *British Railways Board v Customs and Excise Comrs* [1977] 2 All ER 873, [1977] 1 WLR 588, CA. As to composite and separate supplies see PARA 31 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 The Value Added Tax Act 1994 Sch 8 Pt II Group 16 item 1 does not include articles of clothing made wholly or partly of fur skin other than: (1) headgear; (2) gloves; (3) buttons, belts and buckles; and (4) any garment merely trimmed with fur skin, unless the trimming has an area greater than one-fifth of the area of the outside material or, in the case of a new garment, represents a cost to the manufacturer greater than the cost to him of the other components: Sch 8 Pt II Group 16 note (2). 'Fur skin' means any skin with fur, hair or wool attached except: (a) rabbit skin; (b) woolled sheep or lamb skin; and (c) the skin, if neither tanned nor dressed,

of bovine cattle (including buffalo), equine animals, goats or kids (other than Yemen, Mongolian and Tibetan goats or kids), swine (including peccary), chamois, gazelles, deer or dogs: Sch 8 Pt II Group 16 note (3).

5 Ibid Sch 8 Pt II Group 16 item 2.

6 Head (2) in the text applies only where the goods to which they refer are: (1) goods which are manufactured to standards approved by the British Standards Institution and bear a marking indicating compliance with the specification relating to such goods; or (2) goods which are manufactured to standards which satisfy requirements imposed (whether under the law of the United Kingdom or the law of any other member state) for giving effect to EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (as amended) and bear any mark of conformity provided for by virtue of that directive in relation to those goods: Value Added Tax Act 1994 Sch 8 Pt II Group 16 note (4) (amended by the Value Added Tax (Protective Helmets) Order 2000, SI 2000/1517, arts 2, 3; and the Value Added Tax (Protective Helmets) Order 2001, SI 2001/732, arts 2, 4, 5). For the meaning of 'United Kingdom' see PARA 4 note 3 ante; for the meaning of 'another member state' see PARA 4 note 15 ante; and as to the construction of references to the law of another member state see PARA 17 ante. Head (3) in the text does not apply to a protective helmet unless: (a) it is of a type that on 30 June 2000 is prescribed by regulations made under the Road Traffic Act 1988 s 17 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 640); or (b) it is of a type that (i) is manufactured to a standard which satisfied requirements imposed (whether under the law of the United Kingdom or the law of any other member state) for giving effect to EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (as amended), and (ii) bears any mark of conformity required by virtue of that Directive: Value Added Tax Act 1994 Sch 8 Pt II Group 16 note (4A) (added by the Value Added Tax (Protective Helmets) Order 2000, SI 2000/1517, arts 2, 4; and substituted by the Value Added Tax (Protective Helmets) Order 2001, SI 2001/732, arts 2, 6).

7 Value Added Tax Act 1994 Sch 8 Pt II Group 16 note (4) (as amended: see note 6 supra).

8 Ibid Sch 8 Pt II Group 16 item 3 (amended by the Value Added Tax (Protective Helmets) Order 2001, SI 2001/732, arts 2, 3).

9 Value Added Tax Act 1994 Sch 8 Pt II Group 16 note (4) (as amended: see note 6 supra).

10 Ie the supply of the services described in ibid s 5(1), Sch 4 para 1(1) (transfer of an undivided share of, or of the possession of, the relevant goods: see PARA 24 ante), or Sch 4 para 5(4) (deemed supply where goods are used or made available for a non-business purpose: see PARA 24 ante): see Sch 8 Pt II Group 16 note (5) (amended by the Value Added Tax (Protective Helmets) Order 2001, SI 2001/732, arts 2, 5). The Value Added Tax Act 1994 Sch 8 Pt II Group 16 note (5) (as amended) in fact refers to Sch 4 para 5(3) (supply of samples, which is a supply of goods not of services: see PARA 30 ante). As to the likely intention of the draftsman to apply Sch 4 para 5(4) rather than Sch 4 para 5(3) see PARA 184 note 5 ante.

11 Ibid Sch 8 Pt II Group 16 note 5 (as amended: see note 10 supra). In the case of goods comprised in head (2) in the text, Sch 8 Pt II Group 16 note (5) (as amended) applies only if the goods are for use otherwise than by employees of the person to whom the services are supplied: Sch 8 Pt II Group 16 note (5) (as so amended).

## UPDATE

### 189 Clothing and footwear

NOTE 3--*H & M Hennes Ltd*, cited, reported at [2005] EWHC 1383 (Ch), [2005] STC 1749.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/(ii) Specified Supplies/189A. Emissions Allowances.

**189A. Emissions Allowances.**

The supply of an emissions allowance is a zero-rated supply: Value Added Tax Act 1994 Sch 8 Pt II Group 17 (added by SI 2009/2093).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/ (iii) Zero-rated Imports and Exports/190. The zero-rated acquisition and importation of goods.

### **(iii) Zero-rated Imports and Exports**

#### **190. The zero-rated acquisition and importation of goods.**

Where goods of a description for the time being specified as being zero-rated<sup>1</sup>, or of a description forming part of a description of supply<sup>2</sup> for the time being so specified, are acquired in the United Kingdom<sup>3</sup> from another member state<sup>4</sup>, or are imported into the United Kingdom from a place outside the member states<sup>5</sup>, no value added tax is chargeable on their acquisition or importation<sup>6</sup>, except as otherwise<sup>7</sup> provided<sup>8</sup>.

1     Ie under the Value Added Tax Act 1994 s 30(2), Sch 8 (as amended): see PARA 175 et seq ante. For the meaning of 'zero-rated supply' see PARA 174 ante.

2     For the meaning of 'supply' see PARA 27 ante.

3     For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4     As to the charge on acquisitions from other member states see PARA 19 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

5     As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

6     Value Added Tax Act 1994 s 30(3).

7     Ie as otherwise provided by ibid Sch 8 (as amended): see PARA 175 et seq ante. A zero-rated acquisition, although not subject to VAT, may nevertheless constitute a taxable acquisition within s 10(2), since it will not be an exempt acquisition: see PARA 19 note 13 ante. As to other exclusions from zero-rating of importations and taxable acquisitions see PARAS 179, 181, 185 ante.

8     Ibid s 30(3).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/ (iii) Zero-rated Imports and Exports/191. Exports by charities.

### **191. Exports by charities.**

The export of any goods by a charity<sup>1</sup> to a place outside the member states<sup>2</sup> is treated for the purposes of the Value Added Tax Act 1994 as a supply<sup>3</sup> made by the charity: (1) in the United Kingdom<sup>4</sup>; and (2) in the course or furtherance of a business<sup>5</sup> carried on by the charity<sup>6</sup>. The effect of this rule is that charities may recover as input tax<sup>7</sup> VAT incurred on the supplies made to them for the purposes of the export even though the goods are exported otherwise than for consideration<sup>8</sup>.

1 As to the meaning of 'charity' see PARA 188 note 2 ante.

2 As to the export of goods to a place outside the member states see PARA 19 ante; and as to the territories included in, or excluded from, the member states for value added tax purposes see PARA 16 ante.

3 For the meaning of 'supply' see PARA 27 ante.

4 For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

5 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

6 Value Added Tax Act 1994 s 30(5) (substituted by the Finance Act 1995 s 28).

7 For the meaning of 'input tax' see PARAS 4 ante, 215 post.

8 See Customs and Excise Public Notice 701/1 *Charities* (May 2004) PARA 5.8. However, where goods are distributed for no consideration so that there is no supply within the Value Added Tax Act 1994 s 5(2)(a) (see PARA 27 ante) or s 26(2) (see PARA 217 post), no supplies are made within the course or furtherance of a business within s 30(5) (as substituted): *International Planned Parenthood Federation v Customs and Excise Comrs* [2000] V & DR 396.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/ (iii) Zero-rated Imports and Exports/192. The zero-rating of exported goods and services; in general.

## **192. The zero-rating of exported goods and services; in general.**

In addition to supplies<sup>1</sup> within the specified groups<sup>2</sup>, the following are zero-rated supplies<sup>3</sup>:

- 601 (1) a supply of goods if the Commissioners for Her Majesty's Revenue and Customs are satisfied that the person supplying the goods has exported them to a place outside the member states<sup>4</sup> and if such other conditions, if any, as may be specified in regulations<sup>5</sup> or as the Commissioners may impose are fulfilled<sup>6</sup>;
- 602 (2) a supply of goods if the Commissioners are satisfied that the person supplying the goods has shipped them for use as stores on a voyage or flight to an eventual destination outside the United Kingdom<sup>7</sup>, or as merchandise for sale by retail to persons carried on such a voyage or flight in a ship<sup>8</sup> or aircraft and if such other conditions, if any, as may be specified in regulations or as the Commissioners may impose are fulfilled<sup>9</sup>, except in the case of goods shipped for use as stores on a voyage or flight to be made by the person to whom the goods were supplied and to be made for a purpose which is private<sup>10</sup>.

Regulations may also provide for the zero-rating of:

- 603 (a) supplies of goods, or of such goods as may be specified in them, in cases where the Commissioners are satisfied that the goods have been, or are to be, exported to a place outside the member states, or that the supply in question involves both the removal of the goods from the United Kingdom and their acquisition in another member state<sup>11</sup> by a person who is liable for value added tax on the acquisition in accordance with certain provisions<sup>12</sup> of the law of that member state<sup>13</sup>;
- 604 (b) supplies of goods, or of such goods as may be specified in regulations, in cases where the Commissioners are satisfied that the supply in question involves both the removal of the goods from a fiscal warehousing regime<sup>14</sup> and their being placed in a warehousing regime in another member state<sup>15</sup>, or in such member state or states as may be prescribed<sup>16</sup>;
- 605 (c) a supply of services which is made where goods are let on hire and the Commissioners are satisfied that the goods have been, or are to be, removed from the United Kingdom during the period of the letting<sup>17</sup>,

and if, in each case, such other conditions, if any, as may be specified in the regulations or as the Commissioners may impose are fulfilled<sup>18</sup>.

Where the supply of any goods has been zero-rated by virtue of head (1) or head (2) above or in pursuance of regulations made under head (a), head (b) or head (c) above and either:

### **.1**

- 41. (i) the goods are found in the United Kingdom after the date on which they were alleged to have been or were to be exported or shipped or otherwise removed from the United Kingdom; or
- 42. (ii) any condition specified in the relevant regulations or imposed by the Commissioners is not complied with,

and the presence of the goods in the United Kingdom after that date or the non-observance of the condition has not been authorised by the Commissioners for these purposes, the goods are liable to forfeiture<sup>19</sup> and the VAT that would have been chargeable on the supply but for the zero-rating becomes payable forthwith by the person to whom the goods were supplied or by any person in whose possession the goods are found in the United Kingdom; but the Commissioners may, if they think fit, waive payment of the whole or part of that VAT<sup>20</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 Ie within the Value Added Tax Act 1994 s 30(2), Sch 8 (as amended): see PARA 175 et seq ante.

3 For the meaning of 'zero-rated supply' see PARA 174 ante.

4 As to goods exported to a place outside the member states see PARA 19 ante; and as to the territories included in, or excluded from, the member states for VAT purposes see PARA 10 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 Ie in regulations made under the Value Added Tax Act 1994: s 96(1). See the Value Added Tax Regulations 1995, SI 1995/2518, regs 128-129 (as amended); and PARAS 193-194 post. As to the making of regulations generally see PARA 14 ante.

6 Value Added Tax Act 1994 s 30(6)(a). See Customs and Excise Public Notice 703 *Export of Goods from the United Kingdom* (April 2005). The Commissioners are entitled to insist that very strict conditions are complied with before zero-rating is granted and that those conditions, and conditions specified in accordance with the Value Added Tax Act 1994 s 30(8)(b) (see the text and note 18 infra) have been satisfied: see *Henry Moss of London Ltd v Customs and Excise Comrs* [1981] 2 All ER 86, [1981] STC 139, CA. It is, however, irrelevant that it may be illegal to export the relevant goods to the country to which they are exported: zero-rating must still be conceded: Case C-111/92 *Lange v Finanzamt Fürstentfeldbruck* [1994] 1 CMLR 573, ECJ.

7 For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

8 As to the meaning of 'ship' see PARA 19 note 7 ante. Zero-rating is only available if the goods are supplied to the vessel operator which will itself use the goods for refuelling or provisioning and does not extend to supplies to an intermediary at a previous stage in the commercial chain; on the other hand, there is no requirement that the goods should actually be loaded on board the vessels at the time of their supply to the operator: Case C-185/89 *Staatssecretaris van Financiën v Velker International Oil Co Ltd NV* [1990] ECR I-2561, [1991] STC 640, ECJ, interpreting EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 15(4).

9 Value Added Tax Act 1994 s 30(6)(b).

10 Ibid s 30(7).

11 For the meaning of 'another member state' see PARA 4 note 15 ante; and as to the acquisition of goods in another member state see PARA 19 ante.

12 Ie provisions of the law of that member state corresponding, in relation to that member state, to the provisions of the Value Added Tax Act 1994 s 10: see PARA 19 ante. As to the construction of references to the corresponding law of another member state see PARA 17 ante.

13 Ibid s 30(8)(a); and see PARA 194 post.

14 Ie within the meaning of ibid s 18F(2) (as added): see PARA 149 note 3 ante.

15 Ie where that regime is established by provisions of the law of that member state corresponding, in relation to that member state, to the provisions of ibid ss 18A, 18B (as added): see PARAS 147-149 ante. For the meaning of 'warehousing regime' see PARA 144 note 6 ante.

16 Ibid s 30(8A)(a) (added by the Finance Act 1996 s 26(1), Sch 3 para 7).

17 Value Added Tax Act 1994 s 30(9); and see PARA 193 post.

18 Ibid ss 30(8)(b), 30(8A)(b) (as added: see note 16 supra), s 30(9).

19 le under the Customs and Excise Management Act 1979: Value Added Tax Act 1994 s 96(1). See CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1155 et seq. 'Export', which must be given its ordinary meaning of sending goods from one country to another, means, in the context of s 7 (as amended) (see PARAS 48-50 ante) or s 30(10) (as amended), removal from the United Kingdom: *International Planned Parenthood Federation v Customs and Excise Comrs* [2000] V & DR 396 (goods dispatched from Netherlands warehouse of charity, registered for VAT in United Kingdom, to recipients outside European Union, not 'exported' from United Kingdom).

20 Value Added Tax Act 1994 s 30(10) (amended by the Finance Act 1996 Sch 3 para 7). While an Order in Council under the Isle of Man Act 1979 s 6 (as amended) is in force (see PARA 15 ante), the Value Added Tax Act 1994 s 30(10) (as amended) has effect as if the reference to goods zero-rated under the regulations there mentioned included a reference to goods zero-rated under any corresponding regulations made under the Act of Tynwald: Isle of Man Act 1979 s 6(4)(a) (amended by the Value Added Tax Act 1983 s 50(1); and by the Value Added Tax Act 1994 s 100(1), Sch 14 para 7(2)).

## UPDATE

### 192 The zero-rating of exported goods and services; in general

NOTE 8--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 20--A member state is not precluded from granting an exemption from VAT on the supply of goods for export outside of the European Community, where the conditions for exemption are not met, but the taxpayer is not able to recognise that they are not met because the export proofs provided by the purchaser are forged: Case C-271/06 *Netto Supermarket GmbH & Co OHG v Finanzamt Malchin* [2008] STC 3280, ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/ (iii) Zero-rated Imports and Exports/193. Export of freight containers.

### **193. Export of freight containers.**

Where the Commissioners for Her Majesty's Revenue and Customs are satisfied that a container<sup>1</sup> is to be exported to a place outside the member states<sup>2</sup>, its supply<sup>3</sup> is zero-rated<sup>4</sup>, subject to such conditions as they may impose<sup>5</sup>.

1 For these purposes, 'container' means an article of transport equipment (lift-van, movable tank or other similar structure) which is: (1) fully or partially inclosed to constitute a compartment intended for containing goods; (2) of a permanent character and accordingly strong enough to be suitable for repeated use; (3) specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading; (4) designed for ready handling, particularly when being transferred from one mode of transport to another; (5) designed to be easy to fill and to empty; and (6) having an internal volume of one cubic metre or more; and the term 'container' includes the accessories and equipment of the container, appropriate for the type concerned, provided that they are carried with the container, but does not include vehicles, accessories or spare parts of vehicles, or packaging: Value Added Tax Regulations 1995, SI 1995/2518, reg 117(2). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 As to the territories treated as included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

3 For the meaning of 'supply' see PARA 27 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 128. For the meaning of 'zero-rated supply' see PARA 174 ante.

5 Ibid reg 128. As to the imposition of conditions see PARA 192 note 6 ante. See also Customs and Excise Public Notice 703/1 *Supply of Freight Containers for Export or Removal from the United Kingdom* (January 2004).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/ (iii) Zero-rated Imports and Exports/194. Supplies to overseas persons.

**194. Supplies to overseas persons.**

Where the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> are satisfied that:

- 606 (1) goods intended for export to a place outside the member states<sup>2</sup> have been supplied<sup>3</sup>, otherwise than to a taxable person<sup>4</sup>, to a person not resident in the United Kingdom, a trader who has no business<sup>5</sup> establishment in the United Kingdom from which taxable supplies<sup>6</sup> are made, or an overseas authority<sup>7</sup>; and
- 607 (2) the goods were exported to a place outside the member states,

the supply is zero-rated<sup>8</sup>, subject to such conditions as the Commissioners may impose<sup>9</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

3 For the meaning of 'supply' see PARA 27 ante.

4 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

5 For the meaning of 'business' see PARA 23 ante.

6 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

7 For these purposes, 'overseas authority' means any country other than the United Kingdom or any part of, or place in, such a country or the government of any such country, part or place: Value Added Tax Regulations 1995, SI 1995/2518, reg 117(7). For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

8 Ibid reg 129(1). For the meaning of 'zero-rated supply' see PARA 174 ante.

9 Ibid reg 129(1). As to the imposition of conditions see PARA 192 note 6 ante.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/ (iii) Zero-rated Imports and Exports/195. Supplies to persons taxable in another member state.

### **195. Supplies to persons taxable in another member state.**

Where the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> are satisfied that:

- 608 (1) a supply<sup>2</sup> of goods by a taxable person<sup>3</sup> involves their removal from the United Kingdom<sup>4</sup>;
- 609 (2) the supply is to a person taxable in another member state<sup>5</sup>;
- 610 (3) the goods have been removed to another member state<sup>6</sup>; and
- 611 (4) the goods are not goods in relation to whose supply the taxable person has opted<sup>7</sup> for value added tax to be charged by reference to the profit margin on the supply<sup>8</sup>,

the supply is zero-rated<sup>9</sup>, subject to such conditions as the Commissioners may impose<sup>10</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 134(a). For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

5 Ibid reg 134(b). For the meaning of 'another member state' see PARA 4 note 15 ante; and for the meaning of 'taxable in another member state' see PARA 17 note 5 ante.

6 Ibid reg 134(c).

7 Ie pursuant to the Value Added Tax Act 1994 s 50A (as added): see PARA 202 post.

8 Value Added Tax Regulations 1995, SI 1995/2518, reg 134(d).

9 See ibid reg 134. For the meaning of 'zero-rated supply' see PARA 174 ante.

10 See ibid reg 134. As to the imposition of conditions see generally para 192 note 6 ante. In relation to supplies to customers in other member states the Commissioners require that: (1) the supplier obtains and shows on his VAT sales invoice his customer's VAT registration number (with a two-digit country code prefix); (2) the goods are sent or transported out of the United Kingdom to a destination in another member state; and (3) the supplier holds commercial documentary evidence that the goods have been removed from the United Kingdom (guidance on proof of removal of goods is given in Customs and Excise Public Notice 703 *Export of Goods from the United Kingdom* (April 2005)): Customs and Excise Public Notice 725 *The Single Market* (October 2002) PARA 3.1. If these conditions are not satisfied, the Commissioners require the trader to charge and account for tax on the goods in the United Kingdom unless the supply of the goods is normally zero-rated in the United Kingdom: para 3.2.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(2) ZERO-RATED SUPPLIES/ (iii) Zero-rated Imports and Exports/196. Supplies of goods subject to excise duty to persons who are not taxable in another member state.

**196. Supplies of goods subject to excise duty to persons who are not taxable in another member state.**

Where the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> are satisfied that:

- 612 (1) a supply<sup>2</sup> by a taxable person<sup>3</sup> of goods subject to excise duty<sup>4</sup> involves their removal from the United Kingdom<sup>5</sup> to another member state<sup>6</sup>;
- 613 (2) that supply is other than to a person taxable in another member state<sup>7</sup> and the place of supply is not treated<sup>8</sup> as outside the United Kingdom<sup>9</sup>;
- 614 (3) the goods have been removed to another member state in accordance with the provisions of the regulations<sup>10</sup> relating to the holding, movement and warehousing of excise goods and registered excise dealers and shippers<sup>11</sup>; and
- 615 (4) the goods are not goods in relation to whose supply the taxable person has opted<sup>12</sup> for value added tax to be charged by reference to the profit margin on the supply<sup>13</sup>,

the supply is zero-rated<sup>14</sup>, subject to such conditions as the Commissioners may impose<sup>15</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 As to the amount of excise duty chargeable see PARA 98 note 6 ante.

5 For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 135(a). For the meaning of 'another member state' see PARA 4 note 15 ante.

7 For the meaning of 'taxable in another member state' see PARA 17 note 5 ante.

8 I.e. by virtue of the Value Added Tax Act 1994 s 7(5): see PARA 48 ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 135(b).

10 I.e. in accordance with the provisions of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992, SI 1992/3135 (as amended): see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 651 et seq.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 135(c).

12 I.e. pursuant to the Value Added Tax Act 1994 s 50A (as added): see PARA 202 post.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 135(d).

14 See *ibid* reg 135. For the meaning of 'zero-rated supply' see PARA 174 ante.

15 *Ibid* reg 135. As to the imposition of conditions see PARA 192 note 6 ante.

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### **197. Supplies to persons departing from the member states etc.**

Subject to such conditions as the Commissioners for Her Majesty's Revenue and Customs may impose<sup>1</sup>, the supply<sup>2</sup> of goods is zero-rated<sup>3</sup> where the Commissioners are satisfied that:

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43. (1) the goods have been supplied to a person who is an overseas visitor<sup>4</sup> and who, at the time of supply, intended to depart from the member states before the end of the third month following that in which the supply is effected and that the goods should accompany him<sup>5</sup>;
44. (2) except as they may allow, the goods were produced to the competent authorities for the purposes of the common system of value added tax in the member state from which the goods were finally exported to a place outside the member states<sup>6</sup>; and
45. (3) the goods were exported to a place outside the member states<sup>7</sup>.

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On application by an overseas visitor who intends to depart from the member states within 15 months and to remain outside the member states for a period of at least six months, the Commissioners may permit him within 12 months of his intended departure to acquire a motor vehicle<sup>8</sup> from a registered person<sup>9</sup>, without payment of VAT, for subsequent export and its supply is zero-rated, subject to such conditions as they may impose<sup>10</sup>. Similarly, on application by any person who intends to depart from the member states within nine months and to remain outside the member states for a period of at least six months, the Commissioners may permit him within six months of his intended departure to purchase a motor vehicle from a registered person, without payment of VAT, for subsequent export and its supply is also zero-rated, subject to such conditions as they may impose<sup>11</sup>.

On application by a person who is not taxable in another member state<sup>12</sup> and who intends to purchase a new means of transport<sup>13</sup> in the United Kingdom and to remove that new means of transport to another member state, the Commissioners may permit that person to purchase a new means of transport without payment of VAT, for subsequent removal to another member state within two months of the date of supply, and its supply is zero-rated, subject to such conditions as they may impose<sup>14</sup>.

1 Value Added Tax Regulations 1995, SI 1995/2518, reg 131(1) (amended by SI 1995/3147). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. As to the imposition of conditions generally see PARA 192 note 6 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 For the meaning of 'zero-rated supply' see PARA 174 ante. The conditions for the application of zero-rating under the Value Added Tax Regulations 1995, SI 1995/2518, reg 131 (as amended) are set out in Customs and Excise Public Notice 704 *VAT Retail Exports* (November 2004) PARA 2.6. Goods excluded from the operation of the retail export scheme include: (1) motor vehicles (see Customs and Excise Public Notice 705 *Buyer's Guide to Personal Exports of Motor Vehicles to Destinations outside the EU* (March 2004)); (2) sailaway boats (see Customs and Excise Public Notice 703/2 *Sailaway Boats Supplied for Export outside the EC* (May 2002)); (3) goods that will be exported as freight or unaccompanied baggage (see Customs and Excise Public Notice 703 *Export of goods from the United Kingdom* (April 2005)); (4) goods over £600 (excluding VAT) in value exported



for business purposes (see Customs and Excise Public Notice 703 *Export of goods from the United Kingdom* (April 2005)); (5) goods for consumption within the member states; (6) goods requiring an export licence, other than antiques; (7) unmounted gemstones; (8) bullion (over 125g, 2.75 troy ounces or 10 Tolas); (9) goods purchased by mail order including those purchased over the internet (see Customs and Excise Public Notice 704 *VAT Retail Exports* para 2.8); and (10) zero-rated goods.

4 'Overseas visitor' refers to a traveller who is not established within the member states: Value Added Tax Regulations 1995, SI 1995/2518, reg 117(7A) (reg 117(7A)-(7D) added by SI 1999/438). For these purposes, a traveller is not established within the member states only if his domicile or habitual residence is situated outside the member states: Value Added Tax Regulations 1995, SI 1995/2518, reg 117(7B) (as so added). Solely for this purpose, the traveller's domicile or habitual residence is the place entered as such in a valid identity document, identity card or passport: reg 117(7C) (as so added). Such a document is valid for the purposes of reg 117(7C) (as added) only if it is so recognised by the Commissioners for Her Majesty's Revenue and Customs, and it is not misleading as to the traveller's true place of domicile or habitual residence: reg 117(7D) (as so added).

5 Ibid reg 131(1)(a) (amended by SI 1995/3147); and see note 7 *infra*.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 131(1)(b); and see note 7 *infra*.

7 Ibid reg 131(1)(c). For a case where letters from the recipients of supplies were accepted by the VAT and duties tribunal as evidence of exportation see *Kingdom Sportswear Ltd v Customs and Excise Comrs* [1991] VATTR 55.

8 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 132 (amended by SI 2000/258).

9 For the meaning of 'registered person' see PARA 115 note 5 *ante*.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 132 (as amended: see note 8 *supra*).

11 Ibid reg 133 (amended by SI 2000/258).

12 For the meaning of 'taxable in another member state' see PARA 17 note 5 *ante*; and for the meaning of 'another member state' see PARA 4 note 15 *ante*.

13 For the meaning of 'new means of transport' see PARA 19 note 7 *ante*.

14 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 155.

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### **198. Applications of customs and excise legislation.**

Where goods are exported from the United Kingdom<sup>1</sup>: (1) to certain territories which are treated as excluded from the territory of the Community for the purposes of value added tax<sup>2</sup>; or (2) to certain other territories which are treated for those purposes as excluded both from the territory of the member states and from the territory of the Community<sup>3</sup>, the provisions relating to the export of goods to a place outside the customs territory of the Community<sup>4</sup> apply for the purpose of ensuring the correct application of the zero rate of VAT to such goods<sup>5</sup>. The provisions made by or under the Customs and Excise Management Act 1979 in relation to the exportation of goods to places outside the member states also apply<sup>6</sup>, so far as relevant, for the purpose of ensuring the correct application of the zero rate of VAT to the goods<sup>7</sup>.

1 For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 Ie the territories prescribed in the Value Added Tax Regulations 1995, SI 1995/2518, reg 136: see PARA 16 text and notes 2-3 ante.

3 Ie the territories prescribed in ibid reg 137: see PARA 16 text and notes 4-5 ante.

4 Ie the provisions contained in EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) (establishing the Community Customs Code); and EC Commission Regulation 2454/93 (OJ L253, 11.11.93, p 1) (as amended) (implementation of that code). For these purposes, 'customs territory of the Community' has the same meaning as it has for the purposes of EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1): Value Added Tax Regulations 1995, SI 1995/2518, reg 117(10).

5 Ibid reg 144. Where goods are exported to those prescribed territories, the formalities relating to the export of goods to a place outside the customs territory of the Community contained in EC Council Regulation 2913/92 (OJ L302, 19.10.92, p 1) and EC Commission Regulation 2454/93 (OJ L253, 11.11.93, p 1) (as amended) must be completed: Value Added Tax Regulations 1995, SI 1995/2518, reg 140(2).

6 Ie subject to ibid reg 145(2): reg 145(1). Where goods are being exported from the United Kingdom to the territories prescribed in reg 137, the Finance (No 2) Act 1992 s 4 (enforcement powers: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1174) applies to such goods as if references therein to 'member states' excluded the territories so prescribed: Value Added Tax Regulations 1995, SI 1995/2518, reg 145(2).

7 Ibid reg 145(1). See further CUSTOMS AND EXCISE.

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### **(3) RETAIL SCHEMES**

#### **199. In general.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may permit the value which is to be taken as the value, in any prescribed accounting period<sup>2</sup> or part of such a period, of supplies<sup>3</sup> by a retailer which are taxable at other than the zero rate<sup>4</sup> to be determined by a method agreed with that retailer or by any method described in a notice<sup>5</sup> published by the Commissioners for that purpose (a 'scheme')<sup>6</sup>; and they may publish any notice accordingly<sup>7</sup>. The Commissioners may vary the terms of any method by publishing a fresh notice or a notice which amends an existing notice, or by adapting any method by agreement with any retailer<sup>8</sup>. No retailer may at any time use more than one scheme except as provided for in any notice or as the Commissioners may otherwise allow<sup>9</sup>. The Commissioners may refuse to permit the value of taxable supplies<sup>10</sup> to be determined in accordance with a scheme if it appears to them that the use of any particular scheme does not produce a fair and reasonable valuation during any period, that it is necessary to do so for the protection of the revenue or that the retailer could reasonably be expected to account for value added tax in accordance with the regulations generally<sup>11</sup> applicable<sup>12</sup>. No retailer may use a scheme at any time for which he is a flat-rate trader<sup>13</sup>.

Save as the Commissioners may otherwise allow, a retailer who accounts for value added tax on the basis of taxable supplies valued in accordance with any scheme must, so long as he remains a taxable person<sup>14</sup>, continue to do so for a period of not less than one year from the adoption of that scheme by him, and any change by a retailer from one scheme to another must be made at the end of any complete year reckoned from the beginning of the prescribed accounting period in which he first adopted the scheme<sup>15</sup>.

Where a retailer agrees a particular method of calculating the value of his supplies with the Commissioners, his agreement takes effect in contract; and he may be bound by terms which the Commissioners impose as a condition of acceptance of the scheme<sup>16</sup>.

Where, pursuant to any enactment, there is a change in the VAT charged on any supply, including a change to or from no VAT being charged on that supply, a retailer using any scheme must take such steps relating to it as are directed in any notice applicable to him, or as may be agreed between him and the Commissioners<sup>17</sup>.

A retailer must notify the Commissioners before ceasing to account for VAT on the basis of taxable supplies valued in accordance with these provisions<sup>18</sup>, and may be required to pay VAT on such proportion as the Commissioners may consider fair and reasonable of any sums due to him at the end of the prescribed accounting period in which he last used a scheme<sup>19</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

3 For the meaning of 'supply' see PARA 27 ante.

4 As to zero-rated supplies see PARA 174 et seq ante.

5 For these purposes, 'notice' means any notice or leaflet published by the Commissioners pursuant to the Value Added Tax Regulations 1995, SI 1995/2518, Pt IX (regs 66-75) (as amended) (see the text and notes 6-19 infra; and PARA 200 post): reg 66.

6 Ibid regs 66, 67(1). See further Customs and Excise Public Notice 727 *Retail Schemes* (March 2002). As to the power to make retail schemes see the Value Added Tax Act 1994 s 58, Sch 11 para 2(6); and PARA 245 post. Retail schemes represent a derogation from the provisions of EC Council Directive 77/388 (OJ L145, 13.6.1977, p 1), and were preserved by the service of notification by the United Kingdom on the EC Commission in accordance with art 27(2). The Commissioners are only entitled by regulation to make arrangements by which special provision may be made for the value of supplies rather than the time of supply, and it is doubtful whether the words of the Value Added Tax Act 1994 Sch 11 para 2(6) are adequate to justify any general derogation from the basic scheme by regulation. Customs and Excise Public Notice 727 *Retail Schemes* (March 2002) could not, therefore, have the effect which the Commissioners claimed that it had, namely of adjusting the time of supply when there was a change in the rate of VAT: *Customs and Excise Comrs v Next plc, Customs and Excise Comrs v Grattan plc* [1995] STC 651 per Judge J.

Customs and Excise Public Notice 727 *Retail Schemes* (March 2002) is to be read in the light of the Value Added Tax Act 1994 as a whole, so that, when interpreting the delegated legislation made thereby, it must be assumed that references to 'self-financed supplies of credit' include cases where one member of a VAT group provides credit to customers of other members of the group, since the members of the group must be treated as a single taxable person: *Customs and Excise Comrs v Kingfisher plc* [1994] STC 63 per Popplewell J. As to VAT groups see PARAS 75 ante, 205 et seq post. Where a retailer has an existing arrangement with a finance company that in order to facilitate interest free credit to customers the finance company will pay a lesser sum to the retailer than the advertised price of the goods, the retailer is liable to account for output tax on the sums charged to the customer: Case C-34/99 *Customs and Excise Comrs v Primback Ltd* [2001] STC 803, ECJ. Sales of retail items to customers registered for VAT must be accounted for outside the retail schemes: *Oxford, Swindon and Gloucester Co-operative Society v Customs and Excise Comrs* [1995] STC 583 (this case was, however, subsequently the subject of an appeal by the taxpayer, which was conceded by the Commissioners before the matter was heard by the Court of Appeal).

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 67(1).

8 Ibid reg 67(2).

9 Ibid reg 69. As to changing from one scheme to another and the criteria for applying any such change retrospectively see eg *Vulgar v Customs and Excise Comrs* [1976] VATTR 197; *Lewis and Lewis v Customs and Excise Comrs* (1996) VAT Decision 14085, 370 Tax Journal (5 September 1996) p 24; *L & P Fryer (a firm) v Customs and Excise Comrs* (1996) VAT Decision 14265, [1996] STI 1539.

10 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

11 In accordance with regulations made under the Value Added Tax Act 1994 Sch 11 para 2(1) (as amended): see PARA 245 post. As to accounting for VAT generally see PARA 245 et seq post.

12 Value Added Tax Regulations 1995, SI 1995/2518, reg 68. An appeal lies to a VAT and duties tribunal against any decision of the Commissioners refusing to permit the value of supplies to be determined by a method described in a notice published under the Value Added Tax Act 1994 Sch 11 para 2(6): see s 83(x); and PARA 346 post. See also *Customs and Excise Comrs v J Boardmans (1980) Ltd* [1986] STC 10.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 69A (added by SI 2002/1142). For the meaning of 'flat-rate trader' see PARA 260 note 4 post.

14 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

15 Value Added Tax Regulations 1995, SI 1995/2518, reg 71(1) (amended by SI 2002/1142). See *Gyte v Customs and Excise Comrs* [1999] V & DR 241 (retailer changed scheme for second time; application for second retrospective recalculation of output tax refused). The Value Added Tax Regulations 1995, SI 1995/2518, reg 71(1) (as amended) does not apply where a retailer ceases to operate a scheme solely because he becomes a flat-rate trader: reg 71(2) (added by SI 2002/1142).

16 *GUS Merchandise Corp'n Ltd v Customs and Excise Comrs (No 2)* [1993] STC 738. As to where the Commissioners were taken to have permitted a special scheme by conduct (so that the trader could not subsequently change schemes until the end of a complete year) see *Wellington Private Hospital Ltd (No 2) v Customs and Excise Comrs* [1993] VATTR 86.

17 Value Added Tax Regulations 1995, SI 1995/2518, reg 75. The Commissioners cannot, however, rely on the retail scheme provisions to adjust the time of supply: *Customs and Excise Comrs v Next plc, Customs and Excise Comrs v Grattan plc* [1995] STC 651 per Judge J. As to the operation of retail scheme B in relation to stock acquired on a transfer of a business as a going concern see *Customs and Excise Comrs v Co-operative*

*Wholesale Society Ltd* [1995] STC 983. See also *United Norwest Co-operatives Ltd v Customs and Excise Comrs* [1999] STC 686, CA (disposal of zero-rated goods on transfer of business not retail sale).

18 Value Added Tax Regulations 1995, SI 1995/2518, reg 72(1).

19 Ibid reg 72(2).

## **UPDATE**

### **199 In general**

NOTE 6--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(3) RETAIL SCHEMES/200. Treatment of supplies of food.

## **200. Treatment of supplies of food.**

Where the supplies<sup>1</sup> by any retailer include both supplies of food which are zero-rated<sup>2</sup> and supplies of food in the course of catering<sup>3</sup>, he must either: (1) keep such records as will enable the proportion of the value of such supplies which is to be attributed to zero-rated and all other supplies to be determined to the satisfaction of the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup>; or (2) where he can satisfy the Commissioners that it is impracticable to keep such records, make an estimate of the proportion of the value of such supplies which is to be attributed to zero-rated and all other supplies<sup>5</sup>. This scheme is only available to caterers who expect their turnover for the next 12 months to remain below £1 million<sup>6</sup>.

Where any retailer makes an estimate in accordance with head (2) above, value added tax is to be accounted for on the basis of that estimate<sup>7</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 I.e. under the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 1 (as amended): see PARA 175 ante. For the meaning of 'zero-rated supply' see PARA 174 ante.

3 For the meaning of 'in the course of catering' see PARA 175 note 28 ante. Such supplies are standard-rated: see PARA 175 text and notes 28-30 ante.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 See Customs and Excise Public Notice 727 *Retail Schemes* (March 2002) PARA 8.

6 See Customs and Excise Public Notice 727 *Retail Schemes* (March 2002) PARA 8.3.

7 The estimate must be based on a sample of actual sales of a representative period. A new sample must be produced during each accounting period. The caterer must retain details of the sample which substantiate the estimate. In order to use the method he must notify the Commissioners. Upon receipt of acknowledgement from the Commissioners, the caterer may begin to use this method: Customs and Excise Public Notice 727 *Retail Schemes* (March 2002) PARA 8.

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**201. Treatment of supplies of drugs, medicines, aids for the handicapped etc.**

A retailer who makes supplies<sup>1</sup> of certain drugs, medicines, aids for the handicapped and related goods<sup>2</sup> must, in making calculations in order to use any retail scheme<sup>3</sup>, make an adjustment to those calculations in the manner prescribed by a notice published by the Commissioners for Her Majesty's Revenue and Customs for that purpose<sup>4</sup>. The Commissioners may vary the manner of adjustment of such calculations by publishing a fresh notice or by agreement with any retailer<sup>5</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 I.e. supplies of a description specified in the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 12 (as amended): see PARA 186 ante.

3 For the meaning of 'scheme' see PARA 199 ante.

4 See Customs and Excise Public Notice 727 *Retail Schemes* (March 2002) PARA 9. For the meaning of 'notice' see PARA 199 note 5 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 67.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(4) MARGIN SCHEMES/202. In general.

#### **(4) MARGIN SCHEMES**

##### **202. In general.**

The Treasury may by order<sup>1</sup> provide for a taxable person<sup>2</sup> to be entitled to opt that, where he makes certain supplies<sup>3</sup>, value added tax is to be charged by reference to the profit margin on the supplies instead of by reference to their value<sup>4</sup>. An option for the purposes of such an order is exercisable, and may be withdrawn, in such manner as may be required by the order<sup>5</sup>.

An order under these provisions may be made in relation to:

- 616 (1) supplies of works of art, antiques or collectors' items<sup>6</sup>;
- 617 (2) supplies of motor vehicles<sup>7</sup>;
- 618 (3) supplies of second-hand goods<sup>8</sup>; and
- 619 (4) any supply of goods through a person who acts as an agent, but in his own name, in relation to the supply<sup>9</sup>.

The profit margin on a supply to which these provisions apply is taken, for the purposes of an order made under them, to be equal to the amount, if any, by which the price at which the person making the supply obtained the goods in question is exceeded by the price at which he supplies them<sup>10</sup>; and the price at which a person has obtained any goods and the price at which he supplies them must each be calculated in accordance with the provisions contained in the relevant order<sup>11</sup>. Such an order may provide:

- 620 (a) that the consideration<sup>12</sup> for any services supplied in connection with a supply of goods by a person who acts as an agent, but in his own name, in relation to the supply of the goods is to be treated for the purposes of any such order as an amount to be taken into account in computing the profit margin on the supply of the goods, instead of being separately chargeable to VAT as comprised in the value of the services supplied<sup>13</sup>;
- 621 (b) for the total profit margin on all the goods of a particular description supplied by a person in any prescribed accounting period<sup>14</sup> to be calculated in a specified manner<sup>15</sup>.

1 Such an order may: (1) make different provision for different cases; and (2) make provisions of the order subject to such general or special directions as may, in accordance with the order, be given by the Commissioners for Her Majesty's Revenue and Customs with respect to any matter to which the order relates: Value Added Tax Act 1994 s 50A(8) (s 50A added by the Finance Act 1995 s 24(1)). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 Ie any such description of supplies to which the Value Added Tax Act 1994 s 50A (as added) applies as may be specified in the order: s 50A(1) (as added: see note 1 supra). As to those supplies see heads (1)-(4) in the text.

4 Ibid s 50A(1) (as added: see note 1 supra). In exercise of the power so conferred, and of other statutory powers, the Treasury has made the following orders: (1) the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268 (as amended) (see PARA 203 post); (2) the Value Added Tax (Cars) (Amendment) Order 1995, SI 1995/1269 (see PARA 204 post); and (3) the Value Added Tax (Cars) (Amendment) (No 2) Order 1995, SI



1995/1667 (see PARA 204 post). In addition, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax (Cars) Order 1992, SI 1992/3122 (as amended) (see PARA 204 post) now partly has effect as if so made.

The Value Added Tax Act 1994 s 50A (as added) implements EC Council Directive 94/5 (OJ L60, 3.3.94, p 16): see Customs and Excise News Release 20/95 [1995] STI 628. As to the Commissioners' views on margin schemes see Customs and Excise Public Notice 718 *Margin Schemes for Second-hand Goods, Works of Art, Antiques and Collectors' Items* (May 2003).

5 Value Added Tax Act 1994 s 50A(3) (as added: see note 1 supra).

6 Ibid s 50A(2)(a) (as added: see note 1 supra). See the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12 (as amended); and PARA 203 post.

7 Value Added Tax Act 1994 s 50A(2)(b) (as added: see note 1 supra). See the Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8 (as substituted and amended); and PARA 204 post.

8 Value Added Tax Act 1994 s 50A(2)(c) (as added: see note 1 supra). See the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12 (as amended); and PARA 203 post. In Case C-131/91 *'K' Line Air Service Europe BV v Eulaerts NV and Belgium* [1992] ECR I-4513, [1996] STC 597, ECJ, it was held that EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 32 (now replaced by art 26a, which requires member states to make special arrangements for taxing the profit margin arising from dealing in supplies of, inter alia, second-hand goods), was intended to establish a special system to ensure that goods on which VAT had been definitively charged were not taxed a second time, and it followed that it was not intended to apply to supplies of used goods where the supplier had, as a taxable person, been able to exercise a right of deduction under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 17. 'Second-hand goods' thus has a special meaning for VAT purposes: see further PARA 220 note 10 post.

9 Value Added Tax Act 1994 s 50A(2)(d) (as added: see note 1 supra). See the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(6); and PARA 203 post.

10 Value Added Tax Act 1994 s 50A(4) (as added: see note 1 supra). Section 50A(4) (as added) is subject to s 50A(7) (as added): see head (b) in the text and notes 14-15 infra.

11 Ibid s 50A(5) (as added: see note 1 supra).

12 For the meaning of 'consideration' generally see PARA 95 ante.

13 Value Added Tax Act 1994 s 50A(6) (as added: see note 1 supra).

14 For the meaning of 'prescribed accounting period' see PARA 216 note 6 post.

15 Value Added Tax Act 1994 s 50A(7) (as added: see note 1 supra). The order may provide for the total profit margin to be calculated by: (1) aggregating all the prices at which that person obtained goods of that description in that period together with any amount carried forward to that period in pursuance of head (4) infra; (2) aggregating all the prices at which he supplies goods of that description in the period; (3) treating the total profit margin on goods supplied in that period as being equal to the amount, if any, by which, for that period, the aggregate calculated in pursuance of head (1) supra is exceeded by the aggregate calculated in pursuance of head (2) supra; and (4) treating any amount by which, for that period, the aggregate calculated in pursuance of head (2) supra is exceeded by the aggregate calculated in pursuance of head (1) supra as an amount to be carried forward to the following prescribed accounting period so as to be included, for the period to which it is carried forward, in any aggregate falling to be calculated in pursuance of head (1) supra: s 50A(7) (a)-(d) (as so added). In pursuance of this provision the Treasury has made the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 13 (as amended), which makes provision for a simplified method of accounting known as 'global accounting': see PARA 203 text and notes 24-27 post.

## UPDATE

### 202 In general

NOTE 8--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(4) MARGIN SCHEMES/203. Relief for eligible supplies.

### **203. Relief for eligible supplies.**

Where a person supplies goods which are either works of art<sup>1</sup>, antiques<sup>2</sup> or collectors' items<sup>3</sup> or second-hand goods<sup>4</sup>, of which he took possession in any of the specified circumstances<sup>5</sup>, he may opt to account for the value added tax chargeable on the supply on the profit margin on the supply instead of by reference to its value<sup>6</sup>. A taxable person may not, however, opt to account in this manner where:

- 622 (1) the supply is a letting on hire;
- 623 (2) an invoice or similar document<sup>7</sup> showing an amount as being VAT or as being attributable to VAT is issued in respect of the supply;
- 624 (3) the supply is of an air gun, unless the taxable person is registered for the purposes of the Firearms Act 1968; or
- 625 (4) the supply is of goods which are being disposed of in certain specified circumstances<sup>8</sup> but which is not disregarded by virtue of the provisions<sup>9</sup> relating to those circumstances<sup>10</sup>.

A taxable person may only exercise the option to account under a margin scheme in relation to supplies of: (a) works of art supplied to him by, or acquired from another member state by him from, their creator or his successor in title<sup>11</sup>; or (b) works of art, antiques or collectors' items which he imported himself<sup>12</sup>, if at the same time he exercises that option in relation to supplies of goods within the other head as well<sup>13</sup>.

With certain exceptions<sup>14</sup>, for the purposes of determining the profit margin the price at which goods were obtained is calculated as follows:

- 626 (i) where the taxable person took possession of the goods pursuant to a supply, the price is calculated in the same way as the consideration for the supply would be calculated for the purposes of the Value Added Tax Act 1994<sup>15</sup>;
- 627 (ii) where the taxable person is a sole proprietor and the goods were supplied to him in his private capacity, the price is calculated in the same way as the consideration for the supply to him as a private individual would be calculated for the purposes of the Value Added Tax Act 1994<sup>16</sup>;
- 628 (iii) where the goods are a work of art which was acquired from another member state by the taxable person pursuant to a supply to him by the creator of the item or his successor in title, the price is calculated in the same way as the value of the acquisition would be calculated for the purposes of the Value Added Tax Act 1994 plus the VAT chargeable on the acquisition<sup>17</sup>;
- 629 (iv) where the goods are a work of art, an antique or a collectors' item which the taxable person has imported himself, the price is calculated in the same way as the value of the goods for the purpose of charging VAT on their importation would be calculated for the purposes of the Value Added Tax Act 1994 plus any VAT chargeable on their importation<sup>18</sup>;
- 630 (v) where the taxable person took possession of the goods pursuant to a de-supplied transaction, other than an article 5 transaction, by taking the price he paid pursuant to the transaction<sup>19</sup>;
- 631 (vi) where the taxable person took possession of the goods pursuant to an article 5 transaction by taking the price at which his relevant predecessor in title obtained the goods<sup>20</sup>.

The price at which the goods are sold is calculated in the same way as the consideration for the supply would<sup>21</sup> be calculated<sup>22</sup>.

A taxable person who has opted to account for VAT on the profit margin of a supply of eligible goods in accordance with the above provisions may account for VAT on the total profit margin on goods supplied by him during a prescribed accounting period<sup>23</sup>, calculated in the prescribed manner<sup>24</sup>, instead of the profit margin on each supply<sup>25</sup>. This method of global accounting is not, however, available in relation to supplies of motor vehicles, aircraft, boats and outboard motors, caravans and motor caravans, horses and ponies, or any other individual items whose value, calculated in accordance with heads (i) to (vi) above, exceeds £500<sup>26</sup>.

1 For the meaning of 'works of art' see PARAS 28 note 2, 117 note 1 ante.

2 For the meaning of 'antiques' see PARA 28 note 8 ante.

3 For the meaning of 'collectors' items' see PARA 28 note 8 ante.

4 For the meaning of 'second-hand goods' see PARA 28 note 9 ante.

5 In the circumstances specified in the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(3) (as amended): art 12(1). Those circumstances are that: (1) the taxable person took possession of the goods pursuant to: (a) a supply in respect of which no VAT was chargeable under the Value Added Tax Act 1994 or under the Manx Act Pt I; (b) a supply on which VAT was chargeable on the profit margin in accordance with the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(1) or a corresponding provision made under the Manx Act or the law of another member state; (c) a de-supplied transaction, other than an article 5 transaction; (d) an article 5 transaction; (e) (if the goods are a work of art) a supply to the taxable person by, or an acquisition from another member state by him from, its creator or his successor in title; and (2) if the goods are a work of art, an antique or a collector's item, that they were imported by the taxable person himself: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(3)(a) (substituted by SI 1997/1616; and amended by SI 2002/1503). A 'de-supplied transaction' means a transaction which was treated by virtue of any order made or having effect as made under the Value Added Tax Act 1994 s 5(3) or under the corresponding provisions of the Manx Act as being neither a supply of goods nor a supply of services; and 'article 5 transaction' means a de-supplied transaction by virtue of a provision of the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended) (see PARA 26 ante) or a corresponding provision made under the Manx Act: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(10) (art 12(10), (11) added by SI 2002/1503). An article 5 transaction does not fall within head (1)(d) supra unless the taxable person has a relevant predecessor in title: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(3A) (added by SI 2002/1503). A person is a relevant predecessor in title of a taxable person if: (i) he is the person from whom the taxable person took possession of the goods and himself took possession of them in any of the circumstances described in the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(3) (as amended) (but not pursuant to an article 5 transaction); or (ii) where the goods have been the subject of a succession of two or more article 5 transactions (culminating in the article 5 transaction to which the taxable person was a party), he was a party to one of those transactions and himself took possession of the goods in any such circumstances (but not pursuant to an article 5 transaction): art 12(11) (as so added). Accordingly art 12(8) (as amended) refers to a taxable person taking possession of goods in the circumstances set out in heads (1)(e), (2) supra. The 'Manx Act' is the Value Added Tax Act 1996: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 2(1) (definition amended by SI 1998/760). As to the construction of references to the corresponding law of another member state see PARA 17 ante; for the meaning of 'another member state' see PARA 4 note 15 ante; and for the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

Where a taxable person takes possession of goods in the circumstances set out in heads (1)(e), (2) supra, and opts to be taxed under a margin scheme in respect of those goods, the exercise of the option: (A) must be notified by him to the Commissioners for Her Majesty's Revenue and Customs in writing; (B) has effect from the date of that notification or such later date as may be specified therein; and (C) unless the taxable person elects to account for the VAT which is chargeable on any particular supply of such goods by reference to the value of that supply, applies to all supplies of such goods made by the taxable person in the period ending two years after the date on which it first had effect or the date on which written notification of its revocation is given to the Commissioners, whichever is the later: Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(8), (9) (art 12(8) amended by SI 1998/760). As to the removal of goods to the United Kingdom pursuant to a supply of those goods under a margin scheme in another member state see the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, arts 7, 8; and PARAS 19, 28 ante; and as to taxable acquisitions from another member state see PARA 19 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 Ibid art 12(1), (2). Article 12(1) is without prejudice to art 13 (global accounting: see the text and notes 23-26 *infra*) and subject to complying with such conditions as the Commissioners may direct, either in a notice published by them for these purposes or otherwise: art 12(1). See Customs and Excise Public Notice 718 *Margin Schemes for Second-hand Goods, Works of Art, Antiques and Collectors' Items* (May 2003).

7 For the meanings of 'invoice' and 'document' see PARA 17 note 9 *ante*.

8 I.e. the circumstances mentioned in the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 4(1)(a), (b), (c) or (d) (goods repossessed or taken possession of under the terms of a finance agreement or policy of insurance etc): see PARA 28 *ante*.

9 I.e. by virtue of ibid art 4 (disposal of reimported goods previously exported from the United Kingdom or the Isle of Man free of VAT): see PARA 28 *ante*.

10 Ibid art 12(4)(a).

11 I.e. works of art of which he took possession in the circumstances mentioned in ibid art 12(3)(a)(v): see note 5 head (1)(e) *supra*.

12 I.e. works of art etc of which he took possession in the circumstances mentioned in ibid art 12(3)(b): see note 5 head (2) *supra*.

13 Ibid art 12(4)(b) (amended by SI 1998/760).

14 I.e. subject to the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(6): art 12(5). Where the taxable person is an agent acting in his own name, the price at which the goods were obtained is calculated in accordance with head (i) in the text, but the selling price calculated in accordance with head (ii) in the text is increased by the amount of any consideration payable to the taxable person in respect of services supplied by him to the purchaser in connection with the supply of the goods: art 12(6). Instead of calculating the price at which goods were obtained or supplied in accordance with art 12(6), an auctioneer acting in his own name may: (1) calculate the price at which they were obtained by deducting from the successful bid the amount of the commission payable to him under his contract with the vendor for the sale of the goods; (2) calculate the price at which they were supplied by adding to the successful bid the consideration for any supply of services by him to the purchaser in connection with the sale of the goods, in either or both cases excluding the consideration for supplies of services that are not chargeable to VAT: art 12(7) (amended by SI 2001/3753). For the meaning of 'consideration' generally see PARA 95 *ante*.

15 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(5)(a)(i).

16 Ibid art 12(5)(a)(ii).

17 Ibid art 12(5)(a)(iii).

18 Ibid art 12(5)(a)(iv).

19 Ibid art 12(5)(a)(v) (substituted by SI 2002/1503).

20 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(5)(a)(vi) (added by SI 2002/1503).

21 I.e. would be calculated for the purposes of the Value Added Tax Act 1994: see PARA 94 *et seq ante*.

22 Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(5)(b).

23 For the meaning of 'prescribed accounting period' see PARA 216 note 6 *post*.

24 I.e. in accordance with the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 13(3) (as substituted): art 13(1). The total profit margin for a prescribed accounting period is the amount, if any, by which the total selling price calculated in accordance with art 13(4) exceeds the total purchase price calculated in accordance with art 13(5): art 13(3) (substituted by SI 1999/3120). The total selling price is calculated by aggregating, for all goods sold during the period, the prices for which they were sold, calculated in accordance with the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 12(5) or (6) (as amended) as appropriate (art 13(4)); and the total purchase price is calculated by aggregating, for all goods obtained during the period, the prices at which they were obtained, calculated in accordance with art 12(5) (as amended), and adding that total to the amount, if any, carried forward from the previous period in accordance with art 13(6) (art 13(5)). If in any prescribed accounting period the total purchase price calculated in accordance with art 13(5) exceeds the total selling price, the excess amount is carried forward to the following prescribed accounting period for inclusion in the calculation of the total purchase price for that period: art 13(6).

25 Ibid art 13(1). The taxable person must comply with such conditions as the Commissioners may direct in a notice published by them for these purposes: art 13(1).

26 Ibid art 13(2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/3. EXEMPTIONS AND RELIEFS/(4) MARGIN SCHEMES/204. Relief for second-hand motor cars.

#### **204. Relief for second-hand motor cars.**

Where a person supplies a used motor car<sup>1</sup> of which he took possession in any of the specified circumstances<sup>2</sup>, he may opt to account for the value added tax chargeable on the supply on the profit margin on the supply instead of by reference to its value<sup>3</sup>. This relief is not, however, available in relation to:

- 632 (1) a supply which is a letting on hire<sup>4</sup>;
- 633 (2) the supply by any person of a motor car which was produced by him, if it was neither previously supplied by him in the course or furtherance of any business<sup>5</sup> carried on by him nor treated<sup>6</sup> as so supplied<sup>7</sup>;
- 634 (3) any supply, if an invoice or similar document<sup>8</sup> showing an amount as being VAT or as being attributable to VAT is issued in respect of the supply<sup>9</sup>.

Subject to one exception<sup>10</sup>, for the purposes of determining the profit margin, the price at which the motor car was obtained is calculated as follows:

- 635 (a) where the taxable person took possession of the used motor car pursuant to a supply, in the same way as the consideration for the supply would be calculated for the purposes of the Value Added Tax Act 1994<sup>11</sup>;
- 636 (b) where the taxable person is a sole proprietor and the used motor car was supplied to him in his private capacity, in the same way as the consideration for the supply to him as a private individual would be calculated for those purposes<sup>12</sup>;
- 637 (c) where the taxable person took possession of the motor car pursuant to a desupplied transaction, other than an article 5 transaction, by taking the price he paid pursuant to the transaction<sup>13</sup>;
- 638 (d) where the taxable person took possession of the motor car pursuant to an article 5 transaction by taking the price at which his relevant predecessor in title obtained the motor car<sup>14</sup>,

and the price at which the motor car is sold is calculated in the same way as the consideration for the supply would<sup>15</sup> be calculated<sup>16</sup>.

1 For the meaning of 'motor car' see PARA 28 note 9 ante. As to the views of the Commissioners for Her Majesty's Revenue and Customs on the meaning of 'used motor car' see Customs and Excise Press Release (25 June 1982) [1982] STI 278; but see also Case C-131/91 *'K' Line Air Service Europe BV v Eulaerts NV and Belgium* [1992] ECR I-4513, [1996] STC 597, ECJ. As to when value added tax, having been wholly excluded from credit under regulations made under the Value Added Tax Act 1994 s 25(7) (see PARA 218 post), is charged on the subsequent sale of a car see the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(4) (as amended); and PARA 223 post.

2 The circumstances specified in the Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(2) (as substituted and amended): art 8(1) (art 8 substituted by SI 1995/1269). The specified circumstances are that the taxable person took possession of the motor car pursuant to: (1) a supply in respect of which no VAT was chargeable under the Value Added Tax Act 1994 or under the Manx Act (eg on a sale by a private individual); (2) a supply on which VAT was chargeable on the profit margin in accordance with the Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(1) (as substituted) or a corresponding provision made under the Manx Act or a corresponding provision of the law of another member state; (3) a supply to which the provisions of the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(4) (see PARA 223 post) applied and received before 1 March 2000; (4) a de-supplied transaction; (5) an article 5 transaction: Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(2) (as so substituted; art 8(2) amended by SI 1995/1667; SI 1999/2832; SI 2002/1502). The

'Manx Act' is the Value Added Tax Act 1996: Value Added Tax (Cars) Order 1992, SI 1992/3122, art 2(1) (definition added by SI 1995/1269; and amended by SI 1998/759). A 'de-supplied transaction' means a transaction which was treated by virtue of any order made of having effect as made under the Value Added Tax Act 1994 s 5(3) (see PARA 27 ante) or under the corresponding provisions of the Manx Act as being neither a supply of goods nor a supply of services; and 'article 5 transaction' means a transaction which is a de-supplied transaction by virtue of a provision of the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended) (see PARA 26 ante) or a corresponding provision made under the Manx Act: Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(8) (as so substituted; art 8(8), (9) added by SI 2002/1502). An article 5 transaction does not fall within head (5) supra unless the taxable person has a relevant predecessor in title: Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(2A) (art 8(2A) added by SI 2002/1502). A person is a relevant predecessor in title of a taxable person if: (a) he is the person from whom the taxable person took possession of the motor car and himself took possession of it pursuant to a transaction within any of heads (1)-(4) supra; or (b) where the motor car has been the subject of a succession of two or more article 5 transactions (culminating in the article 5 transaction to which the taxable person was a party), he was a party to one of those transactions and himself took possession of the motor car pursuant to a transaction within any of those heads: Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(9) (as so substituted and amended). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante; as to the meaning of 'supply' see PARA 27 ante; and as to the construction of references to the corresponding law of another member state see PARA 17 ante.

For the purposes of head (1) supra, zero-rated supplies are chargeable: *Peugeot Motor Co plc v Customs and Excise Comrs* (1998) VAT Decision 15314, [1998] STI 640. Where the supply of the car forms part of a taxable acquisition on the removal of the car to the United Kingdom, the recipient of the supply does not take possession of the car pursuant to a supply in respect of which no VAT is chargeable: *Wood v Customs and Excise Comrs* (2001) VAT Decision 17256, [2001] STI 1277. Under head (1) supra, fictitious purchases cannot be relied on as 'a supply in respect of which no VAT is chargeable' under the Value Added Tax Act 1994: *Richmond Cars Ltd v Customs and Excise Comrs* [2000] V & DR 388 (sham transactions can never form the basis of liability to, or relief from, tax), following *Furniss v Dawson* [1984] AC 474, [1984] 1 All ER 530, HL.

3 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(1) (as substituted: see note 2 supra). The taxable person must comply with such conditions, including the keeping of such records and accounts, as the Commissioners may direct, either in a notice published by them for these purposes or otherwise: art 8(1) (as so substituted).

4 Ibid art 8(3)(a) (as substituted: see note 2 supra).

5 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

6 Ie by virtue of the Value Added Tax (Cars) Order 1992, 1992/3122, art 5 (as substituted and amended): see PARA 32 ante.

7 Ibid art 8(3)(b) (as substituted: see note 2 supra).

8 For the meanings of 'invoice' and 'document' see PARA 17 note 9 ante.

9 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(3)(c) (as substituted: see note 2 supra).

10 Ie subject to ibid art 8(6) (as substituted): art 8(5) (as substituted: see note 2 supra). Where the taxable person is an agent acting in his own name, the price at which the motor car was obtained is calculated in accordance with heads (a), (b) in the text but the selling price calculated in accordance with art 8(5) (as substituted and amended) (see the text and notes 11-16 infra) is increased by the amount of any consideration payable to the taxable person in respect of services supplied by him to the purchaser in connection with the supply of the motor car: art 8(6) (as so substituted). Instead of calculating the price at which the motor car was obtained or supplied in accordance with art 8(6) (as substituted), an auctioneer acting in his own name may: (1) calculate the price at which the motor car was obtained by deducting from the successful bid the amount of the commission payable to him under his contract with the vendor for the sale of the motor car; (2) calculate the price at which the motor car was supplied by adding to the successful bid the consideration for any supply of services by him to the purchaser in connection with the sale of the motor car, in either, or both, cases excluding the consideration for supplies of services that are not chargeable to VAT: art 8(7) (as so substituted; and amended by SI 2001/3754). For the meaning of 'consideration' generally see PARA 95 ante; and for the meaning of 'auctioneer' see PARA 28 note 18 ante.

11 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(5)(a)(i) (as substituted: see note 2 supra).

12 Ibid art 8(5)(a)(ii) (as substituted: see note 2 supra).

13 Ibid art 8(5)(a)(iii) (art 8(5)(a)(iii), (iv) substituted by SI 2002/1502).

14 Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(5)(a)(iv) (as substituted: see note 13 supra).

15     le for the purposes of the Value Added Tax Act 1994: see PARA 94 et seq ante. A supply of a used motor car which is a business asset by a person registered for value added tax to a taxable person is an exempt supply under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 13(B)(c) and where the purchaser subsequently supplies the motor car to another, VAT is chargeable on the profit margin: *Stafford Land Rover (a firm) v Customs and Excise Comrs* [1999] V & DR 471.

16     Value Added Tax (Cars) Order 1992, SI 1992/3122, art 8(5)(b) (as substituted: see note 2 supra).

## **UPDATE**

### **204 Relief for second-hand motor cars**

NOTE 15--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/4. SPECIAL CASES/(1) GROUPS OF COMPANIES/205. In general.

## 4. SPECIAL CASES

### (1) GROUPS OF COMPANIES

#### 205. In general.

Where any bodies corporate are treated as members of a group<sup>1</sup>, any business<sup>2</sup> carried on by a member of the group is treated as carried on by the representative member<sup>3</sup>, and:

- 639 (1) any supply<sup>4</sup> of goods or services by a member of the group to another member of the group is disregarded<sup>5</sup>;
- 640 (2) any supply to which head (1) above does not apply and which is a supply of goods or services by or to a member of the group is treated as a supply by or to the representative member<sup>6</sup>; and
- 641 (3) any value added tax paid or payable by a member of the group on the acquisition of goods from another member state<sup>7</sup> or on the importation of goods from a place outside the member states<sup>8</sup> is treated as paid or payable by the representative member and the goods are treated as acquired<sup>9</sup> or imported<sup>10</sup> by the representative member for certain specified purposes<sup>11</sup>.

All members of the group are jointly and severally liable for any VAT due from the representative member<sup>12</sup>. Eligibility for VAT group membership is by reference to control and it follows that, where the parent ceases to have control of the subsidiary, that subsidiary ceases to be a member of the group from that time<sup>13</sup>.

The Treasury may make provision by order<sup>14</sup> for securing that any goods or services which, if all the members of the group were one person, would fall to be treated as supplied to or by that person, are treated as supplied to and by the representative member, and may provide for that purpose that the representative member is to be treated as a person of such description as may be determined under the order<sup>15</sup>. Additional anti-avoidance provisions apply in relation to groups<sup>16</sup>.

1    Ie under the Value Added Tax Act 1994 ss 43A-43D (as added and amended): see PARA 75 ante.

2    For the meaning of 'business' see PARA 23 ante.

3    Value Added Tax Act 1994 s 43(1) (amended by the Finance Act 2004 s 20(3)). As to the representative member see PARA 75 ante.

4    For the meaning of 'supply' see PARA 21 ante.

5    Value Added Tax Act 1994 s 43(1)(a). The purpose of s 43 (as amended) is to treat a group of companies as a single entity, taxable through its representative member, so that in applying Customs and Excise Public Notice 727 *Retail Schemes* (March 2002) (which has effect as delegated legislation: see PARA 14 ante), credit provided to a customer by another member of the same VAT group as the retailer must be treated as self-financed credit provided by the representative member: *Customs and Excise Comrs v Kingfisher plc* [1994] STC 63; see also *BOC International Ltd v Customs and Excise Comrs* [1982] VATTR 84; *Midland Bank plc v Customs and Excise Comrs* [1991] VATTR 525.

A supply made by a member of a group ('the supplier') to another member of the group ('the UK member') is not to be disregarded under the Value Added Tax Act 1994 s 43(1)(a) (see head (1) in the text) if: (1) it would (if there were no group) be a supply of relevant services falling within s 8, Sch 5 (as amended) (see PARA 33 note 1

ante) to a person belonging in the United Kingdom; (2) those services are not within any of the descriptions specified in s 8, Sch 9 (as amended) (see PARA 155 et seq ante); (3) the supplier has been supplied (whether or not by a person belonging in the United Kingdom) with any services falling within Sch 5 paras 1-8 (as amended) which do not fall within any of the descriptions specified in Sch 9 (as amended); (4) the supplier belonged outside the United Kingdom when it was supplied with the services mentioned in head (3) supra; and (5) the services so mentioned have been used by the supplier for making the supply to the UK member: s 43(2A) (added and amended by the Finance Act 1997 s 41(1), (2), (3)). Where a supply is excluded by virtue of the Value Added Tax Act 1994 s 43(2A) (as added and amended) from the supplies that are disregarded in pursuance of s 43(1)(a) (see head (1) in the text), all the same consequences follow under the Value Added Tax Act 1994 as if that supply were a taxable supply in the United Kingdom by the representative member to itself, and without prejudice to that, were made by the representative member in the course or furtherance of its business: s 43(2B) (added by the Finance Act 1997 s 41(1), (2)). However, except in so far as the Commissioners for Her Majesty's Revenue and Customs may by regulations otherwise provide, a supply which is deemed by virtue of the Value Added Tax Act 1994 s 43(2B) (as added) to be a supply by the representative member to itself: (a) is not to be taken into account as a supply made by the representative member when determining any allowance of input tax under s 26(1) (see PARA 217 post) in the case of the representative member; (b) is deemed for the purposes of s 19, Sch 6 para 1 (see PARA 96 ante) to be a supply in the case of which the person making the supply and the person supplied are connected within the meaning of the Income and Corporation Taxes Act 1988 s 839 (as amended) (connected persons) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258); and (c) subject to head (b) supra, is to be taken to be a supply the value and time of which are determined as if it were a supply of services which is treated by virtue of the Value Added Tax Act 1994 s 8 (as amended) (reverse charge provisions: see PARA 33 ante) as made by the person by whom the services are received: s 43(2C) (added and amended by the Finance Act 1997 s 41(1), (2), (3), (5)). For the purposes of the Value Added Tax Act 1994 s 43(2A) (as added and amended) where: (i) there has been a supply of the assets of a business of a person ('the transferor') to a person to whom the whole or any part of that business was transferred as a going concern ('the transferee'); (ii) that supply is either a supply falling to be treated, in accordance with an order under s 5(3) (see PARA 27 ante), as being neither a supply of goods nor a supply of services, or a supply that would have fallen to be so treated if it had taken place in the United Kingdom; and (iii) the transferor was supplied with services falling within Sch 5 paras 1-8 (as amended) (see PARA 33 ante) at a time before the transfer when the transferor belonged outside the United Kingdom, those services, so far as they are used by the transferee for making any supply falling within Sch 5 (as amended), are deemed to have been supplied to the transferee at a time when the transferee belonged outside the United Kingdom: s 43(2D) (added by the Finance Act 1997 s 41(1), (2)). Where, in the case of a supply of assets falling within heads (i), (ii) supra the transferor himself acquired any of the assets in question by way of a previous supply of assets falling within those heads, and there are services falling within the Value Added Tax Act 1994 Sch 5 paras 1-8 (as amended) which, if used by the transferor for making supplies falling within Sch 5 (as amended), would be deemed by virtue of s 43(2D) (as added) to have been supplied to the transferor at a time when he belonged outside the United Kingdom, s 43(2D) (as added) has effect, notwithstanding that the services have not been so used by the transferor, as if the transferor were a person to whom those services were supplied and as if he were a person belonging outside the United Kingdom at the time of their deemed supply to him; and this provision applies accordingly through any number of successive supplies of assets falling within heads (i), (ii) supra: s 43(2E) (added by the Finance Act 1997 s 41(1), (2)). For the meaning of 'United Kingdom' see PARA 4 note 3 ante. See further Customs and Excise Business Brief 11/97 [1997] STI 669.

As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

6 Value Added Tax Act 1994 s 43(1)(b) (amended by the Finance Act 1995 s 25(2), (5)). Where: (1) it is material, for the purposes of any provision made by or under the Value Added Tax Act 1994 ('the relevant provision'), whether the person by or to whom a supply is made, or the person by whom goods are acquired or imported, is a person of a particular description; (2) s 43(1)(b) (as amended) or s 43(1)(c) (see head (3) in the text) applies to any supply, acquisition or importation; and (3) there is a difference that would be material for the purposes of the relevant provision between the description applicable to the representative member, and the description applicable to the body which (apart from s 43 (as amended)) would be regarded for the purposes of the Value Added Tax Act 1994 as making the supply, acquisition or importation or, as the case may be, as being the person to whom the supply is made, the relevant provision has effect in relation to that supply, acquisition or importation as if the only description applicable to the representative member were the description in fact applicable to that body: s 43(1AA) (added by the Finance Act 1997 s 40(1), (3)). This does not apply to the extent that what is material for the purposes of the relevant provision is whether a person is a taxable person: Value Added Tax Act 1994 s 43(1AB) (added by the Finance Act 1997 s 40(1), (3)). For the meaning of 'taxable person' see PARA 63 ante. See *Canary Wharf Ltd v Customs and Excise Comrs* [1996] V & DR 323 (supply of standard-rated services by one group member not to be treated as part of single exempt supply by representative member).

7 For the meaning of 'another member state' see PARA 4 note 15 ante.

8 As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

9 Ie for the purposes of the Value Added Tax Act 1994 s 73(7): see PARA 294 post.

10 le for the purposes of *ibid* s 38 (see PARA 120 ante) and s 73(7) (see PARA 294 post).

11 *Ibid* s 43(1)(c).

12 *Ibid* s 43(1).

13 *British Airways Board v Customs and Excise Comrs* (1979) VAT Decision 846; *Barclays Bank plc v Customs and Excise Comrs* (1999) VAT Decision 16008, [1999] STI 1177 (the Commissioners' power to specify a date on which group membership ceases does not apply in such a situation, being confined to doubtful cases). In *J & W Waste Management Ltd and J & W Plant and Tool Hire Ltd v Customs and Excise Comrs* (2003) VAT Decision 18069, [2003] STI 1403, the two companies were members of a former VAT group the representative member of which had been the subject of a winding-up order, as a result of which the group had been deregistered. The companies were allowed to appeal against an assessment on the representative member as a result of which they had become jointly and severally liable for the amount assessed (*Davis Advertising Service Ltd v Customs and Excise Comrs* [1973] VATTR 16 (see PARA 356 post) not followed).

14 le under the Value Added Tax Act 1994 s 5(5) or (6): see PARA 32 ante.

15 *Ibid* s 43(2) (amended by the Finance Act 1997 s 40(2)). See eg the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268; and PARA 19 ante.

16 See the Value Added Tax Act 1994 s 43(9), Sch 9A (both added by the Finance Act 1996 s 31(1), (2), Sch 4; the Value Added Tax Act 1994 Sch 9A amended by the Finance Act 1999 s 16, Sch 2 para 5); and PARA 207 post. As to the potential for abuse of the system of group registration for VAT see eg *Thorn Materials Supply Ltd v Customs and Excise Comrs*, *Thorn Resources Ltd v Customs and Excise Comrs* (1995) VAT Decision 12914, [1995] STI 477 (revsd on appeal: see *Customs and Excise Comrs v Thorn Materials Supply Ltd*, *Customs and Excise Comrs v Thorn Resources Ltd* [1996] STC 1490, CA; affd [1998] 3 All ER 342, [1998] 1 WLR 1106, HL).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/4. SPECIAL CASES/(1) GROUPS OF COMPANIES/206. Supplies to groups.

## **206. Supplies to groups.**

With certain exceptions<sup>1</sup>, where:

- 642 (1) a business<sup>2</sup>, or part of a business, carried on by a taxable person<sup>3</sup> is transferred as a going concern<sup>4</sup> to a body corporate treated as a member of a group<sup>5</sup> for value added tax purposes;
- 643 (2) on the transfer of the business or part, chargeable assets<sup>6</sup> of the business are transferred to the body corporate; and
- 644 (3) the transfer of the assets is treated<sup>7</sup> as neither a supply of goods nor a supply of services<sup>8</sup>,

then the chargeable assets are treated for the purposes of the Value Added Tax Act 1994 as being, on the day on which they are transferred, both supplied to the representative member<sup>9</sup> of the group for the purpose of its business and supplied by that member in the course or furtherance of its business<sup>10</sup>.

This provision does not apply:

- 645 (a) if the representative member of the group is entitled to credit for the whole of the input tax<sup>11</sup> on supplies to it and acquisitions and importations by it during the prescribed accounting period<sup>12</sup> in which the assets are transferred and during any longer period to which certain regulations<sup>13</sup> relate and in which the assets are transferred<sup>14</sup>;
- 646 (b) if the Commissioners for Her Majesty's Revenue and Customs<sup>15</sup> are satisfied that the assets were assets of the taxable person transferring them more than three years before the day on which they are transferred<sup>16</sup>; or
- 647 (c) to the extent that the chargeable assets consist of capital items in respect of which certain regulations<sup>17</sup> in force when the assets are transferred provide for adjustment to the deduction of input tax<sup>18</sup>.

The value of a supply treated as made to or by a representative member by virtue of the above provisions is taken to be the open market value<sup>19</sup> of the chargeable assets<sup>20</sup>; but the supply treated as so made is not taken into account as a supply made by the representative member when determining the allowance of input tax<sup>21</sup> in his case<sup>22</sup>.

The Commissioners may reduce the VAT chargeable<sup>23</sup> in a case where they are satisfied that the person by whom the chargeable assets are transferred has not received credit for the full amount of input tax arising on the supply to or acquisition or importation by him of the chargeable assets<sup>24</sup>.

1 le subject to the Value Added Tax Act 1994 s 44(2)-(4): see heads (a)-(c) in the text.

2 For the meaning of 'business' see PARA 23 ante.

3 For the meaning of 'taxable person' see PARA 63 ante.

4 As to transfer as a going concern see the Value Added Tax Act 1994 s 49; and PARAS 83 ante, 210, 239 post.

5     Ie under *ibid* s 43 (as amended): see PARAS 75, 205 ante.

6     For these purposes, assets are chargeable assets if their supply in the United Kingdom by a taxable person in the course or furtherance of his business would be a taxable supply (and not a zero-rated supply): *ibid* s 44(10). For the meaning of 'United Kingdom' see PARA 4 note 3 ante; as to the meaning of 'supply' see PARA 27 ante; for the meaning of 'taxable supply' see PARA 18 note 3 ante; and for the meaning of 'zero-rated supply' see PARA 174 ante.

7     Ie so treated by virtue of *ibid* s 5(3)(c): see PARA 27 ante.

8     See eg the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended); and PARA 26 ante. As to the substantial avoidance of VAT by this device see *Friary Leasing Ltd v Customs and Excise Comrs* (1989) VAT Decision 3893, [1989] STI 772.

9     As to the representative member see PARA 75 ante.

10    Value Added Tax Act 1994 s 44(1), (5). A self-supply charge is thus imposed, which must be left out of account by the representative member when calculating the amount of input tax it can recover under its partial exemption method: see s 44(6); and the text to notes 21-22 *infra*. As to the partial exemption method see PARA 224 post.

11    For the meaning of 'input tax' see PARAS 4 ante, 215 post.

12    For the meaning of 'prescribed accounting period' see PARA 216 note 6 post.

13    Ie regulations under the Value Added Tax Act 1994 s 26(3)(b): see the Value Added Tax Regulations 1995, SI 1995/2518, regs 99-111 (as amended); and PARA 224 *et seq* post.

14    Value Added Tax Act 1994 s 44(2).

15    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

16    Value Added Tax Act 1994 s 44(3).

17    Ie regulations made under *ibid* s 26(3), (4) (the capital goods scheme): see PARA 224 *et seq* post.

18    *Ibid* s 44(4).

19    For these purposes, the open market value of any chargeable assets is taken to be the price that would be paid on a sale (on which no VAT is payable) between a buyer and a seller who are not in such a relationship as to affect the price: *ibid* s 44(8).

20    *Ibid* s 44(7).

21    Ie under *ibid* s 26: see PARA 217 post.

22    *Ibid* s 44(6).

23    Ie chargeable by virtue of *ibid* s 44(5): see the text to notes 9-10 *supra*.

24    *Ibid* s 44(9). As to goods which are subject to a capital goods scheme see PARA 212 post.

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## **207. Power to give anti-avoidance directions.**

In order to prevent the avoidance of value added tax by the device of joining or leaving a group at an advantageous time, the Commissioners of Her Majesty's Revenue and Customs<sup>1</sup> have wide powers to make directions counteracting the effect of a group relationship or of the termination of a group relationship. They may give a direction<sup>2</sup> if, in any case:

- 648 (1) a relevant event has occurred, that is to say, a body corporate either begins to be, or ceases to be, treated as a member of a group<sup>3</sup> or enters into any transaction<sup>4</sup>;
- 649 (2) the statutory condition<sup>5</sup> is fulfilled<sup>6</sup>;
- 650 (3) that condition would not be fulfilled apart from the occurrence of that event<sup>7</sup>; and
- 651 (4) in the case of an event which is the entering into of a transaction by a body corporate, the transaction in question is not a supply<sup>8</sup> which is the only supply by reference to which the case falls within heads (1) to (3) above<sup>9</sup>.

The statutory condition which must be fulfilled is that:

- 652 (a) there has been, or will or may be, a taxable supply<sup>10</sup> on which VAT has been, or will or may be, charged otherwise than by reference to the supply's full value<sup>11</sup>;
- 653 (b) there is at least a part of the supply which is not or, as the case may be, would not be zero-rated<sup>12</sup>; and
- 654 (c) the charging of VAT on the supply otherwise than by reference to its full value gives rise or, as the case may be, would give rise to a tax advantage<sup>13</sup>,

and the charging of VAT on a supply ('the undercharged supply') otherwise than by reference to its full value is taken to give rise to a tax advantage if, and only if, a person has become entitled either to credit for input tax<sup>14</sup> allowable as attributable to that supply or any part of it<sup>15</sup>, or to any repayment<sup>16</sup> in respect of that supply or any part of it<sup>17</sup>. The Commissioners may not give a direction by reference to a relevant event if they are satisfied that the change in the treatment of the body corporate, or the transaction in question, had as its main purpose or as each of its main purposes a genuine commercial purpose unconnected with the fulfilment of the statutory condition<sup>18</sup>.

The directions that may be given under these provisions are either:

- 655 (i) a direction relating to any supply of goods or services that has been made, in whole or in part, by one body corporate to another<sup>19</sup>, which requires it to be assumed<sup>20</sup>, if that would not otherwise be the case, that, to the extent described in the direction, the supply was not a supply falling to be disregarded<sup>21</sup> as being a supply by one member of a group to another<sup>22</sup>; or
- 656 (ii) a direction relating to a particular body corporate<sup>23</sup> which requires it to be assumed, if that would not otherwise be the case, that for the period described in the direction<sup>24</sup> the body corporate either: (A) did not fall to be, or is not to be, treated as a member of a group or of a particular group described in the direction; or (B) fell to be, or is to be, treated as a member of any group so described of which it was or is eligible<sup>25</sup> to be a member for that period<sup>26</sup>.

A direction so given may vary the effect of a previous direction<sup>27</sup>. A direction may not be given more than six years after the later of the occurrence of the relevant event by reference to which it is given<sup>28</sup> and the time when the relevant entitlement arose<sup>29</sup>.

The Commissioners may at any time withdraw a direction by notice in writing to the person to whom it was given<sup>30</sup>. An appeal lies to the VAT and duties tribunal against any direction so given<sup>31</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

2 I.e. a direction under the Value Added Tax Act 1994 s 43(9), Sch 9A (as added and amended): see the text and notes 3-30 infra. The anti-avoidance provisions are designed to counteract devices such as those used in *Thorn Materials Supply Ltd v Customs and Excise Comrs*, *Thorn Resources Ltd v Customs and Excise Comrs* (1995) VAT Decision 12914, [1995] STI 477, where a company made a supply of goods to another member of the group for a consideration which was substantially, but not completely, received whilst the parties were in the group relationship, left the group and subsequently acquired the assets which it had contracted to supply. It therefore claimed to be able to attribute the input tax it suffered on the purchase of the goods to the supply it made when outside the group relationship, whilst accounting for VAT only on the fraction of the consideration which remained to be paid. On appeal by the Commissioners from the tribunal direct to the Court of Appeal, however, the decision was reversed: *Customs and Excise Comrs v Thorn Materials Supply Ltd*, *Customs and Excise Comrs v Thorn Resources Ltd* [1996] STC 1490, CA; affd [1998] 3 All ER 342, [1998] 1 WLR 1106, HL (held that the Value Added Tax Act 1994 s 6(4) (which advances the time of supply where a VAT invoice is issued before goods are physically supplied: see PARA 35 ante) cannot apply to treat a supply as taking place at a time when it would be disregarded for VAT purposes because at that time the parties were within the same VAT group). See also *BUPA Purchasing Ltd v Customs and Excise Comrs* (2002) VAT Decision 17815, [2003] STI 442. As to appeals direct to the Court of Appeal see PARA 371 post.

A direction so given to any person must be given to him by notice in writing: Value Added Tax Act 1994 Sch 9A para 5(3) (Sch 9A added by the Finance Act 1996 s 31, Sch 4). The giving of any notice or notification to any receiver, liquidator or person otherwise acting in a representative capacity in relation to another is treated for these purposes as the giving of a notice or notification to the person in relation to whom he so acts: Value Added Tax Act 1994 Sch 9A para 7(2) (as so added). For the Commissioners' statement of practice on their intended application of the powers conferred on them by Sch 9A (as added and amended) see [1996] STI 1116; and as to assessments consequential on a direction see PARA 297 post.

3 For these purposes, references to being treated as a member of a group are to be construed in accordance with the Value Added Tax Act 1994 ss 43-43C (s 43 as amended; ss 43A-43C as added and amended) (see PARAS 75, 205 ante): Sch 9A para 7(1) (as added (see note 2 supra); and amended by the Finance Act 1999 s 16, Sch 2 para 5(1), (4)).

4 Value Added Tax Act 1994 Sch 9A para 1(1)(a), (2) (as added: see note 2 supra). A direction must specify the relevant event by reference to which it is given: Sch 9A para 5(4) (as so added).

5 I.e. the condition specified in *ibid* Sch 9A para 1(3) (as added: see note 2 supra): see heads (a)-(c) in the text.

6 *Ibid* Sch 9A para 1(1)(b) (as added: see note 2 supra).

7 *Ibid* Sch 9A para 1(1)(c) (as added: see note 2 supra).

8 For the meaning of 'supply' see PARA 27 ante.

9 Value Added Tax Act 1994 Sch 9A para 1(1)(d) (as added: see note 2 supra).

10 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

11 Value Added Tax Act 1994 Sch 9A para 1(3)(a) (as added: see note 2 supra). References to the full value of a supply are references to the amount which (having regard to any direction under s 19(1), Sch 6 para 1 (see PARA 96 ante)) would be the full value of that supply for the purposes of the charge to VAT if that supply were not a supply falling to be disregarded, to any extent, in pursuance of s 43(1)(a) (see PARA 205 ante): Sch 9A para 1(9) (as added: see note 2 supra).

12 Ibid Sch 9A para 1(3)(b) (as added: see note 2 supra). For the meaning of 'zero-rated supply' see PARA 174 ante.

13 Ibid Sch 9A para 1(3)(c) (as added: see note 2 supra).

14 For the meaning of 'input tax' see PARAS 4 ante, 215 post.

15 Value Added Tax Act 1994 Sch 9A para 1(4)(a) (as added: see note 2 supra). The cases where a person is so taken to have become entitled to a credit for input tax allowable as attributable to the undercharged supply, or to a part of it, include any case where: (1) a person has become entitled to a credit for any input tax on the supply to him, or the acquisition or importation by him, of any goods and services; and (2) whatever the supplies to which the credit was treated as attributable when the entitlement to it arose, those goods or services are used by him in making the undercharged supply, or a part of it: Sch 9A para 1(5) (as added: see note 2 supra). Any question whether any credit for input tax to which a person has become entitled was, or is to be taken to have been, a credit allowable as attributable to the whole or any part of a supply is to be determined, in relation to a supply of a right to goods or services or to a supply of goods or services by virtue of such a right, as if the supply of the right and supplies made by virtue of the right were a single supply of which the supply of the right and each of those supplies constituted different parts: Sch 9A para 1(8)(a) (as added: see note 2 supra). References to the supply of a right to goods or services include references to the supply of any right, option or priority with respect to the supply of goods or services, and to the supply of an interest deriving from any right to goods or services: Sch 9A para 1(10) (as added: see note 2 supra).

For these purposes, where: (a) there is a supply of any of the assets of a business of a person ('the transferor') to a person to whom the whole or any part of that business is transferred as a going concern ('the transferee'); and (b) that supply is treated, in accordance with an order under s 5(3) (see PARA 21 ante), as being neither a supply of goods nor a supply of services (see the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended); and PARA 26 ante), the question, so far as it falls to be determined by reference to those assets, whether a credit for input tax to which any person has become entitled is one allowable as attributable to the whole or any part of a supply is to be determined as if the transferor and the transferee were the same person: Value Added Tax Act 1994 Sch 9A para 1(6) (as added: see note 2 supra). Where, in such a case, the transferor himself acquired any of the assets in question by way of a supply falling within heads (a)-(b) supra, Sch 9A para 1(6) (as added) has the effect, as respects the assets so acquired, of requiring the person from whom those assets were acquired to be treated for the purposes of Sch 9A para 1(4), (5) (as added) as the same person as the transferor and the transferee, and so on in the case of any number of successive supplies falling within those heads: Sch 9A para 1(7) (as added: see note 2 supra).

16 In accordance with regulations under ibid s 39: see PARA 308 et seq post. Any question whether any repayment is a repayment in respect of the whole or any part of a supply is to be determined, in relation to a supply of a right to goods or services or to a supply of goods or services by virtue of such a right, as if the supply of the right and supplies made by virtue of the right were a single supply of which the supply of the right and each of those supplies constituted different parts: Sch 9A para 1(8)(b) (as added: see note 2 supra).

17 Ibid Sch 9A para 1(4)(b) (as added: see note 2 supra).

18 Ibid Sch 9A para 2(1) (as added (see note 2 supra); and numbered as such by the Finance Act 1999 s 16, Sch 2 para 5(1), (2)). This provision does not apply where the relevant event is the termination of a body corporate's treatment as a member of a group by a notice under the Value Added Tax Act 1994 s 43C(1) (as added) or s 43C(3) (as added and amended) (see PARA 75 ante): Sch 9A para 2(2) (added by the Finance Act 1999 Sch 2 para 5(1), (2)).

19 Value Added Tax Act 1994 Sch 9A para 3(1)(a) (as added: see note 2 supra). A direction relating to a supply may be given to: (1) the person who made the supply to which the direction relates; or (2) any body corporate which, at the time when the direction is given, is the representative member of a group of which that person was treated as being a member at the time of the supply: Sch 9A para 5(1) (as added: see note 2 supra). As to the representative member see PARA 75 ante.

20 Where a direction requires any assumptions to be made, then: (1) so far as the assumptions relate to times on or after the day on which the direction is given, the Value Added Tax Act 1994 has effect in relation to such times in accordance with those assumptions; and Sch 9A para 6 (as added) (see PARA 297 post) applies for giving effect to those assumptions in so far as they relate to earlier times: Sch 9A para 3(4) (as added: see note 2 supra). Subject to the six-year time limit (see the text to notes 28-29 infra), a direction may require assumptions to be made in relation to times falling before the occurrence of the relevant event by reference to which the direction is given, or before the relevant entitlement arose; and this reference to the relevant entitlement is a reference to the entitlement by reference to which the requirements of Sch 9A para 1(4) (as added) are taken to be satisfied for the purposes of that direction: Sch 9A para 4(3)(b), (4) (as added: see note 2 supra).

The refusal or non-refusal by the Commissioners of an application such as is mentioned in s 43B (as added and amended) (see PARA 75 ante) does not prejudice their power to give a direction under these provisions requiring



any case to be assumed to be what it would have been had the application not been refused or, as the case may be, had it been refused: Sch 9A para 3(8) (as added (see note 2 supra); and amended by the Finance Act 1999 Sch 2 para 5(1), (3)).

21 Ie in pursuance of the Value Added Tax Act 1994 s 43(1)(a): see PARA 205 ante.

22 Ibid Sch 9A para 3(2) (as added: see note 2 supra).

23 Ibid Sch 9A para 3(1)(b) (as added: see note 2 supra). A direction relating to a body corporate ('the relevant body') may be given to that body or to any body corporate which at the time when the direction is given is, or in pursuance of the direction is to be treated as, the representative member of a group of which the relevant body: (1) is treated as being a member; (2) was treated as being a member at a time to which the direction relates; or (3) is to be treated as being, or having been, a member at any such time: Sch 9A para 5(2) (as added: see note 2 supra).

24 Ie a period comprising times before the giving of the direction or times afterwards, or both: ibid Sch 9A para 3(3) (as added: see note 2 supra).

25 For these purposes, references to being eligible to be treated as a member of a group are to be construed in accordance with ibid ss 43-43C (s 43 as amended; ss 43A-43C as added and amended) (see PARAS 75, 205 ante): Sch 9A para 7(1) (as added: see note 2 supra).

26 Ibid Sch 9A para 3(3) (as added: see note 2 supra). A direction falling within head (ii)(B) in the text may identify in relation to any times or period the body corporate which is to be assumed to have been, or to be, the representative member of the group at those times or for that period: Sch 9A para 3(5) (as added: see note 2 supra).

27 Ibid Sch 9A para 3(6) (as added: see note 2 supra).

28 Ibid Sch 9A para 4(1)(a) (as added: see note 2 supra); and see note 4 supra.

29 Ibid Sch 9A para 4(1)(b) (as added: see note 2 supra); and see note 20 supra.

30 Ibid Sch 9A para 3(7) (as added: see note 2 supra).

31 See ibid s 83(wa) (as added); and PARA 346 post.

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## **(2) OTHER SPECIAL CASES**

### **208. The Crown.**

The Value Added Tax Act 1994 applies in relation to supplies<sup>1</sup> by the Crown as it applies in relation to taxable supplies<sup>2</sup> by taxable persons<sup>3</sup>.

Where the supply by a government department<sup>4</sup> of any goods or services does not amount to the carrying on of a business<sup>5</sup> but it appears to the Treasury that similar goods or services are or might be supplied by taxable persons in the course or furtherance of any business<sup>6</sup>, then, if and to the extent that the Treasury so directs, the supply of those goods or services by that department is to be treated for the purposes of the Value Added Tax Act 1994 as a supply in the course or furtherance of any business carried on by it<sup>7</sup>.

Where VAT is chargeable on the supply of goods or services to a government department, on the acquisition of any goods by a government department from another member state<sup>8</sup> or on the importation of any goods by a government department from a place outside the member states<sup>9</sup> and the supply, acquisition or importation is not for the purpose of: (1) any business carried on by the department; or (2) a supply by the department which, by virtue of a direction by the Treasury<sup>10</sup>, is treated as a supply in the course or furtherance of a business, then, if and to the extent that the Treasury so directs, the Commissioners for Her Majesty's Revenue and Customs<sup>11</sup> must, on a claim made by the department at such time and in such form and manner as the Commissioners may determine, refund to it the amount of the VAT so chargeable<sup>12</sup>. The Commissioners may, however, make the refunding of any amount so due conditional upon compliance by the claimant with requirements with respect to the keeping, preservation and production of records relating to the supply, acquisition or importation in question<sup>13</sup>.

Where a government department makes supplies of goods or services which are taxable supplies, the Treasury may make arrangements: (a) about the treatment of receipts and payments in respect of VAT in departmental accounts; (b) for the exemption of receipts in respect of VAT, to such extent and on such conditions as may be specified, from any requirement for payment into the Consolidated Fund<sup>14</sup>.

1 As to the meaning of 'supply' see PARA 27 ante.

2 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

3 Value Added Tax Act 1994 s 41(1). For the meaning of 'taxable person' see PARA 63 ante.

4 For these purposes, 'government department' includes the Scottish Administration, the National Assembly for Wales, a Northern Ireland department, a Northern Ireland health and social services body, any body of persons exercising functions on behalf of a minister of the Crown, including any part of a government department designated for these purposes by a direction of the Treasury: *ibid* s 41(6) (amended by the Scotland Act 1998 s 125, Sch 8 para 30; the Government of Wales Act 1998 s 125, Sch 12 para 35; and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 29(a)). For the meaning of 'a Northern Ireland health and social services body' see the Value Added Tax Act 1994 s 41(8). For the purposes of s 41(6) (as amended), a health service body as defined in the National Health Service and Community Care Act 1990 s 60(7), and a National Health Service trust established under Pt I (ss 1-26) (as amended) or the National Health Service (Scotland) Act 1978, an NHS foundation trust and a Primary Care Trust and a Local Health Board is to be regarded as a body of persons exercising functions on behalf of a minister of the Crown: Value Added Tax Act 1994 s 41(7) (amended by the Health Act 1999 s 65(1), Sch 4 para 86; the National Health Service Reform and Health Care Professions Act 2002 s 6(2), Sch 5 para 40; the Health and Social Care (Community Health and Standards) Act 2003 s 33(3); and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, Sch 1 para 29(b)). See further HEALTH SERVICES.

For the purposes of the Value Added Tax Act 1994 s 41 (as amended), goods or services obtained by one government department from another government department are treated, if and to the extent that the Treasury so directs, as supplied by that other department, and similarly as regards goods or services obtained by or from the Crown Estate Commissioners: s 41(5). As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

- 5 For the meaning of 'business' see PARA 23 ante.
- 6 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.
- 7 Value Added Tax Act 1994 s 41(2).
- 8 For the meaning of 'another member state' see PARA 4 note 15 ante.
- 9 As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.
- 10 Ie under the Value Added Tax Act 1994 s 41(2): see the text and notes 4-7 supra.
- 11 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.
- 12 Value Added Tax Act 1994 s 41(3).
- 13 Ibid s 41(4).
- 14 Government Resources and Accounts Act 2000 s 21(1), (2). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARAS 1028-1031.

## UPDATE

### 208 The Crown

NOTE 4--In the definition of 'government department' for 'National Assembly for Wales' read 'Welsh Assembly government': 1994 Act s 41(6) (amended by the Government of Wales Act 2006 Sch 10 para 39).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/4. SPECIAL CASES/(2) OTHER SPECIAL CASES/209. Agents.

## 209. Agents.

Where: (1) goods are acquired from another member state<sup>1</sup> by a person who is not a taxable person<sup>2</sup> and a taxable person acts in relation to the acquisition and then supplies the goods as agent for the person by whom they are so acquired; or (2) goods are imported from a place outside the member states<sup>3</sup> by a taxable person who supplies them as agent for a person who is not a taxable person, then if the taxable person acts in relation to the supply<sup>4</sup> in his own name, the goods are treated for the purposes of value added tax as acquired and supplied or, as the case may be, as imported and supplied by the taxable person as principal<sup>5</sup>.

Where, in the case of any supply of goods to which the above provision does not apply, goods are supplied through an agent who acts in his own name, the supply is treated both as a supply to the agent and as a supply by the agent<sup>6</sup>.

Where services are supplied through an agent who acts in his own name, the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup> may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent<sup>8</sup>.

1 As to the acquisition of goods from other member states see PARA 19 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

2 For the meaning of 'taxable person' see PARA 63 ante. A person who is not resident in the United Kingdom and whose place, or principal place, of business is outside the United Kingdom may be treated for these purposes as not being a taxable person if, as a result, he will not be required to be registered under the Value Added Tax Act 1994: s 47(2). For the meaning of 'United Kingdom' see PARA 4 note 3 ante. As to registration for VAT see PARA 64 et seq ante.

3 As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

4 As to the meaning of 'supply' see PARA 27 ante.

5 Value Added Tax Act 1994 s 47(1) (amended by the Finance Act 1995 s 23(1), (4)(a)). Thus the agent is responsible for the VAT on acquisition or importation and on the on-supply, notwithstanding that the goods might ordinarily not attract VAT because the principal is not a registered person.

6 Value Added Tax Act 1994 s 47(2A) (added by the Finance Act 1995 s 23(2), (4)(b)). This can have the effect of imposing a charge to VAT at the standard rate in a case where the supply to the principal would, if made directly, have been zero-rated: see eg Customs and Excise Business Brief 16/96 [1996] STI 1310. It also has the effect of imposing a charge to VAT on the retail selling price of goods, where the retailer is acting as agent for an unregistered principal, thereby reversing the effect of cases such as *Potter (t/a P & R Potter Wholesale) v Customs and Excise Comrs* [1985] STC 45, CA; *Hill (t/a JK Hill & Co) v Customs and Excise Comrs* [1988] STC 424; *Customs and Excise Comrs v Paget* [1989] STC 773; and *Customs and Excise Comrs v Music and Video Exchange Ltd* [1992] STC 220. An agent ordering goods for a named person is not an agent acting in his own name within the Value Added Tax Act 1994 s 47(2A) (as added): *Express Medicare Ltd v Customs and Excise Comrs* [2000] V & DR 377 (nursing homes expressly acting for and on behalf of named residents, using their names and funds). As to the standard rate of VAT see PARA 5 ante; and for the meaning of 'zero-rated supply' see PARA 174 ante.

7 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

8 Value Added Tax Act 1994 s 47(3) (amended by the Finance Act 1995 s 23(3), Sch 29 Pt VI). Thus the person to whom the services are supplied can receive a VAT invoice in the agent's name, without needing to disclose to him the principal's identity. As to the statutory provisions relating to VAT invoices see PARA 278 et seq post; and as to general provisions relating to undisclosed principals see AGENCY vol 1 (2008) PARA 47. As to the provision of nursing services through nursing agencies see *Customs and Excise Comrs v Reed Personnel Services Ltd* [1995] STC 588; *Allied Medicare Nursing Services Ltd v Customs and Excise Comrs* (1991) VAT

Decision 5485, [1991] STI 79; *Parkinson v Customs and Excise Comrs* (1991) VAT Decision 6017, [1991] STI 696; *British Nursing Co-operation Ltd v Customs and Excise Comrs* (1992) VAT Decision 8816, [1992] STI 1036; *BUPA Nursing Services Ltd v Customs and Excise Comrs* (1993) VAT Decision 10010, [1993] STI 660; *Sheffield and Rotherham Nursing Agency v Customs and Excise Comrs* (1993) VAT Decision 11279, [1993] STI 1621; *South Hams Nursing Agency v Customs and Excise Comrs* (1995) VAT Decision 13027, [1995] STI 710.

There is a body of authorities on whether supplies to third parties by independent contractors are being made by the contractor or by the person who has contracted to use the contractor's services. This issue arises frequently in connection with hairdressers, taxi drivers, driving schools and similar institutions, where the customer is more likely to believe that he is being provided with services by the institution than by the independent contractor. In such cases, it is not enough to know that the person supplying services is not an employee; it must also be established that he is providing his services to the customer and not to the company which has engaged him: *Cronin (t/a Cronin Driving School) v Customs and Excise Comrs* [1991] STC 333; *Hosmer v Customs and Excise Comrs* (1992) VAT Decision 7313, [1992] STI 559; *Customs and Excise Comrs v MacHenry's (Hairdressers) Ltd* [1993] STC 170 (considered in *Kieran Mullin Ltd v Customs and Excise Comrs* [2003] EWHC 4 (Ch), [2003] STC 274 (hairdressing salon owner not liable for VAT where services supplied to customers by self-employed stylists)); *Carless v Customs and Excise Comrs* [1993] STC 632; *Hamiltax v Customs and Excise Comrs* (1992) VAT Decision 8948, [1992] STI 1067; *Customs and Excise Comrs v Jane Montgomery (Hair Stylists) Ltd* [1994] STC 256; *Clark v Customs and Excise Comrs* [1996] STC 263. For a similar case in relation to supplies of goods see *Customs and Excise Comrs v Music and Video Exchange Ltd* [1992] STC 220. See also *Ringside Refreshments v Customs and Excise Comrs* [2003] EWHC 3043 (Ch), [2004] STC 426 (catering business proprietor not liable for VAT where food supplied to public through self-employed operators). As to the provision of dance tuition on taxpayer's premises by self-employed tutors see *Lait (t/a The Lait Dance Club) v Customs and Excise Comrs* [2001] V & DR 159. Where the Commissioners decide to treat a supply of services through an agent as a supply to, and a supply by, the agent, the two supplies are deemed to take place simultaneously and cannot be treated as taking place at different times, by reference to the payments made and received by the agent: *Wirral Metropolitan Borough v Customs and Excise Comrs* [1995] STC 597.

## UPDATE

### 209 Agents

NOTE 8--See also *A1 Lofts Ltd v Revenue and Customs Comrs* [2009] EWHC 2694 (Ch), [2010] STC 214.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/4. SPECIAL CASES/(2) OTHER SPECIAL CASES/210. Transfers of going concerns.

## 210. Transfers of going concerns.

Where a business<sup>1</sup> carried on by a taxable person<sup>2</sup> is transferred to another person as a going concern<sup>3</sup>, then, for the purpose of determining whether the transferee is liable to be registered under the Value Added Tax Act 1994, he is treated as having carried on the business before as well as after the transfer, and supplies<sup>4</sup> by the transferor are treated accordingly<sup>5</sup>. Any records relating to the business which are required to be preserved for any period after the transfer<sup>6</sup> are to be preserved by the transferee instead of by the transferor, unless the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup>, at the request of the transferor, otherwise direct<sup>8</sup>.

Without prejudice to the above provision, the Commissioners may by regulations make provision for securing continuity in the application of the Value Added Tax Act 1994 in cases where a business carried on by a taxable person is transferred to another person as a going concern and the transferee is registered under that Act in substitution for the transferor<sup>9</sup>. Such regulations may in particular provide: (1) for certain statutory liabilities and duties<sup>10</sup> of the transferor to become, to such extent as may be provided by the regulations, liabilities and duties of the transferee<sup>11</sup>; and (2) for any right of either of them to repayment or credit in respect of VAT to be satisfied by making a repayment or allowing a credit to the other<sup>12</sup>. No such provision as is mentioned in head (1) or head (2) above is, however, to have effect in relation to any transferor and transferee unless an application in that behalf has been made by them under the regulations<sup>13</sup>.

1 For the meaning of 'business' see PARA 23 ante.

2 For the meaning of 'taxable person' see PARA 63 ante.

3 There is no statutory definition of 'transfer of a business as a going concern'. Courts and tribunals have consistently adopted dicta in *Kenmir Ltd v Frizzell* [1968] 1 All ER 414 at 418, [1968] 1 WLR 329 at 335 per Widgery J: 'regard must be had to the substance of the transaction rather than its form; consideration being given to the whole of the circumstances ... the vital consideration is whether the effect of the transaction is to put the transferee in possession of a going concern the activities of which he could carry on without interruption'. See also Case 24/85 *Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV* [1986] ECR 1119, [1986] 2 CMLR 296 (Advocate-General). Thus it has been held sufficient that the transferee, having acquired the transferor's business assets, sold the old stock prior to commencing a new trade from the same premises: *Customs and Excise Comrs v Dearwood Ltd* [1986] STC 327. The Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended) (see PARA 26 ante) applies to any transfer of a business, notwithstanding that it may only be part of the business of the transferor: *Acrefirst Ltd v Customs and Excise Comrs* [1985] VATTR 133. There is no need to transfer the premises from which a business is carried on in order to transfer the business: *Baltic Leasing Ltd v Customs and Excise Comrs* [1986] VATTR 98. The grant of a franchise of a business does not constitute the transfer of a business as a going concern: *Delta Newsagents Ltd v Customs and Excise Comrs* [1986] VATTR 261. The sale of some business assets and the majority of the business's stock in trade does not constitute a transfer of a business as a going concern where the intention of the transferor is to realise funds to keep the business going: *Customs and Excise Comrs v Padglade Ltd* [1995] STC 602 (distinguishing *Customs and Excise Comrs v Dearwood Ltd* supra; and not following *Kenmir Ltd v Frizzell* supra); and see *Farm Facilities (Fork Lift) Ltd v Customs and Excise Comrs* [1987] VATTR 80; *Morland & Co plc v Customs and Excise Comrs* [1992] VATTR 411; *Hartley Engineering Ltd v Customs and Excise Comrs* (1994) VAT Decision 12385, [1994] STI 1185. To constitute a transfer of a business as a going concern within the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended), the business must have been carried on by the transferor for a period; thus the transfer by a parent company to its subsidiaries of various food stores, which it had purchased from third parties, was outside the scope of what is now the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended) and VAT should have been charged on the transfer: *Kwik Save Group plc v Customs and Excise Comrs* (1995) VAT Decision 12749, [1995] STI 64. For an unusual case where the letting of a business during the owners' absence abroad was effectively held to constitute a suspension of the making by them of taxable supplies see *Cortellessa v Customs and Excise Comrs* (1999) VAT Decision 16333, [2000] STI 267. See also *FMCG Home Services Ltd v Customs and Excise Comrs* (2003) VAT Decision 18377, [2004] STI 447 (transfer of insurance company's cash collection activities

relating to existing insurance policies; the insurance company and the cash collection company carried on different businesses and therefore the transferred assets originally used to make supplies of insurance, now used to collect cash, did not constitute the transfer of a business as a going concern).

4 As to the meaning of 'supply' see PARA 27 ante.

5 Value Added Tax Act 1994 s 49(1)(a). There are particular rules for registration which apply where a person who is not registered for VAT acquires a business as a going concern from a taxable person: see s 3(2), Sch 1 para 1(2) (as amended); the Value Added Tax Regulations 1995, SI 1995/2518, reg 6(1); and PARAS 64, 83 ante. As to the keeping of records on the transfer of a going concern see PARA 239 post. As to the treatment of assets supplied by a trader which formed part of his business to another to whom he transfers his business as a going concern and related matters see the Value Added Tax (Special Provisions) Order 1995, SI 1995/1268, art 5 (as amended) (see PARA 26 ante); as to the exempt supply of land see PARA 156 ante; and as to the election to waive exemption see PARA 157 ante.

6 Ie under the Value Added Tax Act 1994 s 58, Sch 11 para 6 (as amended): see PARA 238 post.

7 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

8 Value Added Tax Act 1994 s 49(1)(b).

9 Ibid s 49(2). See the Value Added Tax Regulations 1995, SI 1995/2518, reg 6 (as amended); and PARA 83 ante.

10 Ie rights and duties under the Value Added Tax Act 1994, excluding ss 59-70 (as amended) (see PARA 321 et seq post): s 49(3)(a).

11 Ibid s 49(3)(a).

12 Ibid s 49(3)(b).

13 Ibid s 49(3).

## UPDATE

### 210 Transfers of going concerns

TEXT AND NOTES 1-8--These provisions now specifically cover the transfer of part of a business: Value Added Tax Act 1994 s 49(1) (amended by Finance Act 2007 s 100(2) (a), (b)). 1994 Act s 49(1)(b) repealed: 2007 Act s 100(2)(c), Sch 27 Pt 6(2). As to the transfer of a business generally see *Harper (t/a Tee Time Catering) v HMRC Comrs* (2007) VAT Decision 20176, [2007] STI 2248. See also *Spence v Revenue and Customs Comrs* (2008) VAT Decision 20563, [2008] SWTI 1212 (distinction between an actual business and ability to carry it on).

TEXT AND NOTES 9-13--Regulations under the Value Added Tax Act 1994 s 49(2) (amended by Finance Act 2007 s 100(3)) may, in particular, provide for the duties under the 1994 Act of the transferor to preserve records relating to the business or part of the business for any period after the transfer to become duties of the transferee unless the Commissioners, at the request of the transferor, otherwise direct: s 49(2A) (added by Finance Act 2007 s 100(4)). Value Added Tax Act 1994 s 49(3) amended: Finance Act 2007 s 100(5).

Where a business or part of a business carried on by a taxable person is transferred to another person as a going concern, and the transferor continues to be required under the 1994 Act to preserve for any period after the transfer any records relating to the business or part of the business then, so far as is necessary for the purpose of complying with the transferee's duties under the 1994 Act, the transferee ('E') may require the transferor (1) to give to E, within such time and in such form as E may reasonably require, such information contained in the records as E may reasonably specify; (2) to give to E, within such time and in such form as E may reasonably

require, such copies of documents forming part of the records as E may reasonably specify; and (3) to make the records available for E's inspection at such time and place as E may reasonably require (and permit E to take copies of, or make extracts from, them): s 49(4), (5) (s 49(4)-(6) added by Finance Act 2007 s 100(6)). Where a business or part of a business carried on by a taxable person is transferred to another person as a going concern, the Commissioners may disclose to the transferee any information relating to the business when it was carried on by the transferor for the purpose of enabling the transferee to comply with his duties under the Value Added Tax Act 1994: s 49(6).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/4. SPECIAL CASES/(2) OTHER SPECIAL CASES/211. Terminal markets.

## **211. Terminal markets.**

The Treasury may by order make provision for modifying the provisions of the Value Added Tax Act 1994 in their application to dealings on terminal markets<sup>1</sup> and to such persons ordinarily engaged in such dealings as may be specified in the order, subject to such conditions as may be so specified<sup>2</sup>. Such an order may include<sup>3</sup> provision for:

- 657 (1) zero-rating<sup>4</sup> the supply<sup>5</sup> of any goods or services or for treating the supply of any goods or services as exempt<sup>6</sup>;
- 658 (2) the registration under the Value Added Tax Act 1994 of any body of persons representing persons ordinarily engaged in dealing on a terminal market and for disregarding such dealings: (a) by persons so represented in determining liability to be registered under; and (b) between persons so represented for all the purposes of, that Act<sup>7</sup>;
- 659 (3) for refunding, to such persons as may be specified by or under the order, input tax<sup>8</sup> attributable to such dealings on a terminal market as may be so specified<sup>9</sup>,

and may contain such incidental and supplementary provisions as appear to the Treasury to be necessary or expedient<sup>10</sup>.

An order may make different provision with respect to different terminal markets and with respect to different commodities<sup>11</sup>.

The following supplies of goods or services in the course of dealings on a terminal market<sup>12</sup> are zero-rated:

- 660 (i) the sale by or to a member of the market<sup>13</sup> of any goods, other than investment gold, ordinarily dealt with on the market<sup>14</sup>;
- 661 (ii) the grant by or to a member of the market of a right to acquire such goods<sup>15</sup>;
- 662 (iii) where a sale of goods or the grant of a right zero-rated under head (i) or head (ii) above is made, or where certain supplies are made<sup>16</sup>, in dealings between members of the market acting as agents, the supply by those members to their principals of their services in so acting<sup>17</sup>;
- 663 (iv) certain supplies between taxable persons in relation to investment gold<sup>18</sup>.

1 The expression 'terminal markets' is not defined in the Value Added Tax Act 1994, but the following explanation may be helpful. The commodity markets in London and elsewhere are organised associations of traders who buy and sell various commodities. In the terminal markets there is a significant degree of trading in 'futures', ie transactions where the contract provides for delivery at some specified date in the future as distinct from 'spot' transactions which provide for immediate delivery. See also note 12 infra.

2 Value Added Tax Act 1994 s 50(1). At the date at which this volume states the law, no such order had been made; but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173 (amended by SI 1975/385; SI 1980/304; SI 1981/338; SI 1984/202; SI 1985/1046; SI 1987/806; SI 1997/1836; and SI 1999/3117) has effect as if so made. As to the making of orders generally see PARA 14 ante.

3 But without prejudice to the generality of the Value Added Tax Act 1994 s 50(1): s 50(2).

4 As to zero-rating see PARA 174 et seq ante.

5 As to the meaning of 'supply' see PARA 27 ante.

6 Value Added Tax Act 1994 s 50(2)(a). For the meaning of 'exempt supply' see PARA 155 ante.

7 Ibid s 50(2)(b). As to registration see PARA 64 et seq ante.

8 For the meaning of 'input tax' see PARAS 4 ante, 215 post.

9 Value Added Tax Act 1994 s 50(2)(c).

10 Ibid s 50(2).

11 Ibid s 50(3).

12 Ie a terminal market to which the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173 (as amended) applies: art 3(1). Those markets are: the London Metal Exchange, the London Rubber Market, the London Cocoa Terminal Market, the London Coffee Terminal Market, the London Sugar Terminal Market, the London Vegetable Oil Terminal Market, the London Wool Terminal Market, the International Petroleum Exchange of London, the London Potato Futures Market, the London Bullion Market, the London Meat Futures Market, the London Grain Futures Market, the London Soya Bean Meal Futures Market, the Liverpool Barley Futures Market, the London Platinum and Palladium Market and the London Securities and Derivatives Exchange Ltd (OMLX): art 2(2) (amended by SI 1975/385; SI 1980/304; SI 1981/338; SI 1984/202; SI 1985/1046; SI 1987/806; SI 1997/1836; and SI 1999/3117).

13 References to a member of a market include any person ordinarily engaged in dealings on the market: Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 2(3).

14 Ibid art 3(1)(a) (amended by SI 1999/3117). The zero-rating of a sale by virtue of this provision is subject to the condition that the sale is either: (1) a sale which, as a result of other dealings on the market, does not lead to a delivery of the goods by the seller to the buyer; or (2) a sale by and to a member of the market which (a) if the market is the London Metal Exchange, is a sale between members entitled to deal in the ring; (b) if the market is the London Cocoa Terminal Market, the London Coffee Terminal Market, the London Meat Futures Market, the International Petroleum Exchange of London, the London Potato Futures Market, the London Soya Bean Meal Futures Market, the London Sugar Terminal Market, the London Vegetable Oil Terminal Market or the London Wool Terminal Market, is a sale registered with the International Commodities Clearing House Limited; (c) if the market is the London Grain Futures Market, is a sale registered in the Clearing House of the Grain and Feed Trade Association Limited; and (d) if the market is the Liverpool Barley Futures Market, is a sale registered at the Clearing House of the Liverpool Corn Trade Association Limited: Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 3(2) (amended by SI 1975/385; SI 1981/338; and SI 1984/202).

15 Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 3(1)(b). The zero-rating of the grant of a right by virtue of art 3(1)(b) is subject to the condition that either: (1) the right is exercisable at a date later than that on which it is granted; or (2) any sale resulting from the exercise of the right would be a sale with respect to which the condition in art 3(2) (as amended) (see note 14 supra) is satisfied: art 3(3).

16 Ie a supply of a description falling within ibid art 4 (as added) or art 5 (as added) (see the text and note 18 infra).

17 Ibid art 3(1)(c) (amended by SI 1999/3117).

18 Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 4 (added by SI 1999/3117). This applies to supplies which but for the Value Added Tax Act 1994 s 8, Sch 9 Group 15 Note 4(a) (as added) (exemption for investment gold) would have fallen within that Group: Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 4 (as so added). The Value Added Tax Act 1994 s 55(1)-(4) (customers to account for tax on supplies of gold) (see PARA 32 ante) applies to any supply between taxable persons which but for Sch 9 Group 15 Note 4(b) (as added) would have fallen within that Group: Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 5 (added by SI 1999/3117). Where a taxable person who is not a member of the London Bullion Market Association makes or receives a supply falling within the description in the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 5 (as added) and is liable to be registered under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended) or Sch 3 (as amended) solely by virtue of that supply or acquisition, Sch 1 paras 5-8 or Sch 3 para 3 (notification of liability and registration) (see PARA 72 ante), and the Value Added Tax Regulations 1995, SI 1995/2518, Pt IV (regs 21-23) (as amended) (EC sales statements: see PARA 284 post) and Pt V (regs 24-43) (as amended) (accounting, payment and records: see PARA 245 et seq post) do not apply: Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 6 (added by SI 1999/3117); Value Added Tax Regulations 1995, SI 1995/2518, reg 33B (added by SI 1999/3114). Notwithstanding the Value Added Tax Act 1994 s 55(2) (see PARA 32 ante), where the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, arts 5, 6 (as added) apply, it is for the London Bullion Market Association member, on the non-member's behalf, to keep a record of the supplies and to pay to the Commissioners for Her Majesty's Revenue and Customs the net

amount of VAT, and not for the person who is not a member: art 7 (added by SI 1999/3117). A person making supplies of a description falling within the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 4 (as added) is not required to keep in relation to those supplies the records specified in the Value Added Tax Regulations 1995, SI 1995/2518, reg 31 (as amended) (see PARA 238 post) (save for business and accounting records), reg 31A (as added) (see PARA 244 post), reg 32 (see PARA 275 post) or reg 33 (see PARA 240 post): reg 33A (added by SI 1999/3114).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/4. SPECIAL CASES/(2) OTHER SPECIAL CASES/212. Capital goods.

## **212. Capital goods.**

The Treasury may by order<sup>1</sup> make provision for the giving of relief, in such cases, to such extent and subject to such exceptions as may be specified in the order, from value added tax paid on the supply<sup>2</sup>, acquisition or importation for the purpose of a business<sup>3</sup> carried on by any person of machinery or plant, or any specified description of machinery or plant, where that VAT or part of that VAT cannot be credited as input tax<sup>4</sup> and such other conditions are satisfied as may be specified in the order<sup>5</sup>.

1 As to the power to make orders generally see PARA 14 ante.

2 As to the meaning of 'supply' see PARA 27 ante.

3 For the meaning of 'business' see PARA 23 ante.

4 I.e. that VAT cannot be credited under the Value Added Tax Act 1994 s 25: see PARA 217 post. For the meaning of 'input tax' see PARAS 4 ante, 215 post; and as to the right to deduct it see s 24(1); and PARA 215 et seq post.

5 Ibid s 34(1). Without prejudice to the generality of this provision, an order so made may provide for relief to be given by deduction or refunding of VAT and for aggregating or excluding the aggregation of value where goods of the same description are supplied, acquired or imported together: s 34(2). At the date at which this volume states the law, no such order had been made.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/4. SPECIAL CASES/(2) OTHER SPECIAL CASES/213. Trading stamp schemes.

### 213. Trading stamp schemes.

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by regulations<sup>2</sup> modify certain statutory provisions relating to the valuation of supplies of goods and services and the valuation of acquisitions from other member states<sup>3</sup> for the purpose of providing, in place of those provisions, for the manner of determining for the purposes of value added tax the value of a supply<sup>4</sup> of goods, or the value of a transaction in pursuance of which goods are acquired from another member state<sup>5</sup>, in a case where the goods are supplied or acquired under a trading stamp scheme<sup>6</sup>. This power is, however, no longer intended to be exercised<sup>7</sup>; and trading stamps are now treated in the same way as other discount vouchers<sup>8</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

2 As to the power to make regulations generally see PARA 14 ante.

3 I.e. the Value Added Tax Act 1994 ss 19, 20 (as amended) (see PARAS 94, 96 et seq ante), Sch 6 (as amended), Sch 7 (see PARA 96 et seq ante).

4 As to the meaning of 'supply' see PARA 27 ante.

5 As to the acquisition of goods from another member state see PARA 19 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

6 Value Added Tax Act 1994 s 52. 'Trading stamp scheme' has the meaning which it bears under the Trading Stamps Act 1964 (repealed) or the Trading Stamps Act (Northern Ireland) 1965 or under any scheme of an equivalent description which is in operation in another member state: Value Added Tax Act 1994 s 52.

7 See Customs and Excise News Release B6/95 [1995] STI 1906. The previous regulations made under this provision have been revoked.

8 As to the treatment of discount vouchers see PARA 95 ante. The determination of the correct VAT treatment of discount vouchers is exceptionally difficult. Apart from Case C-126/88 *Boots Co plc v Customs and Excise Comrs* [1990] ECR I-1235, [1990] STC 387, ECJ (see PARA 95 note 11 ante), two other cases relating to vouchers have been decided by the European Court of Justice on references from English courts or tribunals: see Case C-288/94 *Argos Distributors Ltd v Customs and Excise Comrs* [1996] STC 1359, ECJ; Case C-317/94 *Elida Gibbs Ltd v Customs and Excise Comrs* [1996] STC 1387, ECJ. See also Case C-330/95 *Goldsmiths (Jewellers) Ltd v Customs and Excise Comrs* [1997] ECR I-3801, [1997] STC 1073, ECJ. In Case C-288/94 *Argos Distributors Ltd v Customs and Excise Comrs* supra the court held that where a supplier sells a voucher to a buyer at a discount, and promises subsequently to accept that voucher at its face value in full or part payment of the price of goods purchased by a customer other than the buyer of the voucher, but who is unaware of the price paid for the voucher, the consideration represented by the voucher is the sum actually received by the supplier on the sale of the voucher; the effect is that the supplier is liable to account for VAT only on the discounted amount. In Case C-317/94 *Elida Gibbs Ltd v Customs and Excise Comrs* supra the court held that: (1) where a manufacturer issues a money-off coupon in the course of a promotional campaign to members of the public, which is redeemable, at the amount stated on the coupon, by the manufacturer in favour of a retailer who has accepted the coupon in part payment for a specified item of goods, the amount on which the manufacturer is obliged to account for VAT on goods sold by wholesale and purchased in the course of the campaign is the selling price charged by him less the amount refunded in respect of the voucher; and (2) where a manufacturer sells goods to a retailer, which carry on their packaging a cash-back coupon for a stated amount, and the customer presents the coupon to the manufacturer for redemption, the taxable amount on which the manufacturer must account for VAT is the selling price of the goods charged to the retailer less the amount indicated on the coupon and refunded. The Commissioners have indicated in Customs and Excise Business Brief 10/96 [1996] STI 981 how they propose to deal with business promotion coupon schemes consequent upon the removal of the trading stamps rules: (a) where vouchers are sold by a promoter, the acquisition of goods in return for the vouchers (the 'redemption' of the vouchers) will not be treated as a business gift but as having been acquired for the consideration paid for the vouchers themselves, so that no further VAT is due on the redemption of the vouchers (cf the Value Added Tax Act 1994 s 5(1), Sch 4 para 5(2) (as amended); and see PARA 30 ante); (b)

where a manufacturer issues vouchers or stamps with the sale of trade goods, and the vouchers etc are redeemable against other goods, the redemption is not treated as a business gift but as if the consideration for the premium goods (those with which the vouchers were issued) included an element of consideration for the redemption goods (cf Sch 4 para 5(2) (as amended)); but (c) where such redemption goods are put to a non-business use by the trade customer, a charge will be imposed under Sch 4 para 5(4) (see PARA 30 ante); (d) where a retailer or manufacturer issues vouchers or stamps to a member of the public purchasing goods, the provision of the redemption goods in return for the voucher will not be treated as a business gift (cf Sch 4 para 5(2) (as amended)); (5) where a voucher is redeemed for goods or services provided by a third party to the customer, but paid for by the manufacturer or retailer, the latter may not claim credit for the input tax on the supply of the redemption benefit, because the supply has not been made to him but to the customer. The effect of this approach (which apparently is intended to be a simplification measure, rather than necessarily reflecting the strict legal position) is that, in some cases it will be possible that standard-rated redemption goods will be acquired without a charge to VAT (where, eg, the premium goods were zero-rated). See *Allied Carpets Group plc v Customs and Excise Comrs* [1998] STC 894 (value of vouchers issued by, but not purchased from, stamp promoter in connection with taxpayer's sale of goods could not be deducted from taxpayer's gross daily takings because it never owned vouchers); Case C-427/98 *Coupon Scheme, Re: EC Commission v Germany* [2003] 1 CMLR 77 (coupon scheme did not distort European competition provisions). See also Customs and Excise Public Notice 700/7 *Business Promotion Scheme* (March 2002) PARA 5.

## UPDATE

### 213 Trading stamp schemes

NOTE 8--With regard to gift vouchers, the taxpayer may reduce its VAT liability by the level of expense it incurred when it purchased the vouchers: *Total UK Ltd v Revenue and Customs Comrs* [2006] EWHC 3422 (Ch), [2007] STC 564.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/4. SPECIAL CASES/(2) OTHER SPECIAL CASES/214. Tour operators.

## 214. Tour operators.

The Treasury may by order<sup>1</sup> modify the application of the Value Added Tax Act 1994 in relation to supplies<sup>2</sup> of goods or services by tour operators<sup>3</sup> or in relation to such of those supplies as may be determined by or under the order<sup>4</sup>. Such an order may make particular provision for:

- 664 (1) two or more supplies of goods or services by a tour operator to be treated as a single supply of services<sup>5</sup>;
- 665 (2) the value of that supply to be ascertained, in such manner as may be determined by or under the order, by reference to the difference between sums paid or payable to, and sums paid or payable by, the tour operator<sup>6</sup>;
- 666 (3) account to be taken, in determining the VAT chargeable on that supply, of the different rates of VAT that would have been applicable apart from the rules relating to tour operators<sup>7</sup>;
- 667 (4) excluding any body corporate from the application of the provisions relating to groups<sup>8</sup> of companies<sup>9</sup>; and
- 668 (5) as to the time when a supply by a tour operator is to be treated as taking place<sup>10</sup>.

The value of a designated travel service<sup>11</sup> is determined by reference to the difference between sums paid or payable to, and sums paid or payable by, the tour operator in respect of that service, calculated in such manner as the Commissioners for Her Majesty's Revenue and Customs may specify<sup>12</sup>. Where: (a) a supply of goods or services is acquired for a consideration in money by a tour operator, for the purpose of supplying a designated travel service; (b) the value of the supply is greater than its open market value; and (c) the supplier and the tour operator are connected<sup>13</sup>, the Commissioners may direct that the value of the supply is to be deemed to be its open market value for the purpose of calculating the value of the designated travel service<sup>14</sup>. A tour operator who supplies a designated travel service may treat that supply as not being a designated travel service if there are reasonable grounds for believing that the value<sup>15</sup> of all such supplies made by him in the period of one year then beginning will not exceed one per cent of the value of all supplies made by him in that period<sup>16</sup> and he makes no supplies of designated travel services consisting of accommodation or transport<sup>17</sup>.

Input tax on goods or services acquired by a tour operator for resupply as a designated travel service is excluded from credit<sup>18</sup> as such tax<sup>19</sup>.

1 The Value Added Tax Act 1994 s 97(3) (see PARA 14 ante) does not apply to such an order, notwithstanding that it makes provision for excluding any VAT from credit under s 25 (see PARA 217 post): s 53(4). As to the making of orders generally see PARA 14 ante. The effect of the scheme is to require a tour operator to account only for output tax on his 'margin' in relation to supplies falling within the scope of the scheme ('designated travel services'); but, correspondingly, to prevent him claiming credit for input tax on any supplies which he uses in making scheme supplies. The tour operator's 'margin' is, in simple terms, the difference between the VAT-inclusive purchase price of the designated travel service and his selling price of that service: see the text to note 12 infra.

2 As to the meaning of 'supply' see PARA 27 ante.

3 For these purposes, 'tour operator' includes a travel agent acting as principal and any other person providing for the benefit of travellers services of any kind commonly provided by tour operators or travel agents: Value Added Tax Act 1994 s 53(3). See Joined Cases C-308/96 and C-94/97 *Customs and Excise Comrs v Madgett and Baldwin (t/a Howden Court Hotel)*; *Madgett and Baldwin (t/a Howden Court Hotel) v Customs and*

*Excise Comrs* [1998] STC 1189, [1999] 2 CMLR 392, ECJ (European Court held that the tour operators' margin scheme applies in principle to anyone who 'habitually' buys in and resells services for the direct benefit of a traveller, unless those services are merely ancillary, eg a taxi provided between a hotel and a nearby station). EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 26 also applies to tour operators who provide accommodation but who do not provide transport: Case C-163/91 *Van Ginkel Waddinxveen BV and Reis-en Passagebureau Van Ginkel BV v Inspecteur der Omzetbelasting, Utrecht* [1992] ECR I-5723, [1996] STC 825, ECJ. In *Norman Allen Group Travel Ltd v Customs and Excise Comrs* [1996] V & DR 405, [1996] STI 1353, it was held that supplies of block bookings of ferry journeys and hotel accommodation sold on a wholesale basis to United Kingdom travel companies, although supplies of designated travel services, were outside the scope of the tour operators' margin scheme, which only applies to supplies to 'travellers', following *Independent Coach Travel (Wholesaling) Ltd v Customs and Excise Comrs* [1994] 2 CMLR 257, [1993] VATTR 357. See Customs and Excise Public Notice 709/5 *Tour Operators' Margin Scheme* (August 2004).

4 Value Added Tax Act 1994 s 53(1). In exercise of the power so conferred, the Treasury has made the Value Added Tax (Tour Operators) (Amendment) Order 1995, SI 1995/1495, which came into force on 1 January 1996: see art 1. In addition, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806 (amended by the Value Added Tax Act 1994 s 100(2), Sch 15; SI 1992/3125; and SI 1995/1495) has effect as if so made.

5 Value Added Tax Act 1994 s 53(2)(a). See the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 3(2); and PARA 27 note 6 ante.

6 Value Added Tax Act 1994 s 53(2)(b). See the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, arts 7-9; and the text and notes 11-14 infra.

7 Value Added Tax Act 1994 s 53(2)(c). At the date at which this volume states the law, no such provision has been made, and none has effect as if so made following the revocation of the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 10 (relating to bought-in international passenger transport services) by the Value Added Tax (Tour Operators) (Amendment) Order 1995, SI 1995/1495, art 2. A tour operator's margin on the provision of transport within the European Union is standard-rated. The effect of this provision has been mitigated, though, by the Commissioners for Her Majesty's Revenue and Customs having invited tour operators to revise contractual arrangements with suppliers of such transport services, or with customers, so that the operator acts as agent for one or other party and does not act in his own name. In this case, the supply of such transport falls outside the scope of the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806 (as amended): see Customs and Excise News Release 50/95 [1995] STI 1663; and Customs and Excise Business Brief 2/96 [1996] STI 266. As to the mitigation of tax where there is a supply of transport (or other services) partly within and partly outside the European Union see EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 26(3); and Case C-74/91 *EC Commission v Germany* [1992] ECR I-5437, [1996] STC 843, ECJ. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

8 le the Value Added Tax Act 1994 s 43 (as amended): see PARAS 75, 205 ante.

9 Ibid s 53(2)(d). See the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 13; and PARA 75 text and notes 13-14 ante.

10 Value Added Tax Act 1994 s 53(2)(e). See the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 4; and PARA 37 text and notes 19-22 ante. As to the place of supply of such services see PARA 62 ante.

11 For the meaning of 'designated travel service' see PARA 37 note 17 ante.

12 Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 7. See Joined Cases C-308/96 and C-94/97 *Customs and Excise Comrs v Madgett and Baldwin (t/a Howden Court Hotel); Madgett and Baldwin (t/a Howden Court Hotel) v Customs and Excise Comrs* [1998] STC 1189, [1999] 2 CMLR 392, ECJ (European Court held that these provisions apply solely to services supplied by third parties, and traders may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package); *Customs and Excise Comrs v First Choice Holidays plc* [2004] EWCA Civ 1044, [2004] 3 CMLR 1002 (discount on package holiday met from agent's commission nevertheless part of the taxable consideration); Case C-291/03 *MyTravel plc v Customs and Excise Comrs* [2005] STC 1617, [2005] All ER (D) 53 (Oct), ECJ (circumstances in which a tour operator might recalculate the taxable margin in accordance with the market value method described in *Customs and Excise Comrs v Madgett and Baldwin* supra, and method of such recalculation). See also Customs and Excise Public Notice 709/5 *Tour Operators' Margin Scheme* (August 2004).



13 Any question whether a person is connected with another is to be determined in accordance with the Income and Corporation Taxes Act 1988 s 839 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258); Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 8(4); Interpretation Act 1978 s 17(2)(a).

14 Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 8(1). Such a direction must be given by notice in writing to the tour operator acquiring the supply; but no direction may be given more than three years after the time of the supply: art 8(2). A direction so given to a tour operator in respect of a supply acquired by him may also include a direction that, for the purpose of calculating the value of the designated travel service, the value of any supply fulfilling the prescribed conditions which is acquired by him after the giving of the notice (or after such later time as may be specified in the notice) is deemed to be its open market value: art 8(3). As to the specified conditions see the text to note 13 supra.

15 For these purposes, the value of any supplies is to be calculated in accordance with the Value Added Tax Act 1994 s 19 (see PARAS 94, 96 ante); Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 14(2); Interpretation Act 1978 s 17(2)(b).

16 Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 14(1)(a).

17 Ibid art 14(1)(b).

18 Ie under the Value Added Tax Act 1994 ss 25, 26: see PARAS 216-218 post.

19 Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 12; Interpretation Act 1978 s 17(2)(b). See *Aer Lingus plc v Customs and Excise Comrs* [1992] VATTR 438 (the provision by an airline of a free hotel room or free car hire in connection with the purchase of a ticket is the provision of services of a kind commonly provided by tour operators or travel agents, in respect of which there is no entitlement to input tax credit); cf *Virgin Atlantic Airways Ltd v Customs and Excise Comrs* [1993] VATTR 136 (the tribunal came to the opposite conclusion in relation to similar services (the provision of a chauffeured limousine or free car hire in connection with the purchase of an airline ticket)).

## UPDATE

### 214 Tour operators

NOTES 3, 7--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 3--EC Council Directive 77/388 art 26 also applies to traders who offer language training and education in conjunction with transport to and/or accommodation in the relevant foreign country: Case C-200/04 *Finanzamt Heidelberg v iSt internationale Sprach- und Studienreisen GmbH* [2006] STC 52, ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(1) INPUT TAX AND OUTPUT TAX/(i) In general/215. Meaning of 'input tax' and 'output tax'.

## **5. ACCOUNTING AND ASSESSMENT**

### **(1) INPUT TAX AND OUTPUT TAX**

#### **(i) In general**

##### **215. Meaning of 'input tax' and 'output tax'.**

In relation to a taxable person<sup>1</sup>, 'input tax' consists of:

- 669 (1) value added tax on the supply<sup>2</sup> to him of any goods or services<sup>3</sup>;
- 670 (2) VAT on the acquisition by him from another member state of any goods<sup>4</sup>; and
- 671 (3) VAT paid or payable by him on the importation of any goods from a place outside the member states<sup>5</sup>,

provided, in each case, that the goods or services are used, or are to be used, for the purpose of any business<sup>6</sup> carried on or to be carried on by him<sup>7</sup>.

In addition, VAT on the supply, acquisition, or importation of fuel for private use<sup>8</sup> is treated as input tax, notwithstanding that the fuel is neither used, nor to be used, for the purposes of a business carried on by the taxable person<sup>9</sup>. Where, however, goods and services are supplied to a company, or goods are acquired by a company from another member state or imported by a company from a place outside the member states, and those goods or services are used or are to be used in connection with the provision of accommodation by the company, they are not to be treated as used, or as to be used, for the purposes of any business carried on by the company to the extent that the accommodation is used or to be used for domestic purposes by a director of the company<sup>10</sup> or any person connected<sup>11</sup> with a director of the company<sup>12</sup>.

Where goods or services which have been supplied to a taxable person, goods which have been acquired by a taxable person from another member state, or goods which have been imported by a taxable person from a place outside the member states, are used, or are to be used, partly for the purposes of a business carried on or to be carried on by him and partly for other purposes, VAT on supplies, acquisitions and importations must be apportioned so that only so much as is referable to his business purposes is counted as his input tax<sup>13</sup>.

The Treasury may, by order, provide that where goods or services of a description specified in the order are supplied to a person who is not a taxable person, they are to be treated<sup>14</sup>, in such circumstances as may be specified in the order, as supplied to such other person as may be determined in accordance with the order<sup>15</sup>. The Commissioners for Her Majesty's Revenue and Customs may provide by regulations<sup>16</sup>:

- 672 (a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member states and VAT paid or payable by a taxable person on the importation of goods from places outside the member states to be treated as input tax only if, and to the extent that, the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or as the Commissioners may direct, either generally or in particular cases or classes of cases<sup>17</sup>;

- 673 (b) for a taxable person to count as his input tax<sup>18</sup> VAT on the supply to him of goods or services or on the acquisition of goods by him from another member state or paid by him on the importation of goods from places outside the member states notwithstanding that he was not a taxable person at the time of the supply, acquisition or payment<sup>19</sup>;
- 674 (c) for a taxable person that is a body corporate to count as its input tax<sup>20</sup> VAT on the supply, acquisition or importation of goods before the company's incorporation for appropriation to the company or its business or on the supply of services before that time for its benefit or in connection with its incorporation<sup>21</sup>;
- 675 (d) in the case of a person who has been, but is no longer, a taxable person, for him to be paid by the Commissioners the amount of any VAT on a supply of services made to him for the purposes of the business carried on by him when he was a taxable person<sup>22</sup>.

Subject to these provisions, 'output tax', in relation to a taxable person, means the VAT on supplies which he makes or on the acquisition by him of goods from another member state, including VAT which is also to be counted as input tax by virtue of head (1) above<sup>23</sup>. Where the Commissioners are satisfied that a person is not able to account for the exact amount of output tax chargeable in any period, he may estimate a part of his output tax for that period, provided that any such estimated amount is adjusted and exactly accounted for as VAT chargeable in the next prescribed accounting period<sup>24</sup> or, if the exact amount is still not known and the Commissioners are satisfied that it could not with due diligence be ascertained, in the next but one prescribed accounting period<sup>25</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 Value Added Tax Act 1994 s 24(1)(a).

4 Ibid s 24(1)(b). As to the acquisition of goods from another member state see PARA 19 ante.

5 Ibid s 24(1)(c). As to the charge to VAT on importation from places outside the member states see PARA 113 ante; and as to the territories included in, and excluded from, the member states for VAT purposes see PARA 16 ante.

6 For the meaning of 'business' see PARA 23 ante. The question whether goods or services have been used, or are to be used, 'for the purpose' of a business carried on by the taxable person has been considered in myriad cases. Perhaps the most significant of these is *Ian Flockton Developments Ltd v Customs and Excise Comrs* [1987] STC 394 at 400 per Stuart-Smith J (the test is a subjective one; the fact-finding tribunal must look into the taxpayer's mind as it was at the relevant time to discover his object; and where the taxpayer is a company, the relevant mind or minds is or are that of the person or persons controlling the company, or entitled to act, and acting for the company). See also *Anholt v Customs and Excise Comrs* [1989] VATTR 297 (membership of a sports club may be for the purposes of an actor's profession, where he has a role requiring him to portray an athletic character); *Rock Lambert v Customs and Excise Comrs* (1992) VAT Decision 6637, [1992] STI 60 (VAT on solicitors' fees on the sale of a house to meet partnership business debts not incurred for the purpose of the business); *Turner (t/a Turner Agricultural) v Customs and Excise Comrs* [1992] STC 621 (VAT on defendant's costs incurred by unsuccessful plaintiff in action not incurred for the purposes of plaintiff's business); *WHA Ltd v Customs and Excise Comrs* [2004] EWCA Civ 559, [2004] STC 1081 (where a taxable person pays for the delivery of goods or services to a third party in pursuance of its contractual obligations it is using those goods or services for the purposes of its business). Parliament has sought to impose a partial curb on the recovery of input tax on luxuries, amusements and entertainment, not only by disallowing credit as input tax for tax on the supply, acquisition or importation of goods or services to be used for the purposes of business entertainment (see PARA 221 post) but also by limiting the rights of a taxpayer to appeal against a decision that VAT incurred by the trader does not, or does not fully, qualify as input tax which may be credited or allowed under the Value Added Tax Act 1994 s 26; the tribunal may not allow the appeal unless it considers that the Commissioners' determination was one which it was unreasonable to make: see s 84(4); and PARAS 346-347 post. See also *John Price Business Courses Ltd v Customs and Excise Comrs* (1995) VAT Decision 13135, [1995] STI 829 (VAT paid on subscription for a tennis club by a tax consultant not for the purposes of business and in any event falling within the Value Added Tax Act 1994 s 84(4)). Where expenditure is incurred on a supply of goods or services to be used both for business entertainment and to a measurable extent for other business

purposes, a trader is entitled to a partial credit in respect of the input tax, based on an apportionment between entertainment and non-entertainment business use: *Thorn EMI plc v Customs and Excise Comrs* [1995] STC 674, CA (overruling *Customs and Excise Comrs v Plant Repair and Services (South Wales) Ltd* [1994] STC 232). Where there is a genuine business purpose, however small, in making a purchase of an asset (eg a personalised number plate), the VAT on the supply is deductible in full: *Welbeck Video plc v Customs and Excise Comrs* [1994] 2 CMLR 717, following Case C-97/90 *Lennartz v Finanzamt München III* [1991] ECR I-3795, [1995] STC 514, ECJ, and *Ian Flockton Developments Ltd v Customs and Excise Comrs* supra.

7 Value Added Tax 1994 s 24(1). Strictly speaking, the VAT on each supply made to the taxable person will not have been his personal liability, but the liability of the person making the supply: see s 1(2); and PARA 18 ante. However, the VAT on that supply will have been determined on the basis that the consideration for the supply is inclusive of the VAT chargeable (see s 19; and PARA 94 et seq ante), so that it may be seen that the recipient effectively suffers the VAT on the supply. The right to deduct input tax (ie under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 17(2)) arises only if the tax was properly due from the supplier; and VAT is not recoverable simply because it is mentioned as such on an invoice: Case C-342/87 *Genius Holding BV v Staatssecretaris van Financiën* [1989] ECR 4227, [1991] STC 239, ECJ. As to the Sixth Directive see PARA 1 note 1 ante.

No credit is allowed for sums paid by a trader by way of input tax under a contract to supply goods which are either non-existent (because the supplier is a fraudster) or which never belong to the supplier or which never come into existence because the would-be supplier ceases trading, whether through insolvency or otherwise, before the goods are supplied: *Howard v Customs and Excise Comrs* (1981) VAT Decision 1106 (unreported); *Theotrope Holdings Ltd v Customs and Excise Comrs* [1983] VATTR 88; *Northern Counties Co-operative Enterprises Ltd v Customs and Excise Comrs* [1986] VATTR 250; *Munn v Customs and Excise Comrs* [1989] VATTR 11; *Broadwell Land plc v Customs and Excise Comrs* [1993] VATTR 346; *Customs and Excise Comrs v Pennystar Ltd* [1996] STC 163. Quare whether the position may be different where the proposed supply is one of services rather than goods: see *IMO Precision Controls Ltd v Customs and Excise Comrs* (1992) VAT Decision 7948, [1992] STI 893; *Customs and Excise Comrs v Moonrakers Guest House Ltd* [1992] STC 544; *Customs and Excise Comrs v Bass plc* [1993] STC 42. It appears that input tax recovery will be permitted if, at the time of the claim, it is uncertain whether or not the supply will take place: *Bethway & Moss Ltd v Customs and Excise Comrs* MAN/86/331 VAT Decision 2667 (unreported); *Broadwell Land plc v Customs and Excise Comrs* supra; *Customs and Excise Comrs v Moonrakers Guest House Ltd* supra. Where a trader buys second-hand goods from a non-taxable vendor, then, notwithstanding that an amount of the VAT charged on the original sale will still be contained in the second-hand price, the purchaser is unable to claim credit for that tax as his input tax, unless there is specific domestic legislation which makes provision for him to do so: Case C-165/88 *ORO Amsterdam Beheer BV and Concerto BV v Inspecteur der Omzetbelasting* [1989] ECR 4081, [1991] STC 614, ECJ. No such provision is made by the Value Added Tax Act 1994.

8 For the meaning of 'fuel for private use' see PARA 104 ante.

9 Value Added Tax Act 1994 s 56(5). This is because the trader is liable for output tax in each prescribed accounting period in which he uses, or supplies to another, fuel for private use: see PARA 104 ante. By concession, where a registered person makes no claim for input tax on purchases of road fuel, whether for business or private journeys, the scale charge is not applied: see Customs and Excise Public Notice 48 *Extra-Statutory Concessions* (March 2002) PARA 3.1.

10 Value Added Tax Act 1994 s 24(3)(a). For these purposes, 'director' means: (1) in relation to a company whose affairs are managed by a board of directors or similar body, a member of that board or similar body (s 24(7)(a)); (2) in relation to a company whose affairs are managed by a single director or similar person, that director or person (s 24(7)(b)); (3) in relation to a company whose affairs are managed by the members themselves, a member of the company (s 24(7)(c)).

11 A person is connected with a director if that person is the director's wife or husband, or is a relative, or the wife or husband of a relative, of the director or of the director's wife or husband: *ibid* s 24(7).

12 *Ibid* s 24(3)(b). As to the apportionment of expenditure on a farmhouse see *RS & EM Wright Ltd v Customs and Excise Comrs* (1995) VAT Decision 12984, [1995] STI 651; and Customs and Excise Business Brief 18/96 [1996] STI 1439 at 1441.

13 Value Added Tax Act 1994 s 24(5). This provision is the subject of much difficulty, and the Commissioners for Her Majesty's Revenue and Customs have admitted that it is probably in contravention of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) arts 5(6), 17: see Customs and Excise Leaflet 700/55/93 *VAT Input Tax Appeals: Luxuries, Amusements and Entertainment* Annex B, considering the decision in Case C-97/90 *Lennartz v Finanzamt München III* [1991] ECR I-3795, [1995] STC 514, ECJ, that a taxable person who uses goods for the purposes of an economic activity has the right on their acquisition to deduct input tax however small the proportion of business use, which 'calls into question' the Value Added Tax Act 1994 s 24(5). The Commissioners therefore concluded that: 'If taxable persons choose to apply the *Lennartz* judgment and to take input tax deduction in full, they must account for output tax in each accounting period on the private or non-

business use. This means they must keep records showing how the asset has been used.'. Notwithstanding this admission, in *North East Media Development Trust Ltd v Customs and Excise Comrs* (1995) VAT Decision 13104, [1995] STI 743, the Commissioners sought to defend a claim by the trader that Case C-97/90 *Lennartz v Finanzamt München III* supra was inconsistent with the predecessor of the Value Added Tax Act 1994 s 24(5) by referring to what is now s 5(1), Sch 4 para 5(4) (see PARA 30 ante), contending (as was accepted by the tribunal) that this provision effected the implementation by the United Kingdom of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 5(6) and that the United Kingdom had, therefore, simply given taxpayers a choice as to whether to reclaim input tax in full under art 17, on the basis that the onward non-business use would be treated as a supply in the course of business, or to apportion the deductible input tax and thereafter have no obligation to account for output tax on the non-business application of the goods. In *F & M Mounty & Sons v Customs and Excise Comrs* (1995) VAT Decision 12985, [1995] STI 651, the tribunal held that supplies of services (in the form of repairs to farmhouses used partly for private purposes) were outside the principle in Case C-97/90 *Lennartz v Finanzamt München III* supra and that the input tax on those services was only partly deductible, in accordance with the Value Added Tax Act 1994 s 24(5). Where the s 24(5) apportionment does apply, this is a separate apportionment from that made because the business is partially exempt: see PARA 217 post. No apportionment of VAT falls to be made under s 24(5) by reference to fuel supplied for private use: s 56(5).

A taxpayer may treat an acquisition of goods or services as partly for business purposes and partly for non-business purposes and, by excluding part of the goods or services from his business, neither recover VAT as input tax on that part nor be obliged to account for output tax on that part on the eventual sale of the goods: see Case C-291/92 *Finanzamt Uelzen v Armbrecht* [1995] ECR I-2775, [1995] STC 997, ECJ. See also Case 50/88 *Kühne v Finanzamt München III* [1989] ECR 1925, [1990] STC 749, ECJ; Case C-193/91 *Finanzamt München III v Mohsche* [1993] ECR I-2615, [1997] STC 195, ECJ. The disposal of a vehicle having both business and private purposes, on the acquisition of which no value added tax is deductible, is a transaction excluded from the VAT system: Case C-415/98 *Bakcsi v Finanzamt Fürstenfeldbruck* [2002] QB 685, [2002] STC 802, ECJ.

As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

14    Ie for the purposes of the Value Added Tax Act 1994 s 24(1), (2): see the text and notes 1-7 supra, 23 infra.

15    Ibid s 24(4). As to the making of orders generally see PARA 14 ante. At the date at which this volume states the law, no such order had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax (Person Supplied) Order 1991, SI 1991/2306, has effect as if so made. This order provides that where road fuel is supplied to a person who is not a taxable person and a taxable person pays to him: (1) the actual cost to him of the fuel; or (2) an amount, the whole or part of which approximates to and is paid in order to reimburse him for the cost of the fuel (whether or not the taxable person makes any payment in order to reimburse him for any other cost), the fuel is to be treated as having been supplied to the taxable person for the purpose of a business carried on by him and for a consideration equal to the amount reimbursed (excluding any reimbursement of any cost other than the cost of the fuel): arts 2, 3. The amount mentioned in head (2) supra is to be determined by reference to: (a) the total distances travelled by the vehicle in which the fuel is used, whether or not including distances travelled otherwise than for the purposes of the business of the taxable person; and (b) the cylinder capacity of the vehicle: art 2. This provision was introduced to reverse the decision in *McLean Homes Midland Ltd v Customs and Excise Comrs* (1990) VAT Decision 5010, [1990] STI 802 (employer could not obtain input tax credit for reimbursements he made in respect of fuel supplied to an employee which he used for the purposes of his employer's business). Cf Case 165/86 *Leesportefeuille 'Intiem' CV v Staatssecretaris van Financiën* [1988] ECR 1471, [1989] 2 CMLR 856, ECJ, where the opposite conclusion was reached (in a case where the employer had entered into a prior contract with the relevant garage). Note also that the Value Added Tax (Person Supplied) Order 1991, SI 1991/2306, does not make the right to deduction subject to the condition that the fuel bought by the non-taxable person should be used for the purposes of the taxable person's taxable transactions: see Case C-33/03 *European Commission v United Kingdom* [2005] STC 582, ECJ.

16    Ie under the Value Added Tax Act 1994: see s 96(1). As to the making of regulations generally see PARA 14 ante.

17    Ibid s 24(6)(a) (amended by the Finance Act 2003 s 17(1), (2)).

18    Ie in such circumstances, to such extent and subject to such conditions as may be prescribed: Value Added Tax Act 1994 s 24(6)(b), (c). For the meaning of 'prescribed' see PARA 16 note 2 ante.

19    Ibid s 24(6)(b).

20    See note 18 supra.

21    Value Added Tax Act 1994 s 24(6)(c).

22 Ibid s 24(6)(d).

23 Ibid s 24(2). Since the VAT on acquisitions of goods from other member states is treated both as the taxable person's input tax and output tax it will be found that the taxable person has to account for VAT only on such acquisitions if he is either partially exempt (see PARA 224 et seq post) or if the goods in question are wholly or partly excluded from credit (see PARAS 218-223 post). VAT on importation of goods from places outside the member states is not treated as the taxable person's output tax as the tax is accounted for on entry of the goods: see PARA 113 ante.

24 For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

25 Value Added Tax Regulations 1995, SI 1995/2518, reg 28. As to accounting for VAT see PARA 245 et seq post.

## **UPDATE**

### **215 Meaning of 'input tax' and 'output tax'**

NOTE 6--See Case C-460/07 *Puffer v Unabhängiger Finanzsenat Aubenstelle Linz* [2009] STC 1693, ECJ.

NOTES 7, 13--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(1) INPUT TAX AND OUTPUT TAX/(i) In general/216. The payment of tax.

## **216. The payment of tax.**

A taxable person<sup>1</sup> must account for and pay value added tax, both in respect of supplies<sup>2</sup> made by him<sup>3</sup>, and the acquisition by him from another member state<sup>4</sup> of any goods<sup>5</sup>, by reference to 'prescribed accounting periods'<sup>6</sup> at such time and in such manner as may be determined by or under regulations<sup>7</sup> made by the Commissioners for Her Majesty's Revenue and Customs<sup>8</sup>. At the end of each prescribed accounting period, the taxable person is entitled<sup>9</sup> to credit for so much of his input tax<sup>10</sup> as is allowable<sup>11</sup> and then to deduct that amount from any output tax<sup>12</sup> that is due from him<sup>13</sup>. If, however, either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax, then the amount of the credit or, as the case may be, the amount of the excess is paid<sup>14</sup> to the taxable person by the Commissioners<sup>15</sup>. An amount so due is referred to as a 'VAT credit'<sup>16</sup>.

The whole or any part of the credit may<sup>17</sup> be held over to be credited in and for a subsequent period, either on the taxable person's own application or in accordance with general or special directions given by the Commissioners from time to time, if regulations<sup>18</sup> so allow<sup>19</sup>. In addition, where at the end of any period a VAT credit is due to a taxable person who has failed to submit returns for any earlier period<sup>20</sup>, the Commissioners may withhold payment of the credit until he has complied with that statutory requirement<sup>21</sup>.

A deduction of input tax from output tax<sup>22</sup> may not be made, nor may a VAT credit be paid, except on a claim made in the prescribed<sup>23</sup> manner and time<sup>24</sup>. In the case of a person who has made no taxable supplies<sup>25</sup> in the period concerned or in any previous period, payment of a VAT credit is made subject to such conditions, if any, as the Commissioners think fit to impose<sup>26</sup>.

As a condition of allowing or repaying input tax to any person, the Commissioners may require the production of such evidence relating to VAT as they may specify<sup>27</sup>; and they may, if they think it necessary for the protection of the revenue, require the giving of such security for the amount of the payment as appears to them appropriate as a condition of making any VAT credit<sup>28</sup>.

Where, at the end of a prescribed accounting period, the amount of VAT due from any person or the amount of any VAT credit would be less than £1, that amount is treated as nil<sup>29</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 Value Added Tax Act 1994 s 25(1)(a).

4 As to the acquisition of goods from another member state see PARA 19 ante.

5 Value Added Tax Act 1994 s 25(1)(b).

6 For the purposes of VAT, 'prescribed accounting period' has the meaning given by this provision: see s 96(1). See also the Value Added Tax Regulations 1995, SI 1995/2518, regs 2(1), 25 (reg 25 as amended); and PARAS 115 note 15 ante, 247 post.

7 Regulations may make different provision for different circumstances: Value Added Tax Act 1994 s 25(1). As to the regulations that have been made see the Value Added Tax Regulations 1995, SI 1995/2518, Pt V (regs 24-43) (as amended); and PARAS 21, 145 ante, 238 et seq post. As to the making of regulations generally see PARA 14 ante.

8 Value Added Tax Act 1994 s 25(1). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

9 Ie subject to the provisions of *ibid* s 25.

10 For the meaning of 'input tax' see PARAS 4, 215 ante.

11 Ie under the Value Added Tax Act 1994 s 26: see PARA 217 post.

12 For the meaning of 'output tax' see PARAS 4, 215 ante.

13 Value Added Tax Act 1994 s 25(2).

14 Ie subject to *ibid* s 25(4), (5): see the text to notes 17-21 *infra*.

15 *Ibid* s 25(3). The taxpayer must establish his entitlement to a repayment before one becomes due; and the Commissioners are not obliged to pay interest on the amount from the date of the claim to the date of payment: *R (on the application of UK Tradecorp Ltd) v Customs and Excise Comrs* [2004] EWHC 2515 (Admin), [2005] STC 138.

16 Value Added Tax Act 1994 s 25(3). As to security for the payment of a VAT credit see the text and notes 27-28 *infra*. The Commissioners are not automatically obliged to repay a sum claimed as a VAT credit if they have suspicions that a repayment may not be due; they must have a reasonable opportunity to investigate the claim: *R v Customs and Excise Comrs, ex p Strangewood Ltd* [1987] STC 502.

17 Ie subject to and in accordance with regulations made by the Commissioners: Value Added Tax Act 1994 s 25(4).

18 Ie regulations made under *ibid* s 25(4): see note 17 *supra*. At the date at which this volume states the law, no such regulations had been made.

19 *Ibid* s 25(4).

20 Ie as required by the Value Added Tax Act 1994: s 25(5). As to VAT returns see PARA 247 *et seq post*.

21 *Ibid* s 25(5). The trader is then obliged to pay to the Commissioners the net amount of VAT due from him, ie his output tax less his input tax for the period.

22 Ie a deduction under *ibid* s 25(2): see the text to notes 9-13 *supra*.

23 Ie in such manner and at such time as may be determined by or under regulations made by the Commissioners: *ibid* s 25(6). Save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under s 25(2) must do so on a return made by him for the prescribed accounting period in which the VAT becomes chargeable: Value Added Tax Regulations 1995, SI 1995/2518, reg 29(1) (amended by SI 1997/1086). This is subject to the Value Added Tax Regulations 1995, SI 1995/2518, reg 29(1A), (2) (reg 29(1A) as added) (see PARA 274 *post*): reg 29(1) (as so amended).

24 Value Added Tax Act 1994 s 25(6). No specific manner or time for making a claim for payment of a VAT credit (as opposed to claiming a deduction: see note 23 *supra*) has been prescribed (eg where the trader makes only zero-rated supplies). See, however, *Trustees of the Victoria and Albert Museum v Customs and Excise Comrs* (1995) VAT Decision 13552, [1995] STI 1686 ('a person claiming a deduction' includes 'a person claiming a deduction whether or not there is output tax from which a deduction can be made' (ie a person claiming a payment and not a deduction)) (this point not considered on appeal [1996] STC 1016).

25 For the meaning of 'taxable supplies' see PARA 18 note 3 ante.

26 Value Added Tax Act 1994 s 25(6). This provision enables the Commissioners to recover payments of VAT credit made to 'intending traders', who claim to have incurred input tax for the purposes of business in which they will make taxable supplies; but subsequently fail to make any such supplies. Such persons are entitled to register for VAT and to recover input tax provided that they can satisfy the fiscal authorities by objective circumstances of their stated intention: Case 268/83 *DA Rompelman and EA Rompelman-van Deelen v Minister van Financiën* [1985] ECR 655, [1985] 3 CMLR 202, ECJ. See also Case C-110/94 *Intercommunale voor Zeewaterontziltling (INZO) (in liquidation) v Belgium* [1996] ECR I-857, [1996] STC 569, ECJ (where a tax authority accepts that a company, which has declared its intention to begin an economic activity giving rise to taxable transactions, has the status of a taxable person for the purposes of VAT, the carrying out of a study to investigate the financial viability of the activity itself is part of the economic activity in respect of which input tax may be recovered; and, except in cases of fraud or abuse, the status of a taxable person may not



retrospectively be withdrawn if, as a result of the study, taxable transactions do not take place). It would seem that the Value Added Tax Act 1994 s 25(6) may be exercised only in such circumstances: see *Hordern v Customs and Excise Comrs* [1992] VATTR 382, where the tribunal held, having regard to Case 268/83 *DA Rompelman and EA Rompelman-van Deelen v Minister van Financiën* supra, that a condition imposed under what is now the Value Added Tax Act 1994 s 25(6) was contrary to EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'), discriminatory and unenforceable. As to the Sixth Directive see PARA 1 note 1 ante.

27 Value Added Tax Act 1994 s 58, Sch 11 para 4(1) (Sch 11 para 4(1) substituted, Sch 11 para 4(1A) added, by the Finance Act 2003 s 17(1), (3)). For other provisions relating to security see the Value Added Tax Act 1994 s 48(7) (relating to the failure of an overseas trader to appoint a VAT representative); and PARA 71 ante. See also PARA 286 post.

28 Ibid Sch 11 para 4(1A) (as added: see note 27 supra).

29 Ibid Sch 11 para 2(13).

## UPDATE

### 216 The payment of tax

TEXT AND NOTES--Regulations under the Finance Act 2007 s 95(1) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1800) may, in particular, provide for a payment which is made by cheque in contravention of regulations under the Value Added Tax Act 1994 s 25(1) to be treated as made when the cheque clears, as defined in those regulations: s 58B (added by the 2007 Act s 95(8)).

NOTE 6--As to the Revenue's policy regarding the elimination of a 'stagger' between the making of returns by associated companies see *R (on the application of BMW AG) v Revenue and Customs Comrs* [2009] EWCA Civ 77, [2009] STC 963. See also *WHA Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 728, [2007] STC 1695.

TEXT AND NOTES 22-26--The requirement in the Value Added Tax Act 1994 s 25(6) that a claim for deduction of input tax be made at such time as may be determined by or under regulations does not apply to a claim for deduction of input tax that became chargeable, and in respect of which the claimant held the required evidence, in a prescribed accounting period ending before 1 May 1997 if the claim is made before 1 April 2009: Finance Act 2008 s 121(2). The 'required evidence' means the evidence of the charge to value added tax specified in or under SI 1995/2518 reg 29(2) (see PARA 274): Finance Act 2008 s 121(3).

NOTE 26--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## **(ii) Deduction of Input Tax**

### **217. Extent of right to deduct input tax.**

Subject to certain exceptions<sup>1</sup>, the amount of input tax<sup>2</sup> for which a taxable person<sup>3</sup> is entitled to credit at the end of any period is so much of the input tax for the period<sup>4</sup> as is allowable by or under regulations as being attributable to the following supplies<sup>5</sup> made, or to be made, by him in the course or furtherance of his business<sup>6</sup>:

- 676 (1) taxable supplies<sup>7</sup>;
- 677 (2) supplies made outside the United Kingdom<sup>8</sup> which would be taxable supplies if made in the United Kingdom<sup>9</sup>;
- 678 (3) exempt supplies<sup>10</sup> of services which are supplied to a person who belongs outside the member states<sup>11</sup>;
- 679 (4) exempt supplies of services which are directly linked to the export of goods to a place outside the member states<sup>12</sup>;
- 680 (5) in relation to any transaction specified in head (3) or head (4) above, exempt supplies which consist of the provision of intermediary services<sup>13</sup>; and
- 681 (6) certain supplies of investment gold<sup>14</sup>.

The Commissioners for Her Majesty's Revenue and Customs<sup>15</sup> must make regulations<sup>16</sup> for securing a fair and reasonable attribution of input tax to the supplies described above<sup>17</sup>. Such regulations may provide for:

- 682 (a) determining a proportion by reference to which input tax for any prescribed accounting period<sup>18</sup> is to be provisionally attributed to those supplies<sup>19</sup>;
- 683 (b) adjusting, in accordance with a proportion determined in like manner for any longer period comprising two or more prescribed accounting periods (or parts of such periods), the provisional attribution for any of those periods<sup>20</sup>;
- 684 (c) the making of payments in respect of input tax, by the Commissioners to a taxable person (or a person who has been a taxable person) or by a taxable person (or a person who has been a taxable person) to the Commissioners, in cases where events prove inaccurate an estimate on the basis of which an attribution was made<sup>21</sup>; and
- 685 (d) preventing input tax on a supply which a person makes to himself<sup>22</sup> from being allowable as attributable to that supply<sup>23</sup>,

and may, notwithstanding their stated purpose<sup>24</sup> and to the extent that they have effect in respect of exempt supplies which relate to gold, provide that input tax is allowable, as being attributable to the supplies, only in relation to specified matters<sup>25</sup>.

The amount of any input tax which may be either credited to or deducted by any person is a matter on which an appeal lies to a VAT and duties tribunal<sup>26</sup>.

1 See PARAS 218-223 post.

2 For the meaning of 'input tax' see PARAS 4, 215 ante.

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 The input tax on supplies, acquisitions and importations in the period: Value Added Tax Act 1994 s 26(1). For the meaning of 'supply' see PARA 27 ante.

5 Ibid s 26(1). Businesses which have not paid for supplies within a certain period must repay VAT claimed as input tax on those supplies: see s 26A (as added); and PARA 219 post.

6 Ibid s 26(2). For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante. The relevant regulations are the Value Added Tax Regulations 1995, SI 1995/2518, regs 99-110 (as amended): see PARA 224 et seq post. Nothing in those regulations is to be construed as allowing a taxable person to deduct the whole or any part of VAT on the importation or acquisition by him of goods or the supply to him of goods or services where those goods or services are not used, or to be used, by him in making supplies in the course or furtherance of a business carried on by him: reg 100. Where a trader is not entitled to deduct the entirety of his input tax he is generally described as 'partially exempt' and the method of computing his deductible input tax is described as his 'partial exemption method.' The legislation and regulations reflect EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 17(2), (5). As to the Sixth Directive see PARA 1 note 1 ante. Article 17(5) permits member states to select amongst various different methods of determining the deductible proportion of a trader's input tax. The United Kingdom has adopted different partial exemption methods at different periods: since 1 April 1992, it has adopted the apportionment determined under art 19, which permits deduction of a proportion of the input tax, made up of a fraction of which the numerator is the total amount of turnover per year, exclusive of VAT, attributable to transactions in respect of which VAT is deductible under art 17(2), (3), and the denominator is the total amount of turnover per year attributable to transactions included in the numerator and to transactions in respect of which VAT is not deductible. Article 19(1) further permits member states to include in the denominator the amount of subsidies other than those specified in art 11(A)(1)(a) (ie subsidies directly linked to the price of the trader's supplies). The United Kingdom has not availed itself of this latter permission (but see Case C-536/03 *Jorge v Fazenda Publica* [2005] STI 1017, [2005] All ER (D) 426 (May), ECJ).

In order to qualify for deduction as input tax, there must be a clear nexus between the matter in relation to which the expenditure is incurred and the business itself; it is not sufficient that the business benefits generally from the expenditure: *Customs and Excise Comrs v Rosner* [1994] STC 228 (legal expenses defending trader from criminal charges and thereby enabling his business to continue not deductible); *Midland Bank plc v Customs and Excise Comrs* (1996) VAT Decision 14144, [1996] STI 1302 (VAT on legal fees incurred in unsuccessfully defending action for negligent misrepresentation made in the course of providing services to plaintiff held to be deductible); *Child (t/a Child & Co and Videoland) v Customs and Excise Comrs* (1992) VAT Decision 6827, [1992] STI 237 (VAT on legal fees incurred in connection with drink-drive charge insufficiently connected to business and therefore not deductible); *Spillane v Customs and Excise Comrs* [1990] STC 212 (no deduction for VAT on legal fees incurred in committal proceedings relating to the trader's fraudulent business after the business had ceased); Case C-37/95 *Belgium v Ghent Coal Terminal NV* [1998] All ER (EC) 223, [1998] STC 260, ECJ (EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 17 allows a taxable person to deduct VAT payable by him on goods or services supplied to him for the purpose of investment work intended to be used in connection with taxable transactions); Case C-400/98 *Finanzamt Goslar v Breitsohl* [2001] STC 355, ECJ (a person has the right immediately to deduct the VAT payable or paid on investment expenditure without having to wait for the actual exploitation of his business to begin); Joined Cases C-110/98-C-147/98 *Gabalfrija SL v Agencia Estatal de Administración Tributaria* [2002] 1 CMLR 343, [2002] STC 535, ECJ (member states not entitled to impose conditions on the right to deduct VAT payable or paid on investment expenditure other than those necessary for the levying and collection of tax and the prevention of fraud); Case C-90/02 *Finanzamt Gummersbach v Bockemühl* [2004] 3 CMLR 79, ECJ (taxable person who is liable as a recipient of services for VAT, is not obliged to hold an invoice drawn up in accordance with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 22(3) in order to exercise his right to deduct); Case C-152/02 *Terra Baubedarf-handel GmbH v Finanzamt Osterholz-Scharmbeck* [2004] 3 CMLR 1021, [2005] STC 525, ECJ (exercise of right to deduct does not generally arise until receipt of invoice). It is not, however, essential that the business continues to trade: see Case C-32/03 *I/S Fini H v Skatteministeriet* [2005] STC 903, ECJ (a person who has ceased an economic activity but who, because the lease contains a non-termination clause, continues to pay the rent and charges on the premises used for that activity is entitled to deduct the VAT on the amounts thus paid provided that there is a direct and immediate link between the payments made and the commercial activity and that the absence of any fraudulent or abusive intent has been established). See also Case C-43/96 *EC Commission v France (United Kingdom intervening)* [1998] All ER (EC) 951, ECJ; Case C-305/97 *Royco Leasing Ltd v Customs and Excise Comrs* [1999] All ER (EC) 908, [1999] STC 998, ECJ (EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 17(6) authorises member states to retain all exclusions provided for under national law) (applied in Case C-345/99 *EC Commission v France (United Kingdom intervening)* [2003] STC 372, ECJ (amendment of national laws reducing scope of permitted exclusions under art 17(6) lawful)); Case C-40/00 *EC Commission v France* [2003] STC 390, ECJ (member states entitled to reduce extent of existing exclusions, but, once reduced, they may not be increased to their previous extent); Case C-434/03 *Charles v Staatssecretaris van Financiën* [2005] STI 1258, [2005] All ER (D) 200 (Jul), ECJ (EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 17(6) precludes national legislation preventing a taxable person from allocating capital goods used in part for business purposes and in

part for other purposes wholly to his business and, where appropriate, from deducting immediately and in full the VAT due on the acquisition of those goods). See also Case C-142/99 *Floridiene SA v Belgium* [2001] All ER (EC) 37, [2000] STC 1044, ECJ (dividends distributed and interest paid in respect of a loan by a subsidiary to a holding company are excluded from the calculation of the deductible proportion); Case C-16/00 *Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* [2002] 1 CMLR 688, [2002] STC 460, ECJ (costs incurred in acquisition of subsidiaries were part of the company's general costs and, as such, cost components of its products).

In a number of cases, the issue of deductibility of expenditure on benefits (in particular, hotel accommodation) enjoyed by a party other than the payer has been considered. Technically, there would appear to be a distinction between the question whether the supply has been made to the person claiming the credit and the issue of whether the expenditure was incurred for the purposes of that person's business; but the distinction has not always clearly been made by the courts. In either case, the issues are questions of fact for the tribunal which may be disturbed only in accordance with the principle of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 36 TC 207, HL (if the facts found are such that no person acting judicially and properly instructed as to the law could have come to the determination under appeal). Generally it has been found that there is a supply to the company which pays for the room, for the purposes of its business; but there is a corresponding onwards supply on which output tax must be accounted: *Celtic Football and Athletic Co Ltd v Customs and Excise Comrs* [1983] STC 470 (where there was no argument that there was an onward supply); *Football Association v Customs and Excise Comrs* [1985] VATTR 106; *Ibstock Building Products v Customs and Excise Comrs* [1987] VATTR 1; *Stormseal (UPVC) Window Co Ltd v Customs and Excise Comrs* [1989] VATTR 303. Cf Case C-338/98 *EC Commission v Kingdom of the Netherlands (United Kingdom intervening)* [2003] STC 1506 (VAT component of allowance paid to employee for business use of private vehicle not deductible by employer); *Customs and Excise Comrs v Sooner Foods Ltd* [1983] STC 376 (where the firm met the cost of gift goods being provided to its customers by a third party, in accordance with a promotion scheme it was running, it was not entitled to recover the input tax on the supply of the goods, since they were not supplied to it but to its customers (quaere whether the company was entitled to recover input tax on the cost as a supply of services, if not of goods)); *British Airways plc v Customs and Excise Comrs* [2000] V & DR 74 (in order to receive an input deduction there has to be a prior agreement that goods or services will be supplied at the taxpayer's expense to a third party, and those supplies must be made for purposes of the taxpayer's business).

In connection with the provision of professional services see *Customs and Excise Comrs v British Railways Board* [1975] 3 All ER 451, [1975] STC 498; *Manchester Ship Canal Co v Customs and Excise Comrs* [1982] STC 351; *Ultimate Advisory Services Ltd v Customs and Excise Comrs* (2002) VAT Decision 17610, [2002] STI 1237 (input tax incurred in connection with provision of administrative and legal fees by pension fund trustees may be recovered as incurred for the purposes of its business); *Customs and Excise Comrs v Redrow Group plc* [1999] 2 All ER 1, [1999] STC 161, HL (developer able to deduct VAT on estate agents' fees incurred when selling the houses of potential purchasers (because supply was made to the developer, it being admitted that expenditure was for the purposes of its business)); but see Customs and Excise Business Brief 27/99 [2000] STI 19. As to the right to deduct input tax on professional fees incurred for services effecting the sale of a business as a going concern see Case C-408/98 *Abbey National plc v Customs and Excise Comrs* [2001] All ER (EC) 385, [2001] 1 WLR 769, ECJ. As to the right to deduct input tax on supplies linked to admission to a stock exchange see Case C-465/03 *Kretztechnik AG v Finanzamt Linz* [2005] STC 1118, [2005] All ER (D) 414 (May), ECJ. As to the transfer of a totality of business assets see Case C-497/01 *Zita Modes Sàrl v Administration de L'Enregistrement et des Domaines* [2004] 2 CMLR 533.

As to expenditure having to be a cost component of the taxable supply see *Customs and Excise Comrs v Southern Primary Housing Ltd* [2003] EWCA Civ 1662, [2004] STC 209. See also Case C-137/02 *Finanzamt Offenbach am Main-land v Faxworld Vorgrundungsgesellschaft Peter Hunninghausen und Wolfgang Klein GbR* [2004] 2 CMLR 637, [2005] STC 1192, ECJ.

7 Value Added Tax Act 1994 s 26(2)(a). For the meaning of 'taxable supplies' see PARA 18 note 3 ante.

8 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

9 Value Added Tax Act 1994 s 26(2)(b). For the rules relating to the place of supply of goods and services see PARA 45 et seq ante.

10 For the meaning of 'exempt supplies' see PARA 155 ante. The reference in heads (3)-(5) in the text to exempt supplies is a reference to supplies which are either exempt, or would have been exempt if made in the United Kingdom, by virtue of Sch 9 Pt II Group 2 (as amended) (see PARA 160 ante), or any of Sch 9 Pt II Group 5 items 1-6, 8 (as amended) (see PARA 163 ante): Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 3.

11 Value Added Tax Act 1994 s 26(2)(c); Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, arts 2, 3(a). The Value Added Tax Act 1994 s 26(2)(c) provides for deductions on input tax to be allowable, in addition to those supplies specified in s 26(2)(a), (b) (see the text and notes 7-9 supra), in respect of such other supplies made outside the United Kingdom and such exempt supplies as the Treasury may specify by order for these purposes. Pursuant to this power the Treasury has made the Value Added Tax (Input Tax)

(Specified Supplies) Order 1999, SI 1999/3121 (as amended), specifying the services described in the text and notes 12-14 *infra*. See also *Walter Hall Group plc v Customs and Excise Comrs* [2003] V & DR 257 (issue of shares to United Kingdom nominee on behalf of non-EU beneficial owner not a supply to a person who belonged outside member states). As to what constitutes 'services' see *WHA Ltd v Customs and Excise Comrs* [2004] EWCA Civ 559, [2004] STC 1081. As to the making of orders generally see PARA 14 *ante*.

12 Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 3(b). See notes 10, 11 *supra*.

13 *Ibid* art 3(c). See notes 10, 11 *supra*. The reference in the text to 'intermediary services' is a reference to intermediary services within the meaning of the Value Added Tax Act 1994 Sch 9 Pt II Group 2 item 4 (as amended) (see PARA 160 *post*) or Sch 9 Pt II Group 5 item 5 (as amended) (see PARA 163 *post*): Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 3(c).

14 *Ibid* art 4. See notes 10, 11 *supra*. The supplies referred to in the text are those which fall, or would fall, within the Value Added Tax Act 1994 Sch 9 Pt II Group 15 item 1 or 2 (as added) (see PARA 164 *post*): Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 4.

15 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 *ante*.

16 Such regulations may make different provision for different circumstances and, in particular, may make different provision for different descriptions of goods or services, and may contain such incidental and supplementary provisions as appear to the Commissioners necessary or expedient: Value Added Tax Act 1995 s 26(4). This provision is without prejudice to the generality of s 26(3) (see the text and notes 17-23 *infra*): s 26(4).

17 *Ibid* s 26(3). See the Value Added Tax Regulations 1995, SI 1995/2518, regs 99-110 (as amended); and PARA 224 *et seq post*. These provisions have been said to be exhaustive, so that there is no basis for an argument that, where the apportionment provisions appear to give an unfair result, the trader may rely on the general provisions of the Value Added Tax Act 1994 s 26 to obtain greater recovery of input tax: *Customs and Excise Comrs v University of Wales College, Cardiff* [1995] STC 611. *Cf Dwyer Property Ltd v Customs and Excise Comrs* [1995] STC 1035; *Customs and Excise Comrs v Dennis Rye Ltd* [1996] STC 27.

18 For the meaning of 'prescribed accounting period' see PARA 216 note 6 *ante*.

19 Value Added Tax Act 1994 s 26(3)(a). See the Value Added Tax Regulations 1995, SI 1995/2518, regs 101-102 (as amended), regs 102A-102C (as added); and PARAS 225-226 *post*. For the Commissioners' views on the recovery of VAT charged by an investigating accountant in carrying out a viability study prior to a loan by a bank to a trader see Customs and Excise Business Brief 6/95 [1995] STI 568.

20 Value Added Tax Act 1994 s 26(3)(b). See the Value Added Tax Regulations 1995, SI 1995/2518, reg 107 (as amended), regs 107A-107E (as added); and PARA 232 *post*.

21 Value Added Tax Act 1994 s 26(3)(c). See the Value Added Tax Regulations 1995, SI 1995/2518, regs 108-109; and PARA 231 *post*.

22 *Ie* under or by virtue of any provision of the Value Added Tax Act 1994: s 26(3)(d). As to self-supply see PARA 32 *ante*.

23 *Ibid* s 26(3)(d). See the Value Added Tax Regulations 1995, SI 1995/2518, reg 104; and PARA 225 *post*.

24 *Ie* notwithstanding that the Value Added Tax Act 1994 s 26(3) requires that regulations made thereunder make provision for securing a fair and reasonable attribution of input tax to the specified supplies: s 26(3); Finance Act 1999 s 13(1).

25 *Ibid* s 13(1). Such regulations may require specified persons to keep specified records in relation to specified transactions concerning gold (s 13(5)(a)); require specified persons to give specified information to the Commissioners about specified transactions concerning gold (s 13(5)(b)); and provide for the Value Added Tax Act 1994 Sch 11 para 10(2) (entry and inspection of premises: see PARA 231 *post*) to apply in relation to specified transactions concerning gold as it applies in relation to the supply of goods under taxable supplies (Finance Act 1999 s 13(5)(c)).

26 See the Value Added Tax Act 1994 s 83(c), (e); and PARA 346 *post*.

## UPDATE

### 217 Extent of right to deduct input tax

TEXT AND NOTES--If the benefit of the consideration for the grant of an interest in, right over or licence to occupy land accrues to a person ('the beneficiary') other than the person making the grant, the beneficiary is treated as the person making the grant, and so far as any input tax of the person actually making the grant is attributable to the grant, it is treated as input tax of the beneficiary: Value Added Tax Act 1994 Sch 10 para 40 (Sch 10 substituted by SI 2008/1146).

TEXT AND NOTES 1-6--Input tax is deductible and, accordingly, repayable in appropriate circumstances regardless of whether VAT has been paid on the supply made abroad: *Deutschland Holdings GmbH v HMRC Comrs* (2007) VAT Decision 20267, [2007] STI 2773.

NOTE 2--The right of a taxable person to deduct input tax in respect of a particular transaction is to be determined with reference to that transaction alone; it is immaterial that the transaction is in a series of transactions which are, unknown to him, fraudulent: Cases C-354/03, C-355/03, C-484/03 *Optigen Ltd v Customs and Excise Comrs* [2006] Ch 218, ECJ; *R (on the application of Mobile Export 365 Ltd) v Revenue and Customs Comrs* [2006] EWHC 311 (Admin), [2006] STC 1069. If a taxpayer has the means at his disposal of knowing that by a purchase he is participating in a transaction connected with fraudulent evasion of VAT, he loses his right to deduct input tax: *Mobilx Ltd (in administration) v Revenue and Customs Comrs* [2010] EWCA Civ 517, [2010] All ER (D) 104 (May).

NOTE 6--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

Case C-434/03, cited, reported at [2006] STC 1429. See also Case C-243/03 *EC Commission v French Republic* [2006] STC 1098, ECJ (restriction on right to deduct not permitted by EC Council Directive 77/388 art 19(1); subsidy not directly linked to price of goods or service); Case C-204/03 *EC Commission v Kingdom of Spain* [2005] STC 1087, ECJ; *University of Southampton v Revenue and Customs Comrs* [2006] EWHC 528 (Ch), [2006] STC 1389; Case C-280/04 *Jyske Finans A/S v Skatteministerie* [2006] STC 1744, ECJ; *MBNA Europe Bank Ltd v Revenue and Customs Comrs* [2006] EWHC 2326 (Ch), [2006] STC 2089; *Revenue and Customs Comrs v Gracechurch Management Services Ltd* [2007] EWHC 755 (Ch), [2008] STC 795; Cases C-95/07 and C-96/07 *Ecotrade SpA v Agenzia Delle Entrate-Ufficio di Genova 3* [2008] STC 2626, ECJ; Case C-484/06 *Fiscale eenheid Koninklijke Ahold NV v Staatssecretaris van Financiën* [2009] STC 45, ECJ; Case C-98/07 *Nordania Finans A/S v Skatteministeriet* [2008] STC 3314, ECJ; Case C-371/07 *Danfoss A/S v Skatteministeriet* [2009] STC 701, ECJ; and Case C-377/08 *EGN BV - Filiale Italiana v Agenzia delle Entrate - Ufficio di Roma 2* [2009] STC 2544, ECJ.

*Redrow*, cited, applied in *Baxi Group Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 1378, [2008] STC 491.

Only a person who is acting as a taxable person at the time of purchase of goods is entitled to deduct input tax in respect of them: Case C-378/02 *Waterschap Zeeuws Vlaanderen v Staatssecretaris van Financiën* [2006] 1 CMLR 1, ECJ (public authority, as public body, purchased capital item which it sold as taxable person; no right to deduct input tax on purchase).

See also Case C-369/04 *Hutchison 3G UK Ltd v Revenue and Customs Comrs* [2008] STC 218, ECJ; Case C-25/03 *Finanzamt Bergisch Gladbach v HE* [2007] STC 128, ECJ; and *Revenue and Customs Comrs v Weald Leasing Ltd* [2008] EWHC 30 (Ch), [2008] STC 1601; Case C-488/07 *Royal Bank of Scotland Group plc v Revenue and Customs Comrs* [2009] STC 461, ECJ (member states can adopt own rounding up rules when

employing special methods of calculation provided that principles underpinning common system of value added tax are observed); Application 3991/03 *Bulves AD v Bulgaria* [2009] STC 1193, ECtHR.

NOTE 11--See also *WHA Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 728, [2007] STC 1695; Case C-472/08 *Alstom Power Hydro v Valsts ieņēmumu dienests* [2010] STC 777, ECJ (EC Council Directive 77/388 art 18(4) did not preclude legislation which laid down limitation period of three years in which to make application for refund of excess VAT).

NOTE 25--Finance Act 1999 s 13(5)(c) repealed, s 13(6) amended: Finance Act 2008 Sch 36 para 89, Sch 37 para 10.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(1) INPUT TAX AND OUTPUT TAX/(ii) Deduction of Input Tax/218. Exceptions to the right to deduct input tax; in general.

## **218. Exceptions to the right to deduct input tax; in general.**

The Treasury may by order provide, in relation to such supplies<sup>1</sup>, acquisitions and importations as the order may specify, that value added tax charged on them is to be excluded from any credit<sup>2</sup> as input tax<sup>3</sup>. Any such provision may be framed by reference to the description of goods or services supplied or goods acquired or imported, the persons by whom they are supplied, acquired or imported or to whom they are supplied, the purpose for which they are supplied, acquired or imported, or any circumstances whatsoever<sup>4</sup>; and any such order may contain provision for consequential relief from output tax<sup>5</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 Ie any credit under the Value Added Tax Act 1994 s 25: see PARA 216 ante.

3 Ibid s 25(7). For the meaning of 'input tax' see PARAS 4, 215 ante. For the orders so made see the Value Added Tax (Input Tax) Order 1992, SI 1992/3222 (as amended); and PARA 220 et seq post. See also the Value Added Tax (Tour Operators) Order 1987, SI 1987/1806, art 12; and PARA 214 ante. As to the making of orders generally see PARA 14 ante.

4 Value Added Tax Act 1994 s 25(7)(a).

5 Ibid s 25(7)(b).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(1) INPUT TAX AND OUTPUT TAX/(ii) Deduction of Input Tax/219. Disallowance of input tax in respect of unpaid consideration.

## **219. Disallowance of input tax in respect of unpaid consideration.**

Where a person has become entitled to credit for any input tax<sup>1</sup> and the consideration<sup>2</sup> for the supply<sup>3</sup> to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following either the date of the supply<sup>4</sup> or, if later, the date on which the sum became payable<sup>5</sup>, he is taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the value added tax that is referable to the unpaid consideration or part<sup>6</sup>. A person who has claimed deduction of the whole or part of the VAT on such a supply<sup>7</sup> and has not paid the whole or any part of the consideration<sup>8</sup> must (unless the operative date for VAT accounting purposes for input tax is the date on which payment is made or other consideration is given, or the date of any cheque, if later<sup>9</sup>) make a negative entry<sup>10</sup> in the VAT allowable portion of the relevant part of his VAT account<sup>11</sup>; and if after the end of the relevant period<sup>12</sup> such a person has paid the whole or part of the consideration for the supply in relation to which the input tax repayment was made<sup>13</sup> he must make a corresponding positive entry<sup>14</sup>.

1 Value Added Tax Act 1994 s 26A(1)(a) (s 26A added by the Finance Act 2002 s 22(1)). For the meaning of 'input tax' see PARAS 4, 215 ante. As to entitlement to credit for input tax see PARA 217 ante.

2 For the meaning of 'consideration' generally see PARA 95 ante.

3 For the meaning of 'supply' see PARA 27 ante.

4 Value Added Tax Act 1994 s 26A(1)(b), (2)(a) (as added: see note 1 supra). Section 6 (as amended) (see PARAS 35, 37, 44 ante) applies for determining the time when a supply is to be treated as taking place for these purposes: s 26A(6) (as so added). This date, or the date calculated under s 26A(2)(b) (as added) (see the text and note 5 infra) is known as 'the relevant date': s 26A(1)(b) (as so added).

5 Ibid s 26A(2)(b) (as added: see note 1 supra). See note 4 supra.

6 Ibid s 26A(1) (as added: see note 1 supra).

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 172H(1)(b) (regs 172F-172J added by SI 2002/3027). The Value Added Tax Act 1994 s 26A(4) (as added) provides for the making of regulations, in particular: (1) making provision for restoring the whole or any part of an entitlement to credit for input tax where there is a payment after the end of the six-month period following the relevant date (see note 4 supra) (s 26A(4)(a) (as added: see note 1 supra)); (2) making rules for ascertaining whether anything paid is to be taken as paid by way of consideration for a particular supply (s 26A(4)(b) (as so added)); and (3) making rules dealing with particular cases, such as those involving payment of part of the consideration or mutual debts (s 26A(4)(b) (as so added)). As to the making of regulations generally see PARA 14 ante. Regulations under s 26A (as added) may make such supplementary, incidental, consequential or transitional provisions as appear to the Commissioners for Her Majesty's Revenue and Customs to be necessary or expedient for those purposes (s 26A(3) (as so added)), and may make different provision for different circumstances (s 26A(5) (as so added)). The Value Added Tax Regulations 1995, SI 1995/2518, regs 172F-172J (as added and amended) apply where the supply in relation to which a person has claimed credit for input tax was made on or after 1 January 2003 (reg 172F (as so added)), but none of the circumstances to which the substantive provisions (ie regs 172H, 172I (as added): see the text and notes 8-14 infra) apply is to be regarded as giving rise to any application of regs 34, 35 (reg 34 as amended) (correction of errors: see PARA 276 post): regs 172H(4), 172I(4) (as so added).

As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 The rules on the attribution of payments in ibid reg 170 (as amended) (see PARA 307 post) and, as the case may be, reg 170A (as added) (see PARA 307 post) apply for determining whether anything paid is to be taken as paid by way of consideration for a particular supply: reg 172J (as added: see note 7 supra).

9 Ibid regs 57(b), 172H(5) (reg 172H as added: see note 7 supra).

10 The amount of this negative entry must be such amount as is found by multiplying the amount of the deduction by a fraction of which the numerator is the amount of the consideration for the supply which has not been paid before the end of the relevant period (see note 8 supra) and the denominator is the total consideration for the supply: *ibid* reg 172H(3) (as added: see note 7 supra).

11 *Ibid* reg 172H(2) (as added: see note 7 supra). This duty arises where the person has not paid the whole or any part of the consideration by the end of the period of six months following either the date of the supply (regs 172G(i), 172H(1)(a) (as so added)) or, if later, the date on which the consideration for the supply, or (as the case may be) the unpaid part of it, became payable (reg 172G(ii) (as so added)) ('the relevant period'); and the relevant part of the person's VAT account is that part which relates to the prescribed accounting period of his in which the end of the relevant period falls (reg 172H(2) (as so added)). For the meaning of 'prescribed accounting period' see *PARA 115* note 15 ante.

12 See note 11 supra.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 172I(1)(a), (c) (as added: see note 7 supra).

14 *Ibid* reg 172I(2) (as added: see note 7 supra). The amount of the positive entry must be such amount as is found by multiplying the amount of the input tax repayment by a fraction of which the numerator is the amount of the payment of the whole or part of the consideration (ie the payment referred to in reg 172I(1)(c) (as added) (see the text and notes 12-13 supra)) and the denominator is that consideration for the supply which was not paid before the end of the relevant period: reg 172I(3) (as so added; and amended by SI 2003/532). The positive entry must be made in the VAT allowable portion of that part of the person's VAT account which relates to the prescribed accounting period of his in which payment of the whole or part of the consideration was made: Value Added Tax Regulations 1995, SI 1995/2518, reg 172I(2) (as so added). A person may make a positive entry only if he has made the return for the prescribed accounting period concerned, and has paid any VAT payable by him in respect of that period: reg 172I(1)(b) (as so added).

## UPDATE

### 219 Disallowance of input tax in respect of unpaid consideration

TEXT AND NOTES--As from a date to be appointed, if a person is, as a result of the Value Added Tax Act 1994 s 26A, taken not to have been entitled to any credit for input tax in respect of any supply, and the supply is one in respect of which he is required under s 55A(6) (see *PARA 34A*) to account for and pay VAT, that person is entitled to make an adjustment to the amount of VAT which he is so required to account for and pay: s 26AB(1), (2) (s 26AB added by Finance Act 2006 s 19(2), (8)). The amount of the adjustment is to be equal to the amount of the credit for the input tax to which he is taken not to be entitled: 1994 Act s 26AB(3). Regulations may make such supplementary, incidental, consequential or transitional provisions as appear to the Commissioners for Her Majesty's Revenue and Customs to be necessary or expedient for the purposes of s 26AB; and such regulations may, in particular (1) make provision for the manner in which, and the period for which, the adjustment is to be given effect; (2) require the adjustment to be evidenced and quantified by reference to such records and other documents as may be specified by or under the regulations; (3) require the person entitled to the adjustment to keep, for such period and in such form and manner as may be so specified, those records and documents; (4) make provision for readjustments if any credit for input tax is restored under s 26A: s 26AB(4), (5). Such regulations may make different provision for different circumstances: s 26AB(6).

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## **220. Disallowance of input tax on works of art etc and second-hand goods.**

In general<sup>1</sup>, where:

- 686 (1) a work of art<sup>2</sup> is supplied<sup>3</sup> to a taxable person<sup>4</sup> by, or acquired from another member state<sup>5</sup> by him from, its creator or his successor in title<sup>6</sup>;
- 687 (2) a work of art, an antique<sup>7</sup> or a collectors' item<sup>8</sup> is imported by a taxable person<sup>9</sup>; or
- 688 (3) works of art, antiques, collectors' items or second-hand goods<sup>10</sup> are supplied<sup>11</sup> in circumstances under which value added tax was chargeable on the profit margin<sup>12</sup>,

VAT charged on the supply, acquisition or importation is excluded from any credit<sup>13</sup> as input tax<sup>14</sup>. If, however, the circumstances of the importation or supply are as described in head (1) or head (2) above, the tax on the supply or acquisition is excluded from credit as input tax only if the taxable person has opted to account for VAT on his supplies of such goods on the profit margin<sup>15</sup> and has not elected to account<sup>16</sup> for VAT on his supply of the goods by reference to its value<sup>17</sup>.

1 These provisions derive from EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 26a (added by EC Council Directive 94/5 (OJ L60, 3.3.94, p 16), which requires member states to make special arrangements for taxing the profit margin arising from dealing in supplies of second-hand goods, works of art, collectors' items and antiques. The European Court of Justice has held that the predecessor to EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 26a (as added) (ie art 32) was intended to establish a special system to ensure that goods on which VAT had been definitively charged were not taxed a second time: see Case C-131/91 *'K' Line Air Service Europe BV v Eulaerts NV and Belgium* [1992] ECR I-4513, [1996] STC 597, ECJ. As to the Sixth Directive see PARA 1 note 1 ante.

2 For the meaning of 'work of art' see PARA 117 note 1 ante (definition applied by the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (definitions added by SI 1995/1267; and substituted by SI 1999/3118)).

3 For the meaning of 'supply' see PARA 27 ante.

4 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

5 As to the acquisition of goods from another member state see PARA 19 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

6 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 4(1)(a), (b), (2)(a), (3)(c) (art 4 substituted by SI 1995/1267).

7 'Antiques' means objects other than works of art or collectors' items which are more than 100 years old: Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 3 (definition added by SI 1995/1267).

8 'Collectors' items' means any collection or collector's piece falling within the Value Added Tax Act 1994 s 21(5) (as added and substituted) (see PARA 117 note 3 ante), excluding investment gold coins within the meaning of Sch 9 Pt II Group 15 note (1)(b), (c) (as added) (see PARA 164 ante): Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 3 (definition added by SI 1995/1267; and substituted by SI 1999/3118).

9 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 4(1)(c) (as substituted: see note 6 supra).

10 'Second-hand goods' means tangible movable property, including motor cars, that is suitable for further use as it is or after repair, other than works of art, collectors' items or antiques and other than precious metals

and precious stones: *ibid* art 3 (definition added by SI 1995/1267). Animals (in this instance, horses brought from a private individual and sold on after training) might be 'second-hand goods' within the meaning of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 26a (as added) notwithstanding that the increase in value of the animal on account of the training had not arisen from a 'repair' in the strict meaning of the term: see Case C-320/02 *Förvaltnings AB Stenholmen v Riksskatteverket* [2004] STC 1041, ECJ. For the meaning of 'motor car' see PARA 28 note 9 ante.

11 *Ie* by virtue of an order under the Value Added Tax Act 1994 s 50A (as added) (margin schemes: see PARA 202 ante) or a corresponding provision of the Value Added Tax and Other Taxes Act 1973 (an Act of Tynwald) or by virtue of a corresponding provision of the law of another member state: Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 4(3)(a) (as substituted: see note 6 supra). As to references to the law of another member state see PARA 17 note 2 ante.

12 *Ibid* art 4(2)(b), (3)(a) (as substituted: see note 6 supra).

13 *Ie* any credit under the Value Added Tax Act 1994 s 25: see PARA 216 ante.

14 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 4(1) (as substituted: see note 6 supra).

15 *Ibid* art 4(4)(a) (as substituted: see note 6 supra).

16 *Ie* in accordance with the provisions of an order made under the Value Added Tax Act 1994 s 50A (as added): see PARA 202 ante.

17 Value Added Tax (Input Tax) Order 1992 art 4(4)(b) (as substituted: see note 6 supra).

## UPDATE

### 220 Disallowance of input tax on works of art etc and second-hand goods

NOTES 1, 10--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## **221. Disallowance of input tax on business entertainment.**

'Business entertainment' means entertainment, including hospitality of any kind, provided by a taxable person<sup>1</sup> in connection with a business<sup>2</sup> carried on by him<sup>3</sup>; and value added tax charged on any goods or services supplied to a taxable person for such purposes, or on any goods acquired by such a person or on any goods imported by him for such purposes, is excluded from any credit<sup>4</sup> as input tax<sup>5</sup>. Where pursuant to these provisions a taxable person has claimed no input tax on a supply<sup>7</sup> of any services, VAT is charged on a supply by him of the services in question as if that supply were for a consideration equal to the excess of the consideration for which the services are supplied by him over the consideration for which the services are supplied to him, and accordingly is not charged unless there is such an excess<sup>8</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'business' see PARA 23 ante.

3 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 5(3). 'Business entertainment' does not, however, include the provision of any such entertainment for either or both: (1) employees of the taxable person (art 5(3)(a)); or (2) if the taxable person is a body corporate, its directors or persons otherwise engaged in its management (art 5(3)(b)), unless the provision of entertainment for such persons is incidental to its provision for others (art 5(3)). The vital characteristic of 'business entertainment' for these purposes is that the recipient enjoys food, drink or similar benefits free of charge, whether or not the provider of it has obtained any recompense from elsewhere; these provisions are intended to prevent situations where neither the recipient nor the supplier pays VAT, the recipient because he had made no payment at all and the supplier by claiming credit for input tax incurred on such supplies: see *BMW (GB) Ltd v Customs and Excise Comrs* [1997] STC 824. Thus hospitality in the form of free meals and accommodation provided to sales representatives at a training seminar is business entertainment for these purposes (*Customs and Excise Comrs v Shaklee International* [1981] STC 776, CA): where, however, such hospitality was provided in satisfaction of a reciprocal obligation incurred in participating in an international football tournament it was not 'business entertainment' because it was not free of charge to the recipient (*Celtic Football and Athletic Co Ltd v Customs and Excise Comrs* [1983] STC 470, Ct of Sess). A dinner dance provided as a reward to one's employees is not business entertainment: *KPMG Peat Marwick McLintock v Customs and Excise Comrs* (1993) VAT Decision 10135, [1993] STI 912. Expenditure on free hospitality to guests invited to a film première party, to publicise the film and ensure its success in United Kingdom to the distributor's benefit, was provided in connection with the distributor's business and was accordingly 'business entertainment': see *Entertainment Group of Companies Ltd v Customs and Excise Comrs* [2000] V & DR 447.

4 Value Added Tax (Input Tax) Order 1992 art 5(3)(b).

5 Is excluded from any credit under the Value Added Tax Act 1994 s 25: see PARA 216 ante. For the meaning of 'input tax' see PARAS 4, 215 ante.

6 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 5(1) (amended by SI 1995/281).

7 For the meaning of 'supply' see PARA 27 ante.

8 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 5(2) (amended by SI 1999/2930). Where expenditure is incurred on a supply of services to be used both for business entertainment and to a measurable extent for other business purposes, a trader is entitled to a partial credit in respect of the input tax based on an apportionment between entertainment and non-entertainment business use: *Thorn EMI plc v Customs and Excise Comrs* [1995] STC 674, CA (over-ruling *Customs and Excise Comrs v Plant Repair and Services (South Wales) Ltd* [1994] STC 232). See also the Value Added Tax Act 1994 s 84(4) (limitation on right to appeal against decision disallowing credit for tax as input tax on the ground that the relevant supply was of something in the nature of a luxury, amusement or entertainment); and PARA 347 post.

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## **222. Disallowance of input tax on certain building works.**

Where a taxable person<sup>1</sup> constructing, or effecting any works to, a building, in either case for the purpose of making a grant of a major interest<sup>2</sup> in it, or in any part of it or its site, incorporates goods other than building materials<sup>3</sup> in any part of the building or its site, input tax<sup>4</sup> on the supply<sup>5</sup>, acquisition or importation of the goods is excluded from credit<sup>6</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 I.e. a major interest which is of a description in the Value Added Tax Act 1994 s 30(2), Sch 8 (as amended): see PARA 174 et seq ante. For the meaning of 'major interest' see PARA 30 note 2 ante.

3 'Building materials' means any goods the supply of which would be zero-rated if supplied by a taxable person to a person to whom he is also making a supply of a description within ibid Sch 8 Pt II Group 5 item 2 or item 3 (as substituted and amended) (see PARA 179 ante) or Sch 8 Pt II Group 6 item 2 (as substituted) (see PARA 181 ante): Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 2 (definition added by SI 1995/281). For the meaning of 'zero-rated' see PARA 174 ante. See also *Rialto Homes plc v Customs and Excise Comrs* [1999] V & DR 477 (where it was held that 'building materials' included trees and shrubs used to landscape a housing development).

4 For the meaning of 'input tax' see PARAS 4, 215 ante.

5 For the meaning of 'supply' see PARA 27 ante.

6 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 6 (substituted by SI 1995/281). The credit referred to in the text is credit under the Value Added Tax Act 1994 s 25: see PARA 216 ante.

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### 223. Input tax on motor cars.

As a general rule<sup>1</sup>, the value added tax charged on the supply<sup>2</sup> to, or the acquisition from another member state<sup>3</sup> or importation by, a taxable person<sup>4</sup> of a motor car<sup>5</sup> is excluded from any credit<sup>6</sup> as input tax<sup>7</sup>. Where the supply is a letting of a motor car on hire, one-half of the tax is excluded from credit<sup>8</sup>. That apart, the general rule does not apply<sup>9</sup> and VAT is not excluded from credit where:

- 689 (1) a 'qualifying motor car'<sup>10</sup> is let on hire or supplied to, or acquired from another member state or imported by, a taxable person who intends to use it either exclusively for the purposes of a business carried on by him<sup>11</sup> or primarily either to provide it on hire with the services of a driver for the purpose of carrying passengers<sup>12</sup>, to provide it for self-drive hire<sup>13</sup>, or to use it as a vehicle in which instruction in the driving of a motor car is to be given by him<sup>14</sup>;
- 690 (2) the motor car forms part of the stock in trade of a motor manufacturer or a motor dealer<sup>15</sup>;
- 691 (3) the supply is a letting on hire of a motor car which is not a qualifying motor car<sup>16</sup>;
- 692 (4) the motor car is unused and is supplied to a taxable person whose only taxable supplies<sup>17</sup> are concerned with the letting of motor cars on hire to another taxable person whose business consists predominantly of the letting on hire of motor vehicles to handicapped persons<sup>18</sup> in receipt of a disability living allowance<sup>19</sup>; or
- 693 (5) the motor car is unused and is supplied on a letting on hire to a taxable person whose business consists predominantly of the letting on hire of motor vehicles to handicapped persons in receipt of a disability living allowance by a taxable person whose only taxable supplies are concerned with the letting on hire of motor cars to such a taxable person<sup>20</sup>.

1 The subject to the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2)-(2H) (art 7(2) as substituted; and art 7(2A)-(2H) as added): see the text and notes 8-20 infra.

2 'Supply' for these purposes includes a letting on hire: *ibid* art 7(1)(a) (amended by SI 1995/1666). For the meaning of 'supply' generally see PARA 27 ante.

3 For the meaning of 'another member state' see PARA 4 note 15 ante. As to acquisition from another member state see PARA 19 ante.

4 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

5 For the meaning of 'motor car' see PARA 28 note 9 ante.

6 The under the Value Added Tax Act 1994 s 25: see PARA 216 ante.

7 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(1) (amended by SI 1995/281; SI 1995/1666). Motor vehicles purchased by the police in order to carry out their public duties are not exempt from the provisions of the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7 (as amended): *R v Customs and Excise Comrs, ex p Greater Manchester Police Authority* [2000] STC 620; *affd* [2001] EWCA Civ 213, [2001] STC 406.

8 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2H) (art 7(2) substituted, and art 7(2A)-(2H) added, by SI 1995/1666).

9 The Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(1) (as amended) does not apply: art 7(2) (as substituted: see note 8 supra).

10 A motor car is a 'qualifying motor car' for these purposes if: (1) it has never been supplied, acquired from another member state, or imported in circumstances in which the VAT on that supply, acquisition or importation was wholly excluded from credit as input tax by virtue of *ibid* art 7(1) (as amended) (see art 7(2A)(a) (as added) (see note 8 supra); and amended by SI 1999/2930)); or (2) a taxable person has elected for it to be treated as such (see art 7(2A)(b) (as so added and amended)). A taxable person may elect for a motor car to be treated as a qualifying motor car only if: (a) it is first registered on or after 1 August 1995 (see art 7(2B)(a) (as so added)); (b) it was supplied to, or acquired from another member state or imported by, him prior to that date in circumstances in which the VAT on that supply, acquisition or importation was wholly excluded from credit as input tax by virtue of art 7(1) (as originally enacted) (see art 7(2B)(b) (as so added)); and (c) it had not been supplied on a letting on hire by him prior to 1 August 1995 (see art 7(2B)(c) (as so added)). References to registration of a motor car mean registration in accordance with the Vehicle Excise and Registration Act 1994 s 21 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 519); Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2D) (as so added). The VAT on the supply of a car which is not a qualifying motor car may nevertheless be creditable as input tax if it is a supply by letting on hire: see the text and note 16 *infra*.

Where a registered person provides a VAT invoice relating, in whole or in part, to the supply of the letting on hire of a motor car other than for self-drive hire, he is obliged to state on the invoice whether or not the motor car is a qualifying motor car under art 7(2A) (as added): see the Value Added Tax Regulations 1995, SI 1995/2518, reg 14(6) (added by SI 1995/3147); and PARA 281 *post*. As to VAT invoices see PARAS 245-246 *post*.

11 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2)(a) (as substituted (see note 8 supra); and amended by SI 1998/2767); Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2E)(a) (as added: see note 8 supra). This is subject to the proviso that a taxable person is not to be taken to intend to use a motor car exclusively for the purposes of a business carried on by him if he intends: (1) to let it on hire to any person either for no consideration or for a consideration which is less than that which would be payable in money if it were a commercial transaction conducted at arm's length (art 7(2G)(a) (as so added)); or (2) to make it available (otherwise than by letting it on hire) to any person (including, where the taxable person is an individual, himself, or where the taxable person is a partnership, a partner) for private use, whether or not for a consideration (art 7(2G)(b) (as so added)). The provision of an interest-free loan may constitute 'consideration': *Tamburello Ltd v Customs and Excise Comrs* [1996] V & DR 268. For the meaning of 'business' see PARA 23 *ante*.

The fact that a taxpayer cannot limit a vehicle's insurance policy to cover only business use is not necessarily indicative of his intentions at the time of purchase as to the vehicle's use, and the fact that an insurance policy enables a vehicle lawfully to be used for private purposes does not mean that the taxpayer intended to make it available for such use: see *Grace v Customs and Excise Comrs* (1998) VAT Decision 15323, [1998] STI 642. The decision in that case also states that the intention of the taxpayer as to a vehicle's use must be tested at the time when the input tax is incurred, which has been accepted by the Commissioners for Her Majesty's Revenue and Customs, who have stated that the business must genuinely have no intention to make the car available for private use at that time and that they will closely examine any purported change of intention following input tax recovery (see Customs and Excise Business Brief 15/95 [1995] STI 1263). An intention to use a vehicle exclusively for business purposes does not, however, exclude the possibility of an intention to make it available for private use (*Customs and Excise Comrs v Upton (t/a Fagomatic)* [2002] EWCA Civ 520, [2002] STC 640); where private use is possible, whatever the expressed intention of the taxpayer to limit the use to business use, it can be taken to have been intended for these purposes (*Skellett (t/a Vidcom Computer Services) v Customs and Excise Comrs* (2002) VAT Decision 17855, [2003] STI 606). These cases, which involved taxpayers buying vehicles for themselves, have been distinguished in situations where a vehicle is bought by an employer for an employee, in which the employer's intention that it be used for business purposes only was found to be decisive: see *Customs and Excise Comrs v Elm Milk Ltd* [2005] EWHC 366 (Ch), [2005] STC 776. Cf *Paterson v Customs and Excise Comrs* (2001) VAT Decision 17323, [2002] STI 127; *Squibb & Davies (Demolition) Ltd v Customs and Excise Comrs* (2002) VAT Decision 17829, [2003] STI 511.

As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 *ante*.

12 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2E)(b), (2F)(a) (as added: see note 8 supra).

13 *Ibid* art 7(2F)(b) (as added: see note 8 supra). 'Self-drive hire' means hire where the hirer is the person normally expected to drive the motor car and the period of hire to each hirer, together with the period of hire of any other motor car expected to be hired to him by the taxable person, will normally be less than 30 consecutive days (art 7(3)(b)(i)) and will normally be less than 90 days in any period of 12 months (art 7(3)(b)(ii)).

14 *Ibid* art 7(2F)(c) (as added: see note 8 supra).



15 Ibid art 7(2)(aa) (art 7(2) as substituted (see note 8 supra); and art 7(2)(aa) added by SI 1999/2930). For the meaning of 'motor manufacturer' see PARA 96 note 15 ante; for the meaning of 'motor dealer' see PARA 96 note 16 ante; and for the meaning of 'stock in trade' see PARA 96 note 22 ante.

16 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2)(b) (as substituted (see note 8 supra); and amended by SI 1998/2767).

17 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

18 If his business consists predominantly of making supplies of a description falling within the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 12 item 14: see PARA 186 ante.

19 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2)(c) (as substituted: see note 8 supra). There is no statutory definition of an unused motor car, but the Commissioners of Customs and Excise expressed their views on its meaning in a Press Release dated 25 June 1982: see [1982] STI 278.

20 Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2)(d) (as substituted: see note 8 supra).

## UPDATE

### 223 Input tax on motor cars

NOTE 5--For this purpose, there is excluded from the definition of 'motor car' a vehicle which is not capable of carrying 12 or more seated persons solely because it has been adapted for wheelchair users: SI 1992/3222 art 2 (amended by SI 2009/217).

NOTE 11--*Elm Milk*, cited, affirmed: [2006] EWCA Civ 164, [2006] ICR 880. *Upton*, cited, followed in *Revenue and Customs Comrs v Shaw* [2006] EWHC 3699 (Ch), [2007] STC 1525 (difficult to see how sole trader could ever pass test set out in SI 1992/3222 art 7(2G)). See also *Thompson (t/a Thompson (HAS) & Co) v Customs and Excise Comrs* [2005] EWHC 342 (Ch), [2005] STC 1777.

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## **224. Input tax and partial exemption; in general.**

The determination of a taxable person's entitlement to credit for input tax<sup>1</sup> is, in theory, carried out in two stages. At the first stage, which arises at the end of the prescribed accounting period in which the input tax is incurred, the taxable person is entitled provisionally to deduct the amount of input tax which, in accordance with regulations, is attributable to taxable supplies<sup>2</sup>. However, a taxable person<sup>3</sup> who incurs exempt input tax<sup>4</sup> has applied to him a longer period which in most cases will correspond with the tax year<sup>5</sup>. In such a case, the taxable person must generally recalculate the amount of his input tax which is attributable to his taxable supplies during the longer period; where, on carrying out that recalculation, it is ascertained that there was an over-deduction or under-deduction of input tax, the trader makes the appropriate adjustment in his next following return<sup>6</sup>.

1 For the meaning of 'input tax' see PARAS 4, 215 ante.

2 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 101(1) (amended by SI 2004/3140); and PARA 225 post. For the meaning of 'taxable supply' see PARA 18 note 3 ante; and for the meaning of 'prescribed accounting period' generally see PARAS 115 note 15, 216 note 6 ante. See, however, note 5 infra.

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 'Exempt input tax' means input tax incurred by a taxable person on goods imported or acquired by, or goods or services supplied to, him in so far as they are used by him or are to be used by him, or a successor of his, in making exempt supplies, or supplies outside the United Kingdom which would be exempt if made in the United Kingdom, other than any input tax which is allowable under the Value Added Tax Regulations 1995, SI 1995/2518, reg 103 (as amended), reg 103A (as added) or reg 103B (as added) (see PARAS 227-229 post): reg 99(1)(a) (substituted by SI 2002/1074; and amended by SI 2004/3140). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante. For the meaning of 'successor' see PARA 231 post (definition applied by the Value Added Tax Regulations 1995, SI 1995/2518, reg 99(1)(a) (as so substituted and amended)).

5 See *ibid* reg 99(3), (4). The Commissioners for Her Majesty's Revenue and Customs may, however, approve in the case of a taxable person who incurs exempt input tax, or a class of such persons, that a longer period is to apply which need not correspond with a tax year: reg 99(7). The 'tax year' of a taxable person means:

102 (1) the first period of 12 calendar months commencing on the first day of April, May or June, according to the prescribed accounting periods allocated to him, next following his effective date of registration (determined in accordance with the Value Added Tax Act 1994 Sch 1 (as amended), Sch 2 (as amended), Sch 3 (as amended) or Sch 3A (as added): see PARA 64 et seq ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 99(1)(d)(i) (amended by SI 2000/794)); or

103 (2) any subsequent period of 12 calendar months commencing on the day following the end of his first, or any subsequent, tax year (Value Added Tax Regulations 1995, SI 1995/2518, reg 99(1)(d)(ii)),

although the Commissioners may approve or direct that a tax year is to be a period of other than 12 calendar months or that it is to commence on another date than that determined in accordance with head (1) or head (2) above (reg 99(1)(d)). For the purposes of Pt XIV (regs 99-111) (as amended) (see PARA 225 et seq post), 'prescribed accounting period' means: (a) a prescribed accounting period such as is referred to in reg 25 (as amended) (see PARA 247 post) (reg 99(1)(b)(i)); or (b) a special accounting period, where the first prescribed accounting period would otherwise be six months or longer, save that this does not apply where the reference to the prescribed accounting period is used solely in order to identify a particular return (reg 99(1)(b)(ii)). 'Special accounting period' means each of a succession of periods of the same length as the next prescribed accounting period which does not exceed three months; and (i) the last such period ends on the day before the commencement of that next prescribed accounting period (reg 99(1)(c)(i)); and (ii) the first such period

commences on the effective date of registration determined in accordance with the Value Added Tax Act 1994 Sch 1 (as amended), Sch 2 (as amended), Sch 3 (as amended) or Sch 3A (as added) and ends on the day before the commencement of the second such period (Value Added Tax Regulations 1995, SI 1995/2518, reg 99(1)(c) (ii) (amended by SI 2000/794)). For the meaning of 'return' see PARA 115 note 13 ante.

Where, however, a taxable person did not incur exempt input tax in his immediately preceding tax year or registration period, his longer period begins on the first day of the prescribed accounting period in which he incurs exempt input tax (Value Added Tax Regulations 1995, SI 1995/2518, reg 99(4)(a)) and ends on the last day of that tax year (reg 99(4)(b)), except where he incurs exempt input tax only in the last prescribed accounting period of his tax year, in which case no longer period is to be applied to him in respect of that tax year (reg 99(4)). A taxable person who incurs exempt input tax during his registration period has applied to him a longer period which begins on the first day on which he incurs exempt input tax and ends on the day before the commencement of his first tax year: reg 99(5). In the case of a taxable person ceasing to be taxable (see PARA 63 ante) during a longer period applicable to him, that longer period ends on the day on which he ceases to be taxable: reg 99(6). The 'registration period' of a taxable person means the period commencing on his effective date of registration determined in accordance with the Value Added Tax Act 1994 Sch 1 (as amended), Sch 2 (as amended), Sch 3 (as amended) or Sch 3A (as added) and ending on the day before the commencement of his first tax year: Value Added Tax Regulations 1995, SI 1995/2518, reg 99(1)(e) (amended by SI 2000/794).

As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 See PARA 231 post.

## **UPDATE**

### **224 Input tax and partial exemption; in general**

NOTE 4--SI 2995/2518 reg 99(1)(a) further amended: SI 2009/820.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(1) INPUT TAX AND OUTPUT TAX/(ii) Deduction of Input Tax/225. Attribution of input tax to taxable supplies; the general method.

## **225. Attribution of input tax to taxable supplies; the general method.**

In general<sup>1</sup>, the amount of input tax<sup>2</sup> which a taxable person<sup>3</sup> is entitled to deduct provisionally is the amount which is attributable to taxable supplies<sup>4</sup> in accordance with the following provisions<sup>5</sup>. In respect of each prescribed accounting period<sup>6</sup>, goods imported or acquired by, and goods or services supplied to, the taxable person in the period must be identified<sup>7</sup>. There is attributed to taxable supplies the whole of the input tax on such of those goods or services as are used, or to be used, by the taxable person exclusively<sup>8</sup> in making taxable supplies<sup>9</sup>. No part of the input tax on such of those goods or services as are used, or to be used, by the taxable person exclusively in making exempt supplies<sup>10</sup>, or in carrying on any activity other than the making of taxable supplies, is to be attributed to taxable supplies<sup>11</sup>. There is also attributed to taxable supplies such proportion of the input tax on such of those goods or services as are used, or to be used, by the taxable person in making both taxable and exempt supplies<sup>12</sup> as bears the same ratio to the total of such input tax as the value of taxable supplies made by him bears to the value of all supplies<sup>13</sup> made by him in the period<sup>14</sup>. In calculating this proportion there is excluded:

- 694 (1) any sum receivable by the taxable person in respect of any supply of capital goods<sup>15</sup> used by him for the purposes of his business<sup>16</sup>;
- 695 (2) any sum receivable by him in respect of any of certain descriptions of supplies<sup>17</sup> made by him which are incidental to one or more of his business activities<sup>18</sup>;
- 696 (3) that part of the value of any supply of goods on which output tax<sup>19</sup> is not chargeable by virtue of any Treasury order<sup>20</sup> unless the taxable person has imported, acquired or been supplied with the goods for the purposes of selling them<sup>21</sup>; and
- 697 (4) the value of any supply which the taxable person makes<sup>22</sup> to himself<sup>23</sup>.

1 Other methods of attributing input tax may be applied (see PARA 226 et seq post), and the provisions of the Value Added Tax Regulations 1995, SI 1995/2518, reg 101 (as amended) are stated to be subject to reg 102 (as amended) and reg 103B (as added): reg 101(1) (amended by SI 2004/3140).

2 For the meaning of 'input tax' see PARAS 4, 215 ante.

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 For the meaning of 'taxable supply' see PARA 18 note 3 ante. See *Southampton Leisure Holdings plc v Customs and Excise Comrs* (2002) VAT Decision 17716, [2002] STI 1523 (management expenses incurred in respect of a share-for-share acquisition and issue of new shares); and Customs and Excise Business Brief 23/02 [2002] STI 1209.

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 101(1) (as amended: see note 1 supra).

6 For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 ante.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 101(2)(a) (amended by SI 1996/1250). As to the treatment of groups for VAT purposes see PARAS 75, 205 et seq ante.

8 For the distinction between 'used wholly in making taxable supplies' (which was the test applied by the relevant regulations until 1 April 1992) and 'used exclusively in making taxable supplies' see *Imperial War Museum v Customs and Excise Comrs* [1992] VATTR 346. Where a partially-exempt reinsurance company incurred VAT on legal fees in connection with disputes arising from treaties to provide taxable supplies of

reinsurance services, the expenses were not merely a consequence of those taxable supplies but were an incident of the supply of reinsurance and were, having regard to the reality of the transaction, used both wholly and exclusively 'in making' the taxable supplies of reinsurance: *Customs and Excise Comrs v Deutsche Ruck UK Reinsurance Co Ltd* [1995] STC 495, following *Customs and Excise Comrs v Pippa-Dee Parties Ltd* [1981] STC 495 and *Customs and Excise Comrs v Diners Club Ltd* [1989] 2 All ER 385, [1989] STC 407, CA; and see also *Midland Bank plc v Customs and Excise Comrs* [1996] V & DR 106, [1996] STI 1302 (where the facts were the converse of those in *Customs and Excise Comrs v Deutsche Ruck UK Reinsurance Co Ltd* supra, being concerned with the deductibility of the VAT on legal fees incurred in the unsuccessful defence of an action for misrepresentation arising from a supply of services to the plaintiff). As to expenditure having to be a cost component of the taxable supply see *Customs and Excise Comrs v Southern Primary Housing Ltd* [2003] EWCA Civ 1662, [2004] STC 209.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 101(2)(b). Where, however, a person is treated as making a supply to himself under or by virtue of any provision of the Value Added Tax Act 1994, the input tax on that supply is not to be allowed as attributable to that supply: Value Added Tax Regulations 1995, SI 1995/2518, reg 104. Instead, such input tax will fall to be allowed, if at all, as part of the taxable person's residual input tax: see the text and note 12 infra. As to self-supply see PARA 32 ante.

In order to be able to attribute an amount of input tax to the taxable supplies made by the trader, it must be shown that there is a direct and immediate link between the expenditure and the supplies; the ultimate aim of the trader in incurring the expense (his 'purpose') is irrelevant: Case C-4/94 *BLP Group plc v Customs and Excise Comrs* [1995] ECR I-983, [1995] STC 424, ECJ (applied in *Dial-a-Phone Ltd v Customs and Excise Comrs* [2004] EWCA Civ 603, [2004] STC 987 (input tax paid on advertising mobile telephones (taxable supplies) and insurance services (exempt supplies) for them; advertising directly linked to supply of services by taxpayer as insurance intermediary even though sale of insurance less important than sale of telephones)). The European legislation, proceeding from an ideal image of a chain of transactions, intends to attach to each transaction only so much VAT liability as corresponds to the added value accruing in that transaction, so that there is deducted from the total amount of VAT the tax which has been occasioned by the preceding link in the chain. Accordingly, where a trader incurs professional fees in an issue of shares to fund its taxable trade, the VAT on the fees is not deductible because the expense is linked directly and immediately to the intervening exempt supply (of shares); but this does not mean that VAT on overheads is non-deductible: such VAT is, rather, to be apportioned between taxable and exempt supplies in accordance with the apportionment method adopted in the relevant member state: see Case C-4/94 *BLP Group plc v Customs and Excise Comrs* supra. See also *Schemepanel Trading Ltd v Customs and Excise Comrs* [1996] STC 871 (input tax can be deducted only to the extent that it is a cost component of a taxable supply; where, therefore, a builder, before registering for VAT, received certain stage payments for work done and, subsequent to registration, discharged bills for supplies made to him whilst he was unregistered (and which thus related both to work done on which he had not charged VAT and work done on which he had charged VAT), he could recover tax charged on supplies made to him as input tax only to the extent that it was a cost component of his taxable supplies, notwithstanding the rules relating to the time of supply, following *Neuvalde Ltd v Customs and Excise Comrs* [1989] STC 395, CA); and see further *Customs and Excise Comrs v Harpcombe Ltd* [1996] STC 726. If a trader incurs expense in acquiring the shares in a company in order to extract the business assets from it to use in his own taxable trade, the VAT element of the expense is deductible since there is no intervening exempt supply by the trader to which the expenditure can more directly be linked: *Customs and Excise Comrs v UBAF Bank Ltd* [1996] STC 372, CA. VAT incurred by a trader in obtaining professional advice as to how to raise capital, before the trader decided to proceed by means of a share issue, was deductible as a general overhead of his business: *Banner Management Ltd v Customs and Excise Comrs* [1991] VATTR 254. Following *Customs and Excise Comrs v UBAF Bank Ltd* supra, the Commissioners of Customs and Excise announced that, where a business acquires assets by way of a transfer as a going concern and the assets are used exclusively to make taxable supplies, the VAT incurred on the cost of acquiring those assets may be attributed to those supplies and VAT recovered accordingly; an apportionment of such VAT must be made where the assets are to be used both for taxable and exempt supplies: see Customs and Excise Business Brief 7/96 [1996] STI 843. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

10 For the meaning of 'exempt supplies' see PARA 155 ante.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 101(2)(c). The right to deduct input tax depends on whether there is a sufficiently direct and immediate link with a taxable economic activity: *RAP Group plc v Customs and Excise Comrs* [2000] STC 980.

12 This proportion is commonly known as 'residual input tax'.

13 Foreign supplies that would have been taxable supplies if made in the United Kingdom are not treated as taxable supplies for these purposes: *Customs and Excise Comrs v Liverpool Institute for Performing Arts* [2001] UKHL 28, [2001] STC 891.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 101(2)(d). The result is that the recoverable residual input tax is determined by multiplying the residual input tax by the value of the taxable supplies for the

relevant period, and dividing the sum by the total input tax for that period. The ratio so calculated must be expressed as a percentage and, if that percentage is not a whole number, must be rounded up: (1) where in any prescribed accounting period or longer period which is applied the amount of input tax which is available for attribution under reg 101(2)(d) prior to any such attribution being made does not amount to more than £400,000 per month on average, to the next whole number (reg 101(4), (5)(a) (reg 101(4) amended, and reg 101(5) added, by SI 2005/762)); and (2) in any other case, to two decimal places (Value Added Tax Regulations 1995, SI 1995/2518, reg 101(5)(b) (as so added)).

15 There is no statutory definition of 'capital goods' for these purposes. They were defined in Case 51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, [1977] 1 CMLR 413, ECJ as: 'goods used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but written off over several years'. See also EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 17(7). See also *Customs and Excise Comrs v JDL Ltd* [2002] STC 1 (whether or not a particular item constitutes capital goods is essentially a question for the tribunal to decide on the facts of the particular case). As to the Sixth Directive see PARA 1 note 1 ante.

16 Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3)(a).

17 The relevant descriptions of supply are as follows: (1) any supply which falls within the Value Added Tax Act 1994 Sch 8 Pt II Group 5 item 1 (as substituted) (grants, by a person constructing the building, of a major interest in a building designed as a dwelling or intended for a relevant residential or charitable purpose etc: see PARA 179 ante), or Sch 8 Pt II Group 6 item 1 (as substituted) (grant of a major interest in a protected building by a person substantially reconstructing it: see PARA 181 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3)(b)(i)); (2) any grant which falls within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1 (grant of any interest in, or right over, land or of any licence to occupy land: see PARA 156 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3)(b)(ii)); (3) any grant which falls within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1(a) (grant of a fee simple in certain new buildings or civil engineering works: see PARA 156 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3)(b)(iii)); (4) any grant which would fall within the Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1 but for an election to waive exemption having effect under Sch 10 para 2 (as amended) (see PARA 157 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3)(b)(iv)); and (5) any supply which falls within the Value Added Tax Act 1994 Sch 9 Pt II Group 5 (finance: see PARA 163 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3)(b)(v)).

18 Ibid reg 101(3)(b).

19 For the meaning of 'output tax' see PARAS 4, 215 ante.

20 Ie any order under the Value Added Tax Act 1994 s 25(7): see PARA 218 ante.

21 Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3)(c). For cases where output tax is restricted on a supply of goods under the Value Added Tax Act 1994 s 25(7) see the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 5(2) (as amended) (re-supply of business entertainment); and PARA 221 ante.

22 Ie under or by virtue of any provision of the Value Added Tax Act 1994: see PARA 32 ante.

23 Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3)(d).

## UPDATE

### 225 Attribution of input tax to taxable supplies; the general method

TEXT AND NOTES--SI 1995/2518 reg 101(1)-(5) further amended: SI 2009/820.

NOTE 8--See *Mayflower Theatre Trust Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 116, [2007] STC 880.

TEXT AND NOTES 12-14--Where a taxable person does not have an immediately preceding longer period (and subject to SI 1995/2518 reg 101(2)(e)), there is to be attributed to taxable supplies such proportion of the residual input tax as bears the same ratio to the total of such input tax as the value of taxable supplies made by him bears to the value of all supplies made by him in the period: SI 1995/2518 reg 101(2)(d) (amended by SI 2009/820). This attribution may be made on the basis of the extent to which the goods or services are used or to be used by him in making taxable supplies: reg 101(2)

(e) (reg 101(2)(e)-(g), (7)-(9) added by SI 2009/820). 'Immediately preceding longer period' means the longer period applicable to the taxable person which ends immediately before the longer period in which the prescribed accounting period in respect of which he is making the attribution required by reg 101(2)(d)-(g) falls; and 'residual input tax' means input tax incurred by a taxable person on goods or services which are used or to be used by him in making both taxable and exempt supplies: reg 101(9), (10). 'Taxable supplies' includes supplies of a description falling within reg 103 (see PARA 227); and input tax incurred on goods or services acquired by or supplied to a taxable person which are used or to be used by him in whole or in part in making supplies falling within the Value Added Tax Act 1994 Sch 9 Group 5 item 1 or 6 (see PARA 163), or supplies made from an establishment situated outside the United Kingdom are, whether the supply in question is made within or outside the United Kingdom, attributed to taxable supplies on the basis of the extent to which the goods or services are used or to be used by him in making taxable supplies: reg 101(7), (8).

Where a taxable person has an immediately preceding longer period and subject to reg 101(2)(g), his residual input tax must be attributed to taxable supplies by reference to the percentage recovery rate for that period: reg 101(2)(f). This attribution may be made using the calculation specified in reg 101(2)(d), provided that that calculation is used for all the prescribed accounting periods which fall within any longer period applicable to a taxable person: reg 101(2)(g). 'Percentage recovery rate' means the amount of relevant residual input tax which the taxable person was entitled under reg 107(1)(a)-(d) (see PARA 231) to attribute to taxable supplies, expressed as a percentage of the total amount of the residual input tax which fell to be so attributed, and rounded up in accordance with reg 101(4), (5); and 'relevant residual input tax' means all residual input tax other than that which falls to be attributed under reg 101(8): reg 101(9).

NOTE 15--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## **226. Partial exemption calculation; special methods.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may approve or direct<sup>2</sup> the use by a taxable person<sup>3</sup> of a method other than the general method of attributing input tax<sup>4</sup> to taxable supplies<sup>5</sup>, and a taxable person using such an approved or directed method must continue to use it until the Commissioners approve or direct the termination of its use<sup>6</sup>. Notwithstanding any provision of any approved or directed method which purports to have the contrary effect, the value of any specified supply<sup>7</sup> must be excluded in calculating the proportion of any residual input tax<sup>8</sup> which is to be treated as attributable to taxable supplies<sup>9</sup>. Where a taxable person who is using an approved or directed method incurs otherwise unattributable input tax<sup>10</sup>, that input tax must be attributed to taxable supplies to the extent that the goods or services are used or to be used in making taxable supplies expressed as a proportion of the whole use or intended use<sup>11</sup>.

Where a taxable person is for the time being using an approved or directed method<sup>12</sup> which does not fairly and reasonably represent the extent to which goods or services are used by him or are to be used by him in making taxable supplies<sup>13</sup>, he may serve on the Commissioners<sup>14</sup>, or the Commissioners may serve on him<sup>15</sup>, a notice to that effect<sup>16</sup>, the effect of which<sup>17</sup> is that in relation to future accounting periods<sup>18</sup> the taxable person must calculate the difference between the attribution made by him in any prescribed accounting period or longer period<sup>19</sup> and an attribution which represents the extent to which the goods or services are used by him or are to be used by him in making taxable supplies<sup>20</sup>, and he must account for the difference on the return<sup>21</sup> for that prescribed accounting period or on the return on which that longer period adjustment is required to be made<sup>22</sup>.

These provisions are subject to the special provisions concerning the attribution of input tax in respect of foreign supplies, self-supplies of investment gold and financial supplies<sup>23</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Any approval so given or direction so made has effect only if it is in writing in the form of a document which identifies itself as being such an approval or direction: Value Added Tax Regulations 1995, SI 1995/2518, reg 102(5) (reg 102(5)-(8) added by SI 2005/762). Any direction under these provisions takes effect from the date upon which the Commissioners give the direction, or from such later date as they may specify: Value Added Tax Regulations 1995, SI 1995/2518, reg 102(4). An approval or direction for the use of a special method to attribute input tax may be combined with any of the Commissioners' other powers: *Labour Party v Customs and Excise Comrs* [2001] V & DR 39.

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 I.e. the method specified in the Value Added Tax Regulations 1995, SI 1995/2518, reg 101 (as amended): see PARA 225 ante. For the meaning of 'input tax' see PARAS 4, 215 ante.

5 Ibid reg 102(1) (amended by SI 2004/3140). For the meaning of 'taxable supplies' see PARA 18 note 3 ante. If the use of a method was allowed prior to 1 August 1989 and that method would otherwise allow it, the value of any supply which, under or by virtue of any provision of the Value Added Tax Act 1994, the taxable person makes to himself, and the input tax on such a supply, must not be included in the calculation: Value Added Tax Regulations 1995, SI 1995/2518, reg 102(1)(a), (b). For the meaning of 'supply' see PARA 27 ante. As to self-supplies see PARA 32 ante.

6 Ibid reg 102(3). The Commissioners are entitled informally to give notice to a trader terminating the use of a special method, having regard to reg 4, which provides that any requirement, direction, demand or



permission by the Commissioners under or for the purposes of the regulations may be made or given by a notice in writing or otherwise: *S and U Stores plc v Customs and Excise Comrs* [1985] STC 506.

7     Ie any supply within the Value Added Tax Regulations 1995, SI 1995/2518, reg 101(3): see PARA 225 ante.

8     Ie any input tax on goods or services which are used, or to be used, by the taxable person in making both taxable and exempt supplies: see PARA 225 ante. For the meaning of 'exempt supplies' see PARA 155 ante.

9     Value Added Tax Regulations 1995, SI 1995/2518, reg 102(2).

10    Ie any input tax the attribution of which to taxable supplies is not prescribed in whole or in part by the method referred to in *ibid* reg 102(6) (as added) (see the text and note 11 *infra*) (see reg 102(7)(a) (as added: see note 2 *supra*)) and which does not fall to be attributed to taxable or other supplies as specified under reg 103 (as amended), reg 103A (as added) or reg 103B (as added) (see reg 102(7)(b) (as so added)). Where the input tax specified in reg 102(7)(a) (as added) is input tax the attribution of which to taxable supplies is only in part not prescribed by the method, only that part the attribution of which is not so prescribed falls within that provision: reg 102(8) (as so added).

11    *Ibid* reg 102(6) (as added: see note 2 *supra*).

12    *Ibid* regs 102A(1)(a), 102C(1)(a) (regs 102A-102C added by SI 2003/3220).

13    Value Added Tax Regulations 1995, SI 1995/2518, regs 102A(1)(b), 102C(1)(b) (as added: see note 12 *supra*).

14    *Ibid* reg 102C(1) (as added: see note 12 *supra*).

15    *Ibid* reg 102A(1) (as added: see note 12 *supra*).

16    *Ibid* regs 102A(1), 102C(1) (as added: see note 12 *supra*). The notice must set out the taxable person's, or as the case may be the Commissioners', reasons in support of that notification and must state the effect of the notice: regs 102A(1), 102C(1) (as so added).

17    A notice served by the taxable person will have the effect described in the text and notes 18-22 *infra* only if it has been approved by the Commissioners: *ibid* reg 102C(1) (as added: see note 12 *supra*).

18    Ie prescribed accounting periods commencing on or after the date of the notice or such later date as may be specified in the notice (*ibid* regs 102A(2)(a), 102C(2)(a) (as added: see note 12 *supra*)), and longer periods to the extent of that part of the longer period falling on or after the date of the notice or such later date as may be specified in the notice (regs 102A(2)(b), 102C(2)(b) (as so added)). For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 ante.

19    *Ibid* regs 102A(2), 102B(1)(a), 102C(2) (as added: see note 12 *supra*).

20    *Ibid* reg 102B(1)(b) (as added: see note 12 *supra*).

21    For the meaning of 'return' see PARA 115 note 13 ante.

22    Value Added Tax Regulations 1995, SI 1995/2518, reg 102B(1) (as added: see note 12 *supra*). Regulation 102B (as added) applies from the date prescribed under reg 102A(2) (as added) or reg 102C(2) (as added) (see the text and notes 18-19 *supra*), unless or until the method referred to in reg 102A(1)(a) (as added) or reg 102C(1)(a) (as added) is terminated under reg 102(3) (see the text and note 6 *supra*): reg 102B(2) (as so added). The Commissioners may alternatively allow another return to be used for this purpose, in which event the taxable person will not be required to account for the difference on the return for the prescribed accounting period or on the return on which that longer period adjustment is required to be made: reg 102B(1) (as so added).

23    *Ibid* reg 102(1) (as amended: see note 5 *supra*). The special provisions concerning the attribution of input tax in respect of foreign supplies are contained in reg 103 (as amended) (see PARA 227 post); the special provisions concerning the attribution of input tax in respect of self-supplies of investment gold are contained in reg 103A (as added) (see PARA 229 post); and the special provisions concerning the attribution of input tax in respect of financial supplies are contained in reg 103B (as added) (see PARA 228 post).

## UPDATE

### 226 Partial exemption calculation; special methods

NOTE 6--When reviewing a decision by the Commissioners to terminate the use of a special exemption method, a VAT and duties tribunal has full jurisdiction and is not limited merely to deciding whether the decision was reasonably made: *Banbury Visionplus Ltd v Revenue and Customs Comrs* [2006] EWHC 1024 (Ch), [2006] STC 1568. See also *St Helen's School Northwood Ltd v Revenue and Customs Comrs* [2006] EWHC 3306 (Ch), [2007] STC 633 (refusal to approve special method; standard method produced more fair and reasonable allocation than proposed special method).

NOTE 7--Reference to SI 1995/2518 reg 101(3) is now to reg 101(3)(a)-(d): reg 102(2) (amended by SI 2009/820).

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## **227. Attribution of input tax to foreign supplies.**

Input tax<sup>1</sup> incurred by a taxable person<sup>2</sup> in any prescribed accounting period<sup>3</sup> on goods imported or acquired by, or goods or services supplied to, him which are used or to be used by him (in whole or in part) in making:

698 (1) supplies<sup>4</sup> outside the United Kingdom<sup>5</sup> which would be taxable supplies<sup>6</sup> if made in the United Kingdom<sup>7</sup>;

699 (2) exempt supplies<sup>8</sup>, other than certain self-supplies of investment gold<sup>9</sup>, of services to a person who belongs outside the member states<sup>10</sup>;

700 (3) exempt supplies, other than certain self-supplies of investment gold, of services which are directly linked to the export of goods to a place outside the member states<sup>11</sup>;

701 (4) in relation to any transaction specified in head (2) or head (3) above, exempt supplies, other than certain self-supplies of investment gold, which consist of the provision of intermediary services<sup>12</sup>; or

702 (5) certain supplies of investment gold<sup>13</sup>,

may be treated as attributed to taxable supplies to the extent that the goods or services are so used, or to be used, expressed as a proportion of the whole use or intended use<sup>14</sup>.

1 For the meaning of 'input tax' see PARAS 4, 215 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 ante.

4 For the meaning of 'supply' see PARA 27 ante.

5 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

6 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 103(a).

8 For the meaning of 'exempt supplies' see PARA 155 ante. The reference in heads (2)-(4) in the text to exempt supplies is a reference to supplies which are either exempt, or would have been exempt if made in the United Kingdom, by virtue of the Value Added Tax Act 1994 Sch 9 Pt II Group 2 (as amended) (see PARA 160 ante) or any of Sch 9 Pt II Group 5 items 1-6, 8 (as amended) (see PARA 163 ante): Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 3.

9 The supplies of a description falling within the Value Added Tax Regulations 1995, SI 1995/2518, reg 103A (as added) (see PARA 229 post): reg 103(b) (amended by SI 1999/3114).

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 103(b); Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, arts 2, 3(a). These provisions are made under the Value Added Tax Act 1994 s 26(2)(c) (see PARA 217 ante). As to supplies of this description see further PARA 217 notes 11-14 ante. As to the making of orders generally see PARA 14 ante.

11 Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 3(b). See note 10 supra.

12 Ibid art 3(c). See note 10 supra. The reference in the text to 'intermediary services' is a reference to intermediary services within the meaning of the Value Added Tax Act 1994 Sch 9 Pt II Group 2 item 4 (as

amended) (see PARA 160 ante) or Sch 9 Pt II Group 5 item 5 (as amended) (see PARA 163 ante): Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 3(c).

13 Ibid art 4. See note 10 supra. The supplies referred to in the text are those which fall, or would fall, within the Value Added Tax Act 1994 Sch 9 Pt II Group 15 item 1 or 2 (as added) (see PARA 164 post): Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 4.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 103 (amended by SI 2004/3140). Credit may thus be claimed for the tax. Once the Value Added Tax Regulations 1995, SI 1995/2518, reg 103 (as amended) is brought into play, it governs the attribution of all the input tax on a use basis, apportioning it among supplies outside the European Union (which are recoverable), other exempt supplies (which are not recoverable), and general business supplies (which are recoverable on the usual partial exemption basis, if appropriate): *Easyjet plc v Customs and Excise Comrs* [2003] V & DR 559.

## **UPDATE**

### **227 Attribution of input tax to foreign supplies**

TEXT AND NOTES--SI 1995/2518 reg 103 applies only where no attribution is to be made under reg 101 (see PARA 225) or reg 102 (see PARA 226): reg 103 (amended by SI 2007/768, SI 2009/820).

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**228. Attribution of input tax on services and related goods used to make supplies of professional services.**

Where:

- 703 (1) input tax<sup>1</sup> has been incurred by a taxable person<sup>2</sup> in any prescribed accounting period<sup>3</sup> on supplies<sup>4</sup> to him of services by accountants<sup>5</sup>, advertising agencies<sup>6</sup>, bodies which provide listing and registration services<sup>7</sup>, financial advisers<sup>8</sup>, lawyers<sup>9</sup>, marketing consultants<sup>10</sup>, persons who prepare and design documentation<sup>11</sup> and any person or body which provides similar services<sup>12</sup>, and of any related goods<sup>13</sup>;
- 704 (2) those services and related goods are used or to be used by the taxable person in making both a supply connected with a specified financial transaction<sup>14</sup> and any other supply<sup>15</sup>; and
- 705 (3) the relevant supply<sup>16</sup> is incidental<sup>17</sup> to one or more of the taxable person's business activities<sup>18</sup>,

that input tax must be attributed to taxable supplies<sup>19</sup> to the extent that the services or related goods are so used or to be used expressed as a proportion of the whole use or intended use, notwithstanding any provision of any input tax attribution method that the taxable person is required or allowed to use which purports to have the contrary effect<sup>20</sup>.

1 For the meaning of 'input tax' see PARAS 4, 215 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 ante.

4 For the meaning of 'supply' see PARA 27 ante.

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 103B(1), (2)(a), (4)(a) (reg 103B added by SI 2004/3140).

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 103B(4)(b) (as added: see note 5 supra).

7 Ibid reg 103B(4)(c) (as added: see note 5 supra).

8 Ibid reg 103B(4)(d) (as added: see note 5 supra).

9 Ibid reg 103B(4)(e) (as added: see note 5 supra).

10 Ibid reg 103B(4)(f) (as added: see note 5 supra).

11 Ibid reg 103B(4)(g) (as added: see note 5 supra).

12 Ibid reg 103B(4)(h) (as added: see note 5 supra).

13 Ibid reg 103B(2)(a) (as added: see note 5 supra).

14 I.e. a supply of a description falling within the Value Added Tax Act 1994 Sch 9 Group 5 item 1 or 6 (see PARA 163 ante) and any supply of the same description which is made in another member state (a 'relevant supply'): Value Added Tax Regulations 1995, SI 1995/2518, reg 103B(3)(a) (as added: see note 5 supra).

15 Ibid reg 103B(2)(b) (as added: see note 5 supra).

16 See note 14 supra.

17 As to the meaning of 'incidental' see *Customs and Excise Comrs v CH Beazer (Holdings) plc* [1989] STC 549.

18 Value Added Tax Regulations 1995, SI 1995/2518, reg 103B(2)(c) (as added: see note 5 supra). For the meaning of 'business' see PARA 23 ante.

19 For the meaning of 'taxable supply' see PARA 18 note 3 ante. 'Taxable supplies' includes supplies of a description falling within ibid reg 103 (as amended) (see PARA 227 ante): reg 103B(3)(b) (as added: see note 5 supra).

20 Ibid reg 103B(2) (as added: see note 5 supra).

## **UPDATE**

### **228 Attribution of input tax on services and related goods used to make supplies of professional services**

TEXT AND NOTES--SI 1995/2518 reg 103B applies only where no attribution is to be made under reg 101 (see PARA 225): reg 103B(2) (amended by SI 2007/768, SI 2009/820).

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## **229. Attribution of input tax on self-supplies of investment gold.**

Input tax<sup>1</sup> incurred by a taxable person<sup>2</sup> in any prescribed accounting period<sup>3</sup> in respect of certain supplies<sup>4</sup> by him of or relating to investment gold<sup>5</sup> is allowable as being attributable to those supplies only to the extent that it is incurred:

- 706 (1) on investment gold supplied to him which would otherwise<sup>6</sup> have been such a supply<sup>7</sup>, or on investment gold acquired by him<sup>8</sup>;
- 707 (2) on a supply to him, an acquisition by him, or on an importation by him of gold other than investment gold which is to be transformed by him or on his behalf into investment gold<sup>9</sup>; or
- 708 (3) on services supplied to him comprising a change of form, weight or purity of gold<sup>10</sup>.

Where a taxable person produces investment gold or transforms any gold into investment gold he is also entitled to credit for input tax incurred by him on any goods or services supplied to him, any acquisitions of goods by him or any importations of goods by him, but only to the extent that they are linked to the production or transformation of that gold into investment gold<sup>11</sup>. Where input tax has been incurred on goods or services which are used or to be used in making supplies of or relating to investment gold<sup>12</sup> and any other supply, that input tax is attributed to the supplies of or relating to investment gold to the extent that the goods or services are so used or to be used, expressed as a proportion of the whole use or intended use<sup>13</sup>.

1 For the meaning of 'input tax' see PARAS 4, 215 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 ante.

4 For the meaning of 'supply' see PARA 27 ante.

5 I.e. supplies which fall within the Value Added Tax Act 1994 Sch 9 Pt II Group 15 item 1 or 2 (as added) (see PARA 164 ante); Value Added Tax Regulations 1995, SI 1995/2518, reg 103A(1) (reg 103A added by SI 1999/3114).

6 I.e. but for an election made under the Value Added Tax (Investment Gold) Order 1999, SI 1999/3116 (see PARA 164 ante) or but for the Value Added Tax Act 1994 Sch 9 Pt II Group 15 note (4)(b).

7 I.e. would have fallen within *ibid* Sch 9 Pt II Group 15 item 1 or 2 (as added) (see note 5 supra).

8 Value Added Tax Regulations 1995, SI 1995/2518, reg 103A(2)(a) (as added: see note 5 supra).

9 *Ibid* reg 103A(2)(b) (as added: see note 5 supra).

10 *Ibid* reg 103A(2)(c) (as added: see note 5 supra).

11 *Ibid* reg 103A(3) (as added: see note 5 supra).

12 See note 5 supra.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 103A(4) (as added: see note 5 supra). Where input tax is so attributed to supplies as described in note 5 supra, the taxable person is entitled to credit for only so

much input tax as is reasonably allowable under reg 103A(2) or (3) (as added) (see the text and notes 1-11: reg 103A(5) (as so added). For the purpose of attributing input tax to such supplies for these purposes, any input tax of that description is deemed to be the only input tax incurred by the taxable person in the prescribed accounting period concerned: reg 103A(6) (as so added).



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**230. Attribution of input tax attributable to exempt supplies as being attributable to taxable supplies.**

Where:

- 709 (1) the exempt input tax<sup>1</sup> of a taxable person<sup>2</sup> in any prescribed accounting period<sup>3</sup> or longer period<sup>4</sup>; or
- 710 (2) in circumstances where an attribution of input tax has been amended<sup>5</sup>, the amount attributed to exempt supplies<sup>6</sup>,

does not amount to more than £625 per month on average<sup>7</sup> and does not exceed one half of all his input tax for the period concerned<sup>8</sup>, all such input tax in that period is treated as attributable to taxable supplies<sup>9</sup>.

These rules are generally known as 'the de minimis rules'.

1   Ie input tax attributed under *ibid* regs 101, 102, 103 (all as amended), regs 103A, 103B (both as added) (see PARA 225 *et seq ante*) and, where the case arises, reg 107 (as amended) (see PARA 231 *post*), to exempt supplies or to supplies outside the United Kingdom which would be exempt if made in the United Kingdom (not being supplies specified in the Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121 (as amended) (see PARAS 217, 227 *ante*)): Value Added Tax Regulations 1995, SI 1995/2518, reg 106(3) (reg 106 substituted, and reg 106A added, by SI 2002/1074; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 106(3) amended by SI 2004/3140). For the meaning of 'input tax' see PARAS 4, 215 *ante*. For the meaning of 'supply' see PARA 27 *ante*. For the meaning of 'exempt supplies' see PARA 155 *ante*. As to the meaning of 'United Kingdom' see PARA 4 note 3 *ante*.

2   For the meaning of 'taxable person' see PARAS 18 note 4, 63 *ante*.

3   Value Added Tax Regulations 1995, SI 1995/2518, reg 106(1)(a) (as substituted: see note 1 *supra*). For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 *ante*.

4   *Ibid* reg 106(1)(b) (as substituted: see note 1 *supra*). As to the longer period see PARA 224 note 5 *ante*. For the purposes of the application of these provisions to a period longer than a prescribed accounting period, the relevant input tax (see note 1 *supra*) must be taken together with the amount of any adjustment in respect of that period under reg 107B (as added) (see PARA 231 *post*): reg 106(1)(b) (as so substituted). In the application of reg 106(1) (as substituted) to a longer period, any treatment of exempt input tax as attributable to taxable supplies in any prescribed accounting period is to be disregarded (reg 106(2)(a) (as so substituted)) and no account is to be taken of any amount or amounts which may be deductible or payable under reg 115 (as amended) (the capital goods scheme: see PARA 237 *post*) (reg 106(2)(b) (as so substituted)).

5   Ie in accordance with *ibid* reg 107A (as added) (see PARA 232 *post*).

6   *Ibid* reg 106A(1), (2) (as added: see note 1 *supra*). The amount of input tax attributed to exempt supplies for this purpose is the input tax attributed under regs 101, 103 (both as amended), regs 103A, 103B (both as added) (see PARA 225 *et seq ante*) to exempt supplies or to supplies outside the United Kingdom which would be exempt if made in the United Kingdom (not being supplies specified in the Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121 (as amended) (see PARAS 217, 227 *ante*)), taken together with the amount of any adjustment under the Value Added Tax Regulations 1995, SI 1995/2518, reg 107A (as added) (see PARA 232 *post*): reg 106A(2) (as added: see note 1 *supra*).

7   *Ibid* reg 106(1)(i) (as substituted: see note 1 *supra*), reg 106A(2)(a) (as added: see note 1 *supra*).

8   *Ibid* reg 106(1)(ii) (as substituted: see note 1 *supra*), reg 106A(2)(b) (as added: see note 1 *supra*).

9 Ibid reg 106(1) (as substituted: see note 1 supra), reg 106A(2) (as added: see note 1 supra). Where a taxable person is entitled to treat all his input tax as attributable to taxable supplies in a case where an attribution of input tax has been amended (ie after the application of reg 107A (as added) in the circumstances set out in note 6 supra), he must calculate the difference between the total amount of input tax for that prescribed accounting period (reg 106A(3)(a)(i) (as so added)), and the amount of input tax deducted in that period, taken together with the amount of any adjustment under reg 107A (as added) (see PARA 232 post) (reg 106A(3)(a)(ii) (as so added)), and include this difference as an under-deduction in a return for the first prescribed accounting period next following the prescribed accounting period referred to in reg 107A(1) (as added) (see PARA 232 post), except where the Commissioners for Her Majesty's Revenue and Customs allow another return to be used for this purpose (reg 106A(3)(b) (as so added)). For the meaning of 'return' see PARA 115 note 13 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

Where in a prescribed accounting period a taxable person has treated input tax as attributable to taxable supplies under reg 106(1) (as substituted) but is not entitled so to do because of the operation of reg 106A(2) (as added), he must include the amount so treated as an over-deduction in a return for the first prescribed accounting period next following the prescribed accounting period referred to in reg 107A(1) (as added) (see PARA 232 post), except where the Commissioners allow another return to be used for this purpose: reg 106A(4) (as so added). Where, however, a registered person has his registration cancelled at or before the end of the prescribed accounting period referred to in reg 107A(1) (as added) (see PARA 232 post), he must account for any adjustment under this reg 106A (as added) on his final return: reg 106A(5) (as so added).

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### **231. Adjustment of attribution: longer periods.**

Where a taxable person<sup>1</sup> to whom a longer period<sup>2</sup> is applicable has provisionally attributed an amount of input tax<sup>3</sup> to taxable supplies<sup>4</sup> in accordance with a method, and all his exempt input tax<sup>5</sup> in that longer period cannot be treated as attributable to taxable supplies in accordance with the de minimis rules<sup>6</sup>, he must:

- 711 (1) determine for the longer period the amount of input tax which is attributable to taxable supplies according to the method used in the prescribed accounting periods<sup>7</sup>;
- 712 (2) ascertain whether there has been, overall, an over-deduction or an under-deduction of input tax, having regard to the determination made under head (1) above and to the sum of the amounts of input tax, if any, which were deducted in the returns for the prescribed accounting periods<sup>8</sup>; and
- 713 (3) include any such amount of over-deduction or under-deduction in a return for the first prescribed accounting period next following the longer period, except where the Commissioners for Her Majesty's Revenue and Customs allow another return to be used for this purpose<sup>9</sup>.

The Commissioners may dispense with this requirement to adjust<sup>10</sup>.

Where, however, a taxable person to whom a longer period is applicable has provisionally attributed an amount of input tax to taxable supplies in accordance with a method, and all his exempt input tax in that longer period can be treated as attributable to taxable supplies in accordance with the de minimis rules, he must<sup>11</sup>:

- 714 (a) calculate the difference between the total amount of his input tax for that longer period and the sum of the amounts of input tax deducted in the returns for the prescribed accounting periods<sup>12</sup>; and
- 715 (b) include any such amount of under-deduction in a return for the first prescribed accounting period next following the longer period, except where the Commissioners allow another return to be used for this purpose<sup>13</sup>.

Where a registered person has his registration cancelled at or before the end of a longer period, he must account for any adjustment under these provisions on his final return<sup>14</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'longer period' see PARA 224 note 5 ante.

3 For the meaning of 'input tax' see PARAS 4, 215 ante.

4 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

5 For the meaning of 'exempt input tax' see PARA 224 note 4 ante.

6 I.e. under the Value Added Tax Regulations 1995, SI 1995/2518, reg 106 (as substituted and amended): see PARA 230 ante.

7 Ibid reg 107(1)(a). For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 ante. Where a taxable person has made such an attribution according to the method specified in reg 101 (as amended) (see PARA 225 ante) and that attribution differs substantially from one which represents the extent to which the goods or services are used by him or are to be used by him, or a successor of his, in making taxable supplies (reg 107B(1) (regs 107B-107E added by SI 2002/1074)), he must calculate the difference (reg 107B(2) (a) (as so added)), and, in addition to any amount required to be included under reg 107(1)(c) (see the text and note 9 infra), account for the amount so calculated on the return for the first prescribed accounting period next following the longer period, except where the Commissioners for Her Majesty's Revenue and Customs allow another return to be used for this purpose (reg 107B(2)(b) (as so added)). For these purposes and for the purposes of reg 107A (as added) (see PARA 232 post): (1) a difference is 'substantial' if it exceeds either £50,000 (reg 107C(a) (as so added)) or 50% of the amount of input tax falling to be apportioned under reg 101(2)(d) (see PARA 225 ante) within the prescribed accounting period referred to in reg 107A(1) (as added) (see PARA 232 post), or longer period, as the case may be, but is not less than £25,000 (reg 107C(b) (as so added)); and (2) a person is the 'successor' of another if: (a) he is a person to whom that other person has transferred assets of his business by a transfer of that business, or part of it, as a going concern (reg 107D(a) (as so added)); and (b) the transfer of the assets is one falling by virtue of an order under the Value Added Tax Act 1994 s 5(3) (see PARA 27 ante) to be treated as neither a supply of goods nor a supply of services (Value Added Tax Regulations 1995, SI 1995/2518, reg 107D(b) (as so added)). Reference to a person's successor include references to the successors of his successors through any number of transfers: reg 107D (as so added). For the meaning of 'return' see PARA 115 note 13 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

Regulation 107B (as added) does not apply where the amount of input tax falling to be apportioned under reg 101(2)(d) (see PARA 225 ante) within the prescribed accounting period referred to in reg 107A(1) (as added) (see PARA 232 post), or longer period, as the case may be, does not exceed: (i) in the case of a person who is a group undertaking in relation to one or more other undertakings (other than undertakings which are treated under the Value Added Tax Act 1994 ss 43A-43C (as added) (see PARA 75 ante) as members of the same group as the person), £25,000 per annum, adjusted in proportion for a period that is not 12 months (Value Added Tax Regulations 1995, SI 1995/2518, reg 107E(1), (2)(a) (as so added)); or (ii) in the case of any other person, £50,000 per annum, adjusted in proportion for a period that is not 12 months (reg 107E(2)(b) (as so added)). For these purposes, 'undertaking' and 'group undertaking' have the same meanings as in the Companies Act 1985 s 259 (as substituted) (see COMPANIES): Value Added Tax Regulations 1995, SI 1995/2518, reg 107E(3) (as so added).

Where a registered person has his registration cancelled at or before the end of a longer period, he must account for any adjustment under reg 107B (as added) on his final return: reg 107B(3) (as so added).

8 Ibid reg 107(1)(b).

9 Ibid reg 107(1)(c).

10 Ibid reg 107(1) (amended by SI 1999/599).

11 Technically, it would appear that the taxable person has made an 'error' in accounting for VAT or in his returns, and he is obliged, therefore, to correct the error either in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 34 (as amended) (see PARA 276 post) or in such manner and within such time as the Commissioners may allow (see reg 35; and PARA 276 post). See *Customs and Excise Comrs v Fine Art Developments plc* [1989] STC 85 at 90, HL, per Lord Keith of Kinkel.

12 Value Added Tax Regulations 1995, SI 1995/2518, reg 107(2)(a).

13 Ibid reg 107(2)(b).

14 Ibid reg 107(3) (added by SI 2002/2074).

## UPDATE

### 231 Adjustment of attribution: longer periods

NOTE 6--Reference to SI 1995/2518 reg 106 omitted: reg 107(1) (amended by SI 2009/820).

TEXT AND NOTES 7-9--Replaced. In the circumstances specified in the text, the taxable person (1) must (subject to heads (2)-(4) below, determine for the longer period the amount of input tax which is attributable to taxable supplies according to the method used in the prescribed accounting periods; (2) must, where he has provisionally

attributed input tax in accordance with SI 1995/2518 reg 101(2)(e) (see PARA 225) in any prescribed accounting period, determine for the longer period the amount of residual input tax which is attributable to taxable supplies on the basis of the extent to which the goods or services are used or to be used by him in making taxable supplies; (3) may, where he has not provisionally attributed input tax in accordance with reg 101(2)(e) but was nevertheless entitled to do so, determine for the longer period the amount of residual input tax which is attributable to taxable supplies on the basis of the extent to which the goods or services are used or to be used by him in making taxable supplies; (4) must, where he has provisionally attributed residual input tax under reg 101(1)(f) (see PARA 225), determine for the longer period the amount of residual input tax which is attributable to taxable supplies using the calculation specified in reg 101(2)(d) (see PARA 225) subject to the provisions of reg 101(3)-(5) (see PARA 225); (5) must apply the tests set out in reg 106 (see PARA 230) to determine whether all input tax in the longer period in question must be treated as attributable to taxable supplies; (6) must calculate the difference between the amount of input tax determined to be attributable to taxable supplies under heads (1)-(5) above and the amounts of input tax (if any) which were deducted in the returns for the prescribed accounting periods; and (7) must include any such amount of over-deduction or under-deduction in a return for the first prescribed accounting period next following the longer period, or for the last prescribed accounting period in the longer period, except where HM Revenue and Customs allow another return to be used: reg 107(1)(a)-(g) (substituted by SI 2009/820). Where a taxable person makes no adjustment as required by SI 1995/2518 reg 107(1), the requirement is that the adjustment is made in the return for the first prescribed accounting period next following the longer period: reg 107(2) (substituted by SI 2009/820). For the meaning of 'residual input tax' see PARA 225 (definition applied by SI 1995/2518 reg 107(10) (added by SI 2009/820).

Reference to SI 1995/2518 reg 107(1)(c) is now to reg 107(1)(g): reg 107(2) (amended by SI 2009/820). Reference to Companies Act 1985 s 259 now to Companies Act 2006 s 1161 (see COMPANIES vol 14 (2009) PARAS 26, 27): SI 1995/2518 reg 107E(2) (amended by SI 2008/954).

SI 1995/2518 r 107B does not apply where input tax falls to be attributed under reg 101(8) (see PARA 225) or reg 107(1)(b) or (c): reg 107B(1) (amended by SI 2009/820). The amount so calculated may instead be accounted for in the return for the last prescribed accounting period in the longer period, if applicable: reg 107(2). The references in regs 107C-107E to an apportionment under reg 101(2)(d) in relation to a longer period include cases where the apportionment is made under reg 107(1)(a) or (d) using the calculation specified in reg 101(2)(d): reg 107F (added by SI 2009/820).

As to the powers of a tribunal to review the exercise of the Commissioners' powers under SI 1995/2518 regs 107B, 107C, see *Abbeyview Bowling Club v Revenue and Customs Comrs* (2008) VAT Decision 20661, [2008] SWTI 1685.

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### **232. Adjustment of attribution: other periods.**

Where a taxable person<sup>1</sup> has made an attribution of input tax to taxable supplies<sup>2</sup>, the prescribed accounting period<sup>3</sup> does not form part of a longer period<sup>4</sup>, and the attribution differs substantially<sup>5</sup> from one which represents the extent to which the goods or services are used by him or are to be used by him, or a successor<sup>6</sup> of his, in making taxable supplies<sup>7</sup>, he must calculate the difference and account for it on the return<sup>8</sup> for the first prescribed accounting period next following the prescribed accounting period in question<sup>9</sup>. The Commissioners for Her Majesty's Revenue and Customs<sup>10</sup> may allow another return to be used for this purpose<sup>11</sup>.

Where a registered person has his registration cancelled at or before the end of the first prescribed accounting period referred to above, he must account for any adjustment<sup>12</sup> on his final return<sup>13</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 Ie an attribution under the Value Added Tax Regulations 1995, SI 1995/2518, reg 101(2)(b), (d) (see PARA 225 ante). For the meaning of 'input tax' see PARAS 4, 215 ante. For the meaning of 'taxable supply' see PARA 18 note 3 ante.

3 For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 ante.

4 For the meaning of 'longer period' see PARA 224 note 5 ante.

5 As to when a difference is 'substantial' see PARA 231 note 7 ante.

6 As to when a person is the 'successor' of another see PARA 231 note 7 ante.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 107A(1) (regs 107A, 107E added by SI 2002/1074).

8 For the meaning of 'return' see PARA 115 note 13 ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 107A(2) (as added: see note 7 supra). Regulation 107A (as added) does not apply where the amount of input tax falling to be apportioned under reg 101(2)(d) (see PARA 225 ante) within the prescribed accounting period referred to in reg 107A(1) (as added) (see the text and notes 1-7 supra), or longer period, as the case may be, does not exceed: (1) in the case of a person who is a group undertaking in relation to one or more other undertakings (other than undertakings which are treated under the Value Added Tax Act 1994 ss 43A-43C (as added) (see PARA 75 ante) as members of the same group as the person), £25,000 per annum, adjusted in proportion for a period that is not 12 months (Value Added Tax Regulations 1995, SI 1995/2518, reg 107E(1), (2)(a) (as so added)); or (2) in the case of any other person, £50,000 per annum, adjusted in proportion for a period that is not 12 months (reg 107E(2)(b) (as so added)). For these purposes, 'undertaking' and 'group undertaking' have the same meanings as in the Companies Act 1985 s 259 (as substituted) (see COMPANIES vol 14 (2009) PARAS 26, 27): Value Added Tax Regulations 1995, SI 1995/2518, reg 107E(3) (as so added).

10 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 107A(2) (as added: see note 7 supra).

12 Ie any adjustment under *ibid* reg 107A (as added) (see the text and notes 1-11 supra).

13 *Ibid* reg 107A(3) (as added: see note 7 supra).

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### **233. Re-attribution of input tax owing to change of use.**

In addition to the process of re-attribution of input tax which a taxable person<sup>1</sup> with exempt input tax<sup>2</sup> must carry out<sup>3</sup>, further adjustments may be required where a taxable person uses, or forms an intention to use, goods or services for a purpose other than that which he originally intended<sup>4</sup>. Such adjustments are required, or possible, only if the change of use or intention occurs before any use of the kind originally intended is made of the supplies in question<sup>5</sup>. Where:

- 716 (1) a taxable person has deducted an amount of input tax which has been attributed to taxable supplies<sup>6</sup> because he intended to use the goods or services in making either taxable supplies<sup>7</sup> or both taxable and exempt supplies<sup>8</sup>; and
- 717 (2) during a period of six years commencing on the first day of the prescribed accounting period<sup>9</sup> in which the attribution was determined, and before that intention is fulfilled, he uses or forms an intention to use the goods or services concerned in making exempt supplies or (if his original intention was to use the goods in making taxable supplies) in making both taxable and exempt supplies<sup>10</sup>,

the taxable person must account on the return<sup>11</sup> for the prescribed accounting period in which the use occurs or the intention is formed, as the case may be, for an amount equal to the input tax which has ceased to be attributable to taxable supplies in accordance with the method which he was required to use when the input tax was first attributed, unless the Commissioners for Her Majesty's Revenue and Customs<sup>12</sup> otherwise allow<sup>13</sup>. He must repay that amount to the Commissioners<sup>14</sup>.

Where a taxable person has incurred an amount of input tax which has not been attributed to taxable supplies because he intended to use the goods or services in making either exempt supplies<sup>15</sup> or both taxable and exempt supplies<sup>16</sup>, and during a period of six years commencing on the first day of the prescribed accounting period in which the attribution was determined and before that intention is fulfilled, he uses or forms an intention to use the goods or services concerned in making taxable supplies or (if his original intention was to use the goods in making exempt supplies) in making both taxable and exempt supplies, then the Commissioners must<sup>17</sup> pay to the taxable person an amount equal to the input tax which has become attributable to taxable supplies in accordance with the method which he was required to use when the input tax was first attributed<sup>18</sup>.

Where any of these provisions<sup>19</sup> apply<sup>20</sup>, the use to which the goods or services concerned are put, or to which they are intended to be put, includes the making of any supplies outside the United Kingdom<sup>21</sup>, and at the time when the taxable person was first required to attribute the input tax he was not required to use a method approved or directed<sup>22</sup> or that method did not provide expressly for the attribution of input tax attributable to supplies outside the United Kingdom<sup>23</sup>, the amount for which, as the case may be, the taxable person is liable to account<sup>24</sup> or is entitled to be paid<sup>25</sup> is calculated by reference to the extent to which the goods or services concerned are used or intended to be used in making taxable supplies, expressed as a proportion of the whole use or intended use<sup>26</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'input tax' see PARAS 4, 215 ante. For the meaning of 'exempt input tax' see PARA 224 note 4 ante.

3 See PARAS 231-232 ante.

4 See the Value Added Tax Regulations 1995, SI 1995/2518, regs 108-110 (reg 110 as substituted and amended); and the text and notes 5-26 infra.

5 See *ibid* regs 108(1), 109(1); and the text and notes 6-10, 15-16 infra.

6 For the meaning of 'taxable supply' see PARA 18 note 3 ante. For the purposes of *ibid* regs 108, 109, 'taxable supplies' includes supplies of a description falling within reg 103 (as amended) (see PARA 227 ante) (reg 110(1)(b) (reg 110 substituted by SI 1999/3114; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 110(1)(b) amended by SI 2004/3140)); and for the purposes of identifying the use, or intended use, of goods and services in regs 108, 109 and Pt XV (regs 112-116) (as amended) (see PARAS 235-237 et seq post), 'taxable supplies' is to be construed as including supplies of a description falling within reg 103A(1) (as added) (see PARA 229 ante), but only to the extent that there is, or would be, credit for input tax on goods and services under reg 103A (as added) (reg 110(2)(b) (as so substituted)).

Any question as to the nature of any supply is to be determined in accordance with the provisions of the Value Added Tax Act 1994 and any regulations or orders made thereunder in force at the time when the input tax was first attributed: Value Added Tax Regulations 1995, SI 1995/2518, regs 108(3), 109(3).

7 *Ibid* reg 108(1)(a).

8 *Ibid* reg 108(1)(b). For the meaning of 'exempt supplies' generally see PARA 155 ante. For the purposes of regs 108, 109, 'exempt supplies' includes supplies outside the United Kingdom which would be exempt if made in the United Kingdom, other than taxable supplies (see note 6 supra) (reg 110(1)(a) (as substituted: see note 6 supra)); and for the purposes of identifying the use, or intended use, of goods and services in regs 108, 109 and Pt XV (regs 112-116) (as amended) (see PARAS 235-237 et seq post), 'exempt supplies' is to be construed as including supplies of a description falling within reg 103A(1) (as added) (see PARA 229 ante), but only to the extent that there is, or would be, no credit for input tax on goods and services under reg 103A (as added) (reg 110(2)(a) (as so substituted)). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

9 For the meaning of 'prescribed accounting period' for these purposes see PARA 224 note 5 ante.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 108(1). See *Tremerton Ltd v Customs and Excise Comrs* [1999] STC 1039 (input tax deducted on professional fees incurred in respect of purchase of land intended for taxable supplies, ie sale of residential properties; land assigned to developer; tax reattributed to supply of land, an exempt supply).

11 For the meaning of 'return' see PARA 115 note 13 ante.

12 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 108(2). The predecessor to reg 108, the Value Added Tax (General) Regulations 1985, SI 1985/886, reg 34 (revoked) led to the assertion by the Commissioners of a method of attribution known as the 'first supply rule', generally relying on the decision in *Sheffield Co-operative Society Ltd v Customs and Excise Comrs* [1987] VATTR 216 that where that provision applied, there was no scope for an apportionment between taxable and exempt supplies because the whole of the input tax had been used in making the first exempt supply. The validity of this approach was examined in *Customs and Excise Comrs v Briararch Ltd*, *Customs and Excise Comrs v Curtis Henderson Ltd* [1992] STC 732 (buildings had been redeveloped with the intention of making taxable supplies from them, but before that intention could be realised, short exempt leases were granted of the whole building; it was held that it could not properly be said that the supplies for which input tax credit was claimed were wholly used in making exempt supplies, since the intention to make future taxable supplies continued to exist; and, in such cases, the Value Added Tax (General) Regulations 1985, SI 1985/886, reg 34 (revoked) envisaged an apportionment). The same principle continues to apply in relation to the Value Added Tax Regulations 1995, SI 1995/2518, regs 108, 109. See also *Cooper & Chapman (Builders) Ltd v Customs and Excise Comrs* [1993] STC 1; cf *Customs and Excise Comrs v University of Wales College, Cardiff* [1995] STC 611. The decisions in Case C-4/94 *BLP Group plc v Customs and Excise Comrs* [1996] 1 WLR 174, [1995] STC 424, ECJ, and *Robert Gordon's College v Customs and Excise Comrs* [1996] 1 WLR 201, [1995] STC 1093, HL, may, however, affect the application of the principle in *Customs and Excise Comrs v Briararch Ltd*, *Customs and Excise Comrs v Curtis Henderson Ltd* supra. In *Svenska International plc v Customs and Excise Comrs* [1999] 2 All ER 906, [1999] STC 406, HL, the Commissioners sought to use the predecessor provision (ie the Value Added Tax (General) Regulations 1985, SI 1985/886, reg 34 (revoked)) to recover input tax deducted by one company on making supplies to another, where the companies subsequently became grouped for VAT and where payment for the supplies was made only after the group registration had been effected; it was held that for the purposes of reg 34 (revoked) a



supply could be deemed to be used subsequent to its actual use and there was accordingly no need for some action or decision by the taxable person which could be characterised as a use or an appropriation for use. Such a conclusion was supported by reg 23(1) (revoked) (see now the Value Added Tax Regulations 1995, SI 1995/2518, reg 90(1); and PARA 38 ante) which, in relation to a continuous supply of services, treated the supply as being made upon payment or upon the issue of a tax invoice. Input tax which is properly attributable to both an exempt supply and a zero-rated supply must be apportioned: *Customs and Excise Comrs v Wiggett Construction Ltd* [2001] STC 933.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 108(2).

15 Ibid reg 109(1)(a).

16 Ibid reg 109(1)(b).

17 Ie on receipt of an application made by the taxable person in such form and manner and containing such particulars as the Commissioners may direct: ibid reg 109(2).

18 Ibid reg 109(2). Where a taxable person pays input tax on a lease and intends to sublet without electing to waive his exemption from VAT, he does not have an intention to use the goods concerned in making taxable supplies and, consequently, he cannot claim repayment of input tax on the head lease under reg 109: see *Royal and Sun Alliance Insurance Group plc v Customs and Excise Comrs* [2003] UKHL 29, [2003] 2 All ER 1073 (lease treated as a series of successive supplies (see PARA 38 ante); therefore, those supplies the taxable person intended to make before it waived its exemption were exempt supplies). See also Customs and Excise Business Brief 14/04 [2004] STI 1194.

19 Ie the Value Added Tax Regulations 1995, SI 1995/2518, reg 108 or reg 109.

20 Ibid reg 110(4)(a) (as substituted: see note 6 supra).

21 Ibid reg 110(4)(b) (as substituted: see note 6 supra).

22 Ie under ibid reg 102 (as amended) (see PARA 226 ante).

23 Ibid reg 110(4)(c) (as substituted: see note 6 supra).

24 Ie under ibid reg 108 (see the text and notes 1-14 supra).

25 Ie under ibid reg 109 (see the text and notes 15-18 supra).

26 Ibid reg 110(4) (as substituted: see note 6 supra). These provisions are subject to reg 103 (as amended) and reg 103B (as added) (see PARAS 227-228 ante): reg 110(4) (amended by SI 2004/3140). Any adjustment under the Value Added Tax Regulations 1995, SI 1995/2518, reg 108 or reg 109 must not cause any more or any less input tax to be credited, as the case may be, in respect of supplies of a description falling within reg 103A(1) (as added) (see PARA 229 ante) than would be allowed or required under reg 103A (as added): reg 110(3) (as so substituted).

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### 234. Exceptional claims for value added tax relief.

On a claim made in the prescribed manner<sup>1</sup>, the Commissioners for Her Majesty's Revenue and Customs may authorise a taxable person to treat as if it were input tax<sup>2</sup>:

- 718 (1) value added tax on supplies<sup>3</sup> of goods or services made to him before the date with effect from which he was, or was required to be, registered<sup>4</sup>, or which was paid by him on the importation or acquisition of goods before that date, for the purposes of a business<sup>5</sup> which either was, or was to be, carried on by him at the time of the supply or payment<sup>6</sup>;
- 719 (2) in the case of a body corporate, VAT on goods obtained for it before its incorporation, or on the supply of services before that time for its benefit or in connection with its incorporation, provided that the person to whom the supply was made or who paid VAT on the importation or acquisition:
  - 21 46. (a) became a member, officer or employee of the body and was reimbursed, or has received an undertaking to be reimbursed, by the body for the whole amount of the price paid for the goods or services<sup>7</sup>;
  47. (b) was not at the time of the importation, acquisition or supply a taxable person<sup>8</sup>; and
  48. (c) imported, acquired or was supplied with the goods, or received the services, for the purpose of a business to be carried on by the body and has not used them for any purpose other than such a business<sup>9</sup>.

22

No VAT may, however, be so treated as input tax in respect of:

- 720 (i) goods or services which had been supplied<sup>10</sup>, or (save as the Commissioners may otherwise allow) goods which had been consumed<sup>11</sup>, by the relevant person<sup>12</sup> before the date with effect from which the taxable person was, or was required to be, registered<sup>13</sup>;
- 721 (ii) goods which had been supplied to, or imported or acquired by, the relevant person more than three years before the date with effect from which the taxable person was, or was required to be, registered<sup>14</sup>;
- 722 (iii) services performed upon goods to which either head (i) or head (ii) above applies<sup>15</sup>; or
- 723 (iv) services which had been supplied to the relevant person more than six months before the date with effect from which the taxable person was, or was required to be, registered<sup>16</sup>.

Correspondingly, if a person who has been, but is no longer, a taxable person makes a claim in such manner and supported by such evidence as the Commissioners may require, they may pay to him the amount of any VAT on the supply of services to him after the date with effect from which he ceased to be, or to be required to be, registered and which was attributable to any taxable supply<sup>17</sup> made by him in the course or furtherance<sup>18</sup> of any business which was carried on by him when he was, or was required to be, registered<sup>19</sup>.

1 le in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 111(3) (as amended), reg 111(3A), (3B) (as added): reg 111(1). In general, and save as the Commissioners for Her Majesty's Revenue and Customs may otherwise allow, a claim must be made on the first return the taxable person is required to make and must be supported by invoices and other evidence as the Commissioners may require (reg 111(3) (reg 111(2) substituted, reg 111(3), (5) amended, and reg 111(2A), (2B), (3A), (3B), (6), (7) added, by SI 1987/1086)), although a taxable person who was registered before 1 May 1997 and has not made any returns before that date is required only to make his claim before the first return he makes (Value Added Tax Regulations 1995, SI 1995/2518, reg 111(3A) (as so added)). The Commissioners may not allow a person to make any claim under reg 111(3) (as amended) in terms such that the value added tax concerned would fall to be claimed as if it were input tax more than three years after the date by which the first return he is required to make is required to be made: reg 111(3B) (as so added). It is necessary to make special provision for the evidence required to support the claim, since the claimant will not have received a VAT invoice (which is required under reg 13(1)(a) only where a registered person makes a taxable supply in the United Kingdom to another taxable person: see PARA 278 post). For the meaning of 'return' see PARA 115 note 13 ante; and as to the meaning of 'invoice' see PARA 17 note 9 ante. For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante. As to VAT invoices see PARAS 245-246 post. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'input tax' see PARAS 4, 215 ante.

3 For the meaning of 'supply' see PARA 27 ante.

4 For the meaning of 'registered' see PARA 64 note 2 ante.

5 For the meaning of 'business' see PARA 23 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 111(1)(a). For a case in which the Commissioners were held rightly to have refused a claim for relief see *Gulland Properties Ltd v Customs and Excise Comrs* (1996) VAT Decision 13955, [1996] STI 938. A taxable person making a claim under the Value Added Tax Regulations 1995, SI 1995/2518, reg 111(1) must thus compile and preserve, for such period as the Commissioners may require: (1) in respect of goods, a stock account showing separately quantities purchased, quantities used in the making of other goods, date of purchase, and date and manner of subsequent disposals of both such quantities (reg 111(4)(a)); and (2) in respect of services, a list showing their description, date of purchase and date of disposal, if any (reg 111(4)(b)).

7 Ibid reg 111(1)(b)(i).

8 Ibid reg 111(1)(b)(ii).

9 Ibid reg 111(1)(b)(iii).

10 Ibid reg 111(2)(a)(i) (as substituted: see note 1 supra).

11 Ibid reg 111(2)(a)(ii) (as substituted: see note 1 supra).

12 le either the taxable person (reg 111(2B)(a) (as added: see note 1 supra)) or, in the case of reg 111(1)(b) (see the text and notes 7-9 supra), the person to whom the supply had been made, or who had imported or acquired the goods, as the case may be (reg 111(2B)(b) (as so added)). See *Jerzynek v Customs and Excise Comrs* (2004) VAT Decision 18767, [2004] STI 2571.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 111(2)(a) (as substituted: see note 1 supra).

14 Ibid reg 111(2)(b) (as substituted: see note 1 supra). This provision does not apply where the taxable person was registered before 1 May 1997 (reg 111(2A)(a) (as added: see note 1 supra)) and did not make any returns before that date (reg 111(2A)(b) (as so added)).

15 Ibid reg 111(2)(c) (as substituted: see note 1 supra).

16 Ibid reg 111(2)(d) (as substituted: see note 1 supra).

17 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

18 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

19 Value Added Tax Regulations 1995, SI 1995/2518, reg 111(5) (as amended: see note 1 supra). This is subject to the proviso that no such claim may be made more than three years after the date on which the

supply of services was made (reg 111(6) (as added: see note 1 supra)), unless the person in question ceased to be, or ceased to be required to be, registered before 1 May 1997 (reg 111(7)(a) (as so added)) and the supply was made before that date (reg 111(7)(b) (as so added)).

## **UPDATE**

### **234 Exceptional claims for value added tax relief**

NOTE 1--The time limit is extended to four years: SI 1995/2518 reg 111(3B) (amended by SI 2009/586). HM Revenue and Customs must not allow a person to make any claim under SI 1995/2518 reg 111(3) in the circumstances where the first return the taxable person was required to make was required to be made on or before 31 March 2006: reg 111(3C) (added by SI 2009/586).

TEXT AND NOTE 14--The time limit is extended to four years: SI 1995/2518 reg 111(2)(b) (amended by SI 2009/586). Where the relevant person was, or was required to be, registered on or before 1 April 2009, no VAT may be treated as if it were input tax under SI 1995/2518 reg 111(1) in respect of goods which were supplied to, or imported or acquired by the relevant person more than three years before the date with effect from which that person was, or was required to be, registered; and where the relevant person was, or was required to be, registered on or before 31 March 2010 and the above does not apply, no VAT may be treated as if it were input tax under reg 111(1) in respect of goods which were supplied to, or imported or acquired by, the relevant person on or before 31 March 2006: reg 111(2C), (2D) (added by SI 2009/586).

NOTE 19--The time limit is extended to four years: SI 1995/2518 reg 111(6) (amended by SI 2009/586). No claim may be made under SI 1995/2518 reg 111(5) in relation to a supply of services which was made on or before 31 March 2006: reg 111(8) (added by SI 2009/586).

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### **235. The capital goods scheme.**

Provision is made for an adjustment to the attribution of input tax<sup>1</sup> to taxable and exempt supplies in the case of substantial amounts of input tax incurred on certain types of capital item<sup>2</sup>. This method of adjustment is usually referred to as 'the capital goods scheme'.

The capital items to which the scheme applies are:

- 724 (1) a computer or an item of computer equipment of a value of not less than £50,000 supplied to, or imported or acquired by, the owner<sup>3</sup>;
- 725 (2) land, a building or part of a building, or a civil engineering work or part of a civil engineering work, where the value of the interest therein supplied to the owner, by way of a taxable supply<sup>4</sup> which is not a zero-rated supply<sup>5</sup>, is not less than £250,000<sup>6</sup>;
- 726 (3) a building or part of a building where the owner's interest in, right over, or licence to occupy the building or part is treated as supplied to him on a change of use from a relevant residential or relevant charitable purpose<sup>7</sup> and the value of that supply<sup>8</sup> is not less than £250,000<sup>9</sup>;
- 727 (4) a building or part of a building where the owner's interest in, right over, or licence to occupy the building or part was, on or before 1 March 1997, treated as supplied to him under the developer's self-supply provisions<sup>10</sup> and the value of that supply<sup>11</sup> was not less than £250,000<sup>12</sup>;
- 728 (5) a building, other than one falling, or capable of falling, within head (3) or head (4) above, which has been constructed by the owner and which is first brought into use by him on or after 1 April 1990 where the aggregate of the value of taxable grants relating to the land on which the building is constructed which are made to the owner, on or after that date<sup>13</sup>, and of the value of all the taxable supplies of goods and services (other than any that are zero-rated) made or to be made to the owner for or in connection with the construction of the building on or after that date, is not less than £250,000<sup>14</sup>;
- 729 (6) a building which the owner alters, or an extension or an annex which he constructs, where additional floor area is created in the altered building, extension or annex, of not less than 10 per cent of the floor area of the building before the alteration in question is carried out, or the extension or annex in question is constructed<sup>15</sup>, and the value of all the taxable supplies of goods and services (other than any that are zero-rated) made or to be made to the owner for or in connection with the alteration, extension or annex in question on or after 1 April 1990 is not less than £250,000<sup>16</sup>;
- 730 (7) a civil engineering work constructed by the owner and first brought into use by him on or after 3 July 1997 where the aggregate of the value of the taxable grants relating to the land on which the civil engineering work is constructed made to the owner on or after that date<sup>17</sup>, and the value of all the taxable supplies of goods and services, other than any that are zero-rated, made or to be made to him for or in connection with the construction of the civil engineering work on or after that date, is not less than £250,000<sup>18</sup>; and
- 731 (8) a building which the owner refurbishes or fits out where the value of capital expenditure on the taxable supplies of services and of goods affixed to the building, other than any that are zero-rated, made or to be made to the owner for or in

connection with the refurbishment or fitting out in question on or after 3 July 1997 is not less than £250,000<sup>19</sup>.

1 For the meaning of 'input tax' see PARAS 4, 215 ante. As to adjustments of attributions generally see PARA 231 ante.

2 See the Value Added Tax Regulations 1995, SI 1995/2518, Pt XV (regs 112-116) (as amended); the text and notes 3-19 infra; and PARA 236 et seq post. Any reference therein to a capital item is to be construed as a capital item to which Pt XV (as amended) applies by virtue of reg 113 (as amended) (see the text and notes 3-19 infra), being an item which a person ('the owner') uses in the course or furtherance of a business carried on by him, and for the purpose of that business, otherwise than solely for the purpose of selling the item: reg 112(2). For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante. See also *Customs and Excise Comrs v JDL Ltd* [2002] STC 1 (whether or not a particular item constitutes capital goods is essentially a question for the tribunal to decide on the facts of the particular case).

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 113(a).

4 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

5 For the meaning of 'zero-rated' see PARA 174 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 113(b) (reg 113(b), (d), (e) amended, and reg 113(g), (h) added, by SI 1997/1614). For the purposes of establishing whether the value of the interest supplied to the owner by way of a taxable supply which is not a zero-rated supply is not less than £250,000, there is excluded so much of that value as may consist of rent (including charges reserved as rent) which is neither payable nor paid more than 12 months in advance nor invoiced for a period in excess of 12 months: Value Added Tax Regulations 1995, SI 1995/2518, reg 113(b) (as so amended).

7 Ibid reg 113(c)(i). The reference in the text to an interest being supplied on a change of use from a relevant residential or relevant charitable purpose is a reference to an interest being treated as supplied under the Value Added Tax Act 1994 Sch 10 para 1(5) (see PARA 180 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 113(c)(i).

8 Ie determined in accordance with the Value Added Tax Act 1994 Sch 10 para 1(6)(b) (as substituted): see PARA 180 ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 113(c)(ii).

10 Ibid reg 113(d)(i) (as amended: see note 6 supra). The reference in the text to an interest in, right over, or licence to occupy a building or part being treated as supplied under the developer's self-supply provisions is a reference to such interest, right or licence being treated as supplied under the Value Added Tax Act 1994 Sch 10 para 6(1) (see PARA 34 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 113(d)(i) (as so amended). As to the phasing out of the developer's self-supply provisions see PARA 34 ante.

11 Ie determined in accordance with the Value Added Tax Act 1994 Sch 10 para 6(2): see PARA 34 ante.

12 Value Added Tax Regulations 1995, SI 1995/2518, reg 113(d)(ii) (as amended: see note 6 supra).

13 Ibid reg 113(e)(i) (as amended: see note 6 supra).

14 Ibid reg 113(e)(ii) (as amended: see note 6 supra).

15 Ibid reg 113(f)(i) (as amended: see note 6 supra).

16 Ibid reg 113(f)(ii) (as amended: see note 6 supra).

17 Ibid reg 113(g)(i) (as added: see note 6 supra).

18 Ibid reg 113(g)(ii) (as added: see note 6 supra).

19 Ibid reg 113(h) (as added: see note 6 supra).

## UPDATE

### 235 The capital goods scheme

NOTE 6--SI 1995/2518 reg 113(d) further amended: SI 2008/1146.

NOTES 7, 8--Reference to Value Added Tax Act 1994 Sch 10 para 1(5) now to Sch 10 para 37(3), and reference to Sch 10 para 1(6)(b) now to Sch 10 para 37(5): SI 1995/2518 reg 113(c) (amended by SI 2008/1146).

NOTES 10, 11--The Value Added Tax Act 1994 Sch 10 para 6(1), (2) has effect as it did prior to the substitution of Sch 10 by SI 2008/1146: SI 1995/2518 reg 113(d) (amended by SI 2008/1146).

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### **236. Period of adjustment under the capital goods scheme.**

The proportion, if any, of the total input tax<sup>1</sup> on a capital item<sup>2</sup> which may be deducted under the partial exemption rules<sup>3</sup> is subject to adjustments in accordance with the provisions of the capital goods scheme<sup>4</sup>. The adjustments must be made over a period determined as follows<sup>5</sup>. In the case of a computer, or an item of computer equipment<sup>6</sup>, the period of adjustment consists of five successive intervals<sup>7</sup>, as it does in the case of an interest in land, a building or a part of a building, or a civil engineering work or part thereof<sup>8</sup>, which is supplied to the owner<sup>9</sup> at a time when the interest has less than ten years to run<sup>10</sup>. In relation to a capital item of any other description, the period of adjustment consists of ten successive intervals<sup>11</sup>.

The first interval applicable to a capital item is determined as follows:

- 732 (1) where the owner is a registered person<sup>12</sup> when he imports, acquires or is supplied with the item as a capital item, the first interval commences on the day of the importation, acquisition or supply<sup>13</sup> and ends on the day before the commencement of his tax year<sup>14</sup> following that day<sup>15</sup>;
- 733 (2) where the owner is a registered person when he appropriates an item to use as a capital item<sup>16</sup>, the first interval commences on the day he first so uses it and ends on the day before the commencement of his tax year following that day<sup>17</sup>;
- 734 (3) where the capital item is a building or part of a building and the owner's interest in, right over, or licence to occupy it is treated as supplied to him on a change of use from a relevant residential or relevant charitable purpose<sup>18</sup>, the first interval commences on the day that interest, right or licence is so treated as supplied to him<sup>19</sup> and ends on the day before the commencement of his tax year following that day<sup>20</sup>;
- 735 (4) where the capital item is a building or part of a building, and the owner's interest in, right over, or licence to occupy it was, on or before 1 March 1997, treated as supplied to him under the developer's self-supply provisions<sup>21</sup>, the first interval commences on the later of 1 April 1990 and the day the owner first uses the building or part, and ends on the day before the commencement of his tax year following the day of commencement of the first interval<sup>22</sup>;
- 736 (5) where the capital item is either a building constructed by the owner and first brought into use by him on or after 1 April 1990<sup>23</sup>, a building which the owner alters, or an extension or annex which he constructs<sup>24</sup>, a civil engineering work constructed by the owner and first brought into use by him after 3 July 1997<sup>25</sup>, or a building which the owner refurbishes or fits out<sup>26</sup>, the first interval commences on the day on which the owner first uses it, or first uses the building which has been refurbished or fitted out, and ends on the day before the commencement of his tax year following that day<sup>27</sup>;
- 737 (6) where the owner is not a registered person when he first uses an item as a capital item, and subsequently becomes a registered person, the first interval corresponds with his registration period<sup>28</sup>; and
- 738 (7) where the owner is not a registered person when he first uses an item as a capital item, and subsequently is included among bodies treated as members of a group<sup>29</sup>, the first interval corresponds with, or is that part still remaining of, the then current tax year of that group<sup>30</sup>.



Thereafter, each subsequent interval applicable to a capital item corresponds with a longer period<sup>31</sup> applicable to the owner or, if no longer period applies to him, a tax year of his<sup>32</sup>. Where, however, the owner of a capital item is a registered person and either becomes a member of a group<sup>33</sup>, ceases to be a member of a group<sup>34</sup>, or transfers the item<sup>35</sup> in the course of the transfer of his business or part of his business as a going concern<sup>36</sup>, the interval then applying ends on the day before he becomes or ceases to be a member of the group, or transfers the business or part of the business, and each subsequent interval, if any, applicable to the capital item ends on the successive anniversaries of that day<sup>37</sup>; and where the extent to which a capital item is used in making taxable supplies does not change between what would, but for these provisions, have been the first interval and the first subsequent interval applicable to it and the length of the two intervals taken together does not exceed 12 months, the first interval applicable to the capital item ends on what would have been the day that the first subsequent interval expired<sup>38</sup>.

1 For the meaning of 'input tax' see PARAS 4, 215 ante.

2 For the meaning of 'capital item' see PARA 235 note 2 ante.

3 Ie under the Value Added Tax Regulations 1995, SI 1995/2518, Pt XIV (regs 99-111) (as amended): see PARAS 224-234 ante.

4 Ibid reg 114(1). As to the capital goods scheme see PARA 235 ante.

5 Ibid reg 114(2).

6 Ie a capital item of a description falling within ibid reg 113(a): see PARA 235 head (1) ante.

7 Ibid reg 114(3)(a).

8 Ie a capital item of a description falling within ibid reg 113(b) (as amended): see PARA 235 head (2) ante.

9 For the meaning of 'the owner' for these purposes see PARA 235 note 2 ante.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 114(3)(b) (reg 114(3)-(5) amended, reg 114(5A), (5B) added, and reg 114(7) substituted, by SI 1997/1614).

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 114(3)(c).

12 As to the meaning of 'registered person' see PARA 64 note 2 ante.

13 For the meaning of 'supply' see PARA 27 ante.

14 For the meaning of 'tax year' see PARA 224 note 5 ante (definition applied by the Value Added Tax Regulations 1995, SI 1995/2518, reg 112(1)).

15 Ibid reg 114(4)(a).

16 Ie when he appropriates the item from trading stock.

17 Value Added Tax Regulations 1995, SI 1995/2518, reg 114(4)(b).

18 Ie when the capital item is of a description falling within ibid reg 113(c): see PARA 235 head (3) ante.

19 Ie under the Value Added Tax Act 1994 Sch 10 para 1(5): see PARA 180 ante.

20 Value Added Tax Regulations 1995, SI 1995/2518, reg 114(4)(c).

21 Ie when the capital item is of a description falling within ibid reg 113(d) (as amended): see PARA 235 head (4) ante.

22 Ibid reg 114(4)(d).

23 Ie when the capital item is of a description falling within ibid reg 113(e) (as amended): see PARA 235 head (5) ante.

- 24    Ie when the capital item is of a description falling within ibid reg 113(f): see PARA 235 head (6) ante.
- 25    Ie when the capital item is of a description falling within ibid reg 113(g) (as added): see PARA 235 head (7) ante.
- 26    Ie when the capital item is of a description falling within ibid reg 113(h) (as added): see PARA 235 head (8) ante.
- 27    Ibid reg 114(4)(e) (as amended: see note 10 supra).
- 28    Ibid reg 114(4)(f)(i). For the meaning of 'registration period' see PARA 224 note 5 ante (definition applied by reg 112(1)).
- 29    Ie under the Value Added Tax Act 1994 s 43 (as amended): see PARAS 75, 205 ante.
- 30    Value Added Tax Regulations 1995, SI 1995/2518, reg 114(4)(f)(ii).
- 31    For the meaning of 'longer period' see PARA 224 note 5 ante (definition applied by ibid reg 112(1)).
- 32    Ibid reg 114(5) (as amended: see note 10 supra).
- 33    Ibid reg 114(5A)(a) (as added: see note 10 supra). As to groups see head (7) in the text.
- 34    Ibid reg 114(5A)(b) (as added: see note 10 supra). It is immaterial for these purposes whether or not the person becomes a member of another such group immediately after ceasing to be a member of the group in question: reg 114(5A)(b) (as so added).
- 35    Ie in circumstances where the new owner is not, under ibid reg 6(1) (see PARA 83 ante), registered with the registration number of and in substitution for the transferor: reg 114(5A)(c) (as added: see note 10 supra). See note 36 infra.
- 36    Ibid reg 114(5A)(c) (as added: see note 10 supra). As to transfers as a going concern see PARA 210 ante. Where the owner of a capital item transfers it during the period of adjustment applicable to it in the course of the transfer of his business or a part of his business as a going concern (the item therefore not being treated as supplied) and the new owner is, under reg 6(1) (see PARA 83 ante), registered with the registration number of, and in substitution for the transferor, the interval applying to the capital item at the time of the transfer ends on the last day of the longer period applying to the new owner immediately after the transfer or, if no longer period then applies to him, on the last day of his tax year following the day of transfer: reg 114(7) (as so added).
- 37    Ibid reg 114(5A) (as added: see note 10 supra).
- 38    Ibid reg 114(5B) (as added: see note 10 supra).

## **UPDATE**

### **236 Period of adjustment under the capital goods scheme**

NOTE 19--Reference to Value Added Tax Act 1994 Sch 10 para 1(5) now to Sch 10 para 37(3): SI 1995/2518 reg 114(4)(d) (amended by SI 2008/1146).

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### **237. Method of adjustment under the capital goods scheme.**

In the first interval in which a taxable person<sup>1</sup> incurs input tax<sup>2</sup> on a capital item<sup>3</sup>, he will be entitled to attribute the input tax to his taxable supplies<sup>4</sup> in accordance with his partial exemption method<sup>5</sup> and, subject to the effect of that method, may be able in that period to recover the entirety of the input tax which he suffered on the supply to him of the capital item<sup>6</sup>. The capital goods scheme<sup>7</sup> begins to operate after the end of the first interval of adjustment<sup>8</sup>. Where in a subsequent interval<sup>9</sup> applicable to a capital item, the extent to which the item is used in making taxable supplies<sup>10</sup> increases (or decreases) from the extent to which it was so used or to be used at the time that the original entitlement to deduction<sup>11</sup> of the input tax was determined, the owner may deduct (or is obliged to pay to the Commissioners for Her Majesty's Revenue and Customs) for that subsequent interval an amount calculated by dividing the total input tax on the capital item<sup>12</sup> by the total period of adjustment<sup>13</sup> and multiplying the result by the adjustment percentage<sup>14</sup>.

Where the whole of the owner's interest in a capital item is supplied by him, or the owner is deemed or would have been deemed<sup>15</sup> to supply a capital item<sup>16</sup> during an interval other than the last interval applicable to the capital item, then if the supply or deemed supply is:

- 739 (1) a taxable supply, the owner is treated as using the capital item for each of the remaining complete intervals applicable to it wholly in making taxable supplies<sup>17</sup>; or
- 740 (2) an exempt supply, the owner is treated as not using the capital item for any of the remaining complete intervals applicable to it in making any taxable supplies<sup>18</sup>,

and the owner must, unless so to do would result in an excessive adjustment<sup>19</sup>, calculate for each of the remaining complete intervals applicable to it<sup>20</sup> such amount as he may deduct or such amount as he may be liable to pay to the Commissioners<sup>21</sup>. If this process would result in an excessive adjustment<sup>22</sup> then, save as the Commissioners may otherwise allow, the owner may deduct, or as the case may require, pay to the Commissioners such amount as results in the total amount of input tax deducted or deductible being equal to the output tax chargeable by him on the supply of the capital item<sup>23</sup>. The aggregate of the amounts that the owner may deduct in relation to a capital item in pursuance of this provision may not, however, exceed the output tax<sup>24</sup> chargeable by him on the supply of the capital item<sup>25</sup>.

If a capital item is irretrievably lost or stolen or is totally destroyed<sup>26</sup> or if, being an interest in land<sup>27</sup>, it expires<sup>28</sup> during the period of adjustment applicable to it, no further adjustment is made in any subsequent complete intervals applicable to it<sup>29</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'input tax' see PARAS 4, 215 ante.

3 For the meaning of 'capital item' see PARA 235 note 2 ante.

4 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

5 As to partial exemption methods see PARA 224 et seq ante.

6 See PARA 224 et seq ante. It is no part of the purpose of the capital goods scheme to restrict the amount of input tax a trader may immediately recover; rather, it seeks more accurately to determine the proportion of taxable supplies to which the capital item is attributable over the whole or part of the period in which the trader uses it, subject to a maximum adjustment period of ten years.

7 As to the capital goods scheme see PARA 235 ante.

8 See the text and notes 9-29 infra.

9 As to subsequent intervals see PARA 236 ante.

10 For these purposes, an attribution of the total input tax on the capital item is determined for each subsequent interval applicable to it in accordance with the method used under the Value Added Tax Regulations 1995, SI 1995/2518, Pt XIV (regs 99-111) (as amended) (see PARA 224 et seq ante) for that interval and the proportion of the input tax thereby determined to be attributable to taxable supplies is treated as being the extent to which the capital item is used in making taxable supplies in that subsequent interval: reg 116(1) (reg 116(1) amended, and reg 116(A2) added, by SI 1997/1614). The attribution of the total input tax on a capital item for subsequent intervals determined in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 114(5A) (as added) (see PARA 236 ante) is determined by such method as is agreed with the Commissioners: reg 114(A2) (as so added). In any particular case, the Commissioners for Her Majesty's Revenue and Customs may allow another method by which, or may direct the manner in which, the extent to which a capital item is used in making taxable supplies in any subsequent interval applicable to it is to be ascertained: reg 116(2). Regulation 116(2) is of limited application and is directed towards the case where there is a change in the relevant proportion of the capital goods devoted to exempt and non-exempt uses (eg in the area of land so devoted); it is not directed towards the case where a belated election to waive exemption is made under the Value Added Tax Act 1994 Sch 10 para 3(9) (as amended) (see PARA 158 ante): *Customs and Excise Comrs v R & R Pension Fund Trustees* [1996] STC 889 at 896. Where the owner of a building which is a capital item grants or assigns a tenancy or lease in the whole or any part of that building and that grant or assignment is a zero-rated supply to the extent only as provided by: (1) the Value Added Tax Act 1994 Sch 8 Pt II Group 5 note 14 (as substituted) (see PARA 179 ante), or Sch 8 Pt II Group 5 note 14 (as substituted) as applied to Sch 8 Pt II Group 6 note 3 (as substituted) (see PARA 181 ante); or (2) Sch 13 para 8 (transitional provisions), any subsequent exempt supply of his arising directly from that grant or assignment is to be disregarded in determining the extent to which the capital item is used in making taxable supplies in any interval applicable to it: Value Added Tax Regulations 1995, SI 1995/2518, reg 116(3) (amended by SI 1995/3147). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. For the meaning of 'owner' see PARA 235 note 2 ante.

11 For these purposes, 'the original entitlement to deduction' means the entitlement to deduction determined in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, Pt XIV (as amended) (see PARA 224 et seq ante): reg 115(5) (definition added by SI 1999/599).

12 'The total input tax on the capital item' means:

104 (1) in relation to a capital item falling within the Value Added Tax Regulations 1995, SI 1995/2518, reg 113(a) or (b) (as amended) (see PARA 235 heads (1)-(2) ante), the value added tax charged on the supply to, or on the importation or acquisition by, the owner of the capital item, other than VAT charged on rent (including charges reserved as rent) which is neither payable nor paid more than 12 months in advance nor invoiced for a period in excess of 12 months (if any) (reg 115(5));

105 (2) in relation to a capital item falling within reg 113(c) or (d) (as amended) (see PARA 235 heads (3)-(4) ante), the VAT charged on the supply which the owner is treated as making to himself under the Value Added Tax Act 1994 Sch 10 para 1(5) or Sch 10 para 6(1) (see PARA 34 ante), as the case may require (Value Added Tax Regulations 1995, SI 1995/2518, reg 115(5)); and

106 (3) in relation to a capital item falling within reg 113(e) (as amended), reg 113(f), reg 113(g) (as added) or reg 113(h) (as added) (see PARA 235 heads (5)-(8) ante), the aggregate of the VAT charged on the supplies described therein, as the case may require, other than VAT charged on rent (if any) (reg 115(5) (amended by SI 1997/1614)),

and includes, in relation to any capital item, any VAT charged as input tax under the Value Added Tax Regulations 1995, SI 1995/2518, reg 111 (as amended) (see PARA 234 ante) which relates to the capital item, other than such VAT charged on rent, if any: reg 115(5). For these purposes, references to the owner are to be construed as references to the person who incurred the total input tax on the capital item: reg 115(5). For the meaning of 'supply' see PARA 27 ante; and as to zero-rated supplies see PARA 174 et seq ante.

13     Ie the total number of successive intervals: see PARA 236 ante. Where the capital item falls within ibid reg 114(3)(a) or (b) (as amended), that number is five; and where the capital item falls within reg 114(3)(c) (ie in any other case) that number is ten: see reg 115(1)(a), (b).

14     Ibid reg 115(1), (2) (amended by SI 1999/599). 'The adjustment percentage' means the difference, if any, between the extent, expressed as a percentage, to which the capital item was used or to be used for the making of taxable supplies at the time the original entitlement to deduction of the input tax was determined, and the extent to which it is so used or is treated under the Value Added Tax Regulations 1995, SI 1995/2518, reg 115(3) (see heads (1)-(2) in the text) as being so used in the subsequent interval in question: reg 115(5) (amended by SI 1999/599).

A taxable person claiming any amount pursuant to the Value Added Tax Regulations 1995, SI 1995/2518, reg 115(1) (as amended), or liable to pay any amount pursuant to reg 115(2) (as amended), must include that amount in a return for the second prescribed accounting period next following the interval to which that amount relates, except where the Commissioners allow another return to be used for this purpose: reg 115(6) (amended by SI 1997/1086; SI 1997/1614). Where, however, an interval has come to an end under the Value Added Tax Regulations 1995, SI 1995/2518, reg 114(5A) (as added) (see PARA 236 ante) because the owner of the capital item has ceased to be a member of a group under the Value Added Tax Act 1994 s 43 (as amended) (see PARAS 75, 205 ante), any amount claimable from the Commissioners or payable to them, as the case may be, in respect of that interval must be included in a return for that group for the second prescribed accounting period after the end of the tax year of the group in which the interval in question fell (Value Added Tax Regulations 1995, SI 1995/2518, reg 115(6)(a) (as so amended)); and where an interval has come to an end under reg 114(5A) (as added) because the owner has transferred part of his business as a going concern and he remains a registered person after the transfer, any amount claimable from the Commissioners or payable to them, as the case may be, in respect of that interval must be included in a return by him for the second prescribed accounting period after the end of his tax year in which the interval in question fell, except (in either case) where the Commissioners allow another return to be used for this purpose (reg 115(6)(b) (as so amended)). The Commissioners may not allow the taxable person to use a return other than that specified in reg 115(6) (as amended) unless it is the return for a prescribed accounting period commencing within three years of the end of the prescribed accounting period to which the specified return relates: reg 115(8) (added by SI 1997/1086). For the meaning of 'return' see PARA 115 note 13 ante; for the meaning of 'registered person' see PARA 115 note 5 ante; and for the meanings of 'prescribed accounting period' and 'tax year' see PARA 224 note 5 ante (definitions applied by the Value Added Tax Regulations 1995, SI 1995/2518, reg 112(1)).

15     Ie but for the fact that the VAT on the deemed supply, whether by virtue of its value or because it is zero-rated or exempt, would not have been more than the sum specified in the Value Added Tax Act 1994 Sch 4 para 8(1) (as amended) (see PARA 30 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 115(3) (amended by SI 2000/258). As to exempt supplies see PARA 155 et seq ante.

16     Ie pursuant to the Value Added Tax Act 1994 Sch 4 para 8(1) (as amended) (see PARA 30 ante).

17     Value Added Tax Regulations 1995, SI 1995/2518, reg 115(3)(a).

18     Ibid reg 115(3)(b).

19     Ie unless the total amount of input tax deducted or deductible by the owner of a capital item as a result of the initial deduction, any adjustments made under ibid reg 115(1) or (2) (as amended) (see the text and notes 9-14 supra) and the adjustment which would otherwise fall to be made under reg 115(3) (as amended) (see the text and note 21 infra) would exceed the output tax chargeable by him on the supply of that capital item: reg 115(3A) (regs 115(3A), (3B) added by SI 1997/1614). See further the text and notes 22-23 infra.

20     Ie in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 115(1) or (2) (as amended) (see the text and notes 9-14 supra).

21     Ibid reg 115(3) (amended by SI 1997/1614). A taxable person claiming any amount or amounts, or liable to pay any amount or amounts, pursuant to reg 115(3) (as amended), must include that amount or those amounts in a return for the second prescribed accounting period next following the interval in which the supply, or deemed supply, in question takes place except where the Commissioners allow another return to be used for this purpose: Value Added Tax Regulations 1995, SI 1995/2518, reg 115(7) (amended by SI 1997/1086). This is subject to the proviso that the Commissioners may not allow the taxable person to use a return other than that specified in the Value Added Tax Regulations 1995, SI 1995/2518, reg 115(7) (as amended) unless it is the return for a prescribed accounting period commencing within three years of the end of the prescribed accounting period to which the specified return relates: reg 115(8) (added by SI 1997/1086).

22     Ie where the Value Added Tax Regulations 1995, SI 1995/2518, reg 115(3A) (as added) (see the text and note 19 supra) applies.

23     Ibid reg 115(3B) (as added: see note 19 supra).

- 24 For the meaning of 'output tax' see PARAS 4, 215 ante.
- 25 Value Added Tax Regulations 1995, SI 1995/2518, reg 115(3) proviso.
- 26 Ibid reg 115(4)(a).
- 27 Ie if it is of a kind falling within ibid reg 114(3)(b) (as amended): see PARA 236 ante.
- 28 Ibid reg 115(4)(b).
- 29 Ibid reg 115(4).

## **UPDATE**

### **237 Method of adjustment under the capital goods scheme**

NOTE 12--Head (2). Reference to Value Added Tax Act 1994 Sch 10 para 1(5) now to Sch 10 para 37(3), and Sch 10 para 6(1) has effect as it did prior to the substitution of Sch 10 by SI 2008/1146: SI 1995/2518 reg 115(5)(b) (amended by SI 2008/1146).

NOTE 14--HM Revenue and Customs must not allow the taxable person to use a return other than a specified return unless it is the return for a prescribed accounting period commencing within four years of the end of the prescribed accounting period to which the specified return relates: SI 1995/2518 reg 115(9) (reg 115(8)-(10) substituted by SI 2009/586). HM Revenue and Customs must not allow the taxable person to use a return other than a specified return where the specified return is the return for a prescribed accounting period finishing on or before 31 March 2006: SI 1995/2518 reg 115(10). A 'specified return' is a return specified in reg 115(6), reg 115(6)(a), (b) or reg 115(7): reg 115(8).

NOTE 21--As to apportionment under SI 1995/2518 reg 115(3), see Case C-63/04 *Centralan Property Ltd v Customs and Excise Comrs* [2006] STC 1568, ECJ.

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### **237A. Goods used for non-business purposes.**

Where goods<sup>1</sup> that are held or used for the purposes of a business<sup>2</sup> have an economic life at a time when they are used for private or non-business purposes, the value or part of the value of the relevant supply<sup>3</sup> which is referable to that use is calculated as set out below<sup>4</sup>. Goods held or used for the purposes of a business have an economic life being the period of time commencing on the day when they are first used for any purpose after they have been supplied to, or acquired or imported by, a person or any of his predecessors<sup>5</sup> and lasting for a period of 120 months in the case of land, a building or part of a building<sup>6</sup>, and 60 months for other goods<sup>7</sup>.

The value of a relevant supply is the amount determined using the formula:

$$\frac{A}{B} \times (C \times U\%)$$

where A is the number of months in the prescribed accounting period<sup>8</sup> during which the relevant supply occurs which fall within the economic life of the goods concerned; B is the number of months of the economic life of the goods concerned; and C is the full cost of the goods<sup>9</sup> excluding any increase resulting from a supply of goods or services giving rise to a new economic life; and U% is the extent, expressed as a percentage, to which the goods are put to any private use or used, or made available for use, for non-business purposes as compared with the total use made of the goods during the part of the prescribed accounting period falling within the economic life of the goods<sup>10</sup>.

1 'Goods' includes land forming part of the assets of, or held or used for the purposes of a business which is treated as goods for the purposes of the Value Added Tax Act 1994 Sch 4 para 5 by virtue of Sch 4 para 9 (see PARA 30); and references to goods being held or used for the purposes of a business are to be construed accordingly: Value Added Tax Regulations 1995, SI 1995/2518, reg 116B (Pt 15A (regs 116A-116N) added by SI 2007/3099).

2 For the meaning of 'business' see PARA 23.

3 I.e a supply that is treated as made pursuant to the 1994 Act Sch 4 para 5(4): see PARA 30.

4 SI 1995/2518 reg 116A. For transitional provisions see regs 116J-116N.

5 'Predecessor' has the same meaning as in the 1994 Act Sch 4 para 5 (see PARA 30): SI 1995/2518 reg 116B(1).

6 Where the economic life of the interest of a person or any of his predecessors, in land, a building or part of a building commences at a time when that interest has less than 120 months to run at that time, the economic life is limited to the number of months remaining before expiry of that interest, and element B of the formula set out in the text is to be construed accordingly: *ibid* reg 116D.

7 *Ibid* reg 116C. However (1) where a supply of goods or services is made to a person or any of his predecessors in respect of any goods held or used for the purposes of a business (whether or not the goods have an economic life in relation to that person at that time); (2) VAT is chargeable on that supply which is eligible (in whole or in part) for credit under the 1994 Act ss 25 (see PARA 216) and 26 (see PARA 217) or repayment under s 39 (see PARAS 308, 309); and (3) by virtue of that supply, the full cost of the goods is greater than their full cost immediately before that supply, a new economic life is, without prejudice to any other economic life having effect in relation to those goods, be treated as commencing in respect of them in accordance with SI 1995/2518 reg 116C as if they had been supplied, acquired or imported at the time when the supply of goods or services is made: reg 116G.

8 For the meaning of 'prescribed accounting period' see PARA 216 NOTE 6. Where a prescribed accounting period in which a relevant supply occurs immediately follows a prescribed accounting period during which the goods the use of which gives rise to that supply were not used or made available for use for any purpose, element A of the formula set out in the text comprises (without prejudice to any other element of that formula) the total number of months falling within the economic life concerned, covered by the prescribed accounting period in which the relevant supply occurs, and all preceding prescribed accounting periods which commence after the end of that during which the goods were last used or made available for use for any purpose before the prescribed accounting period in which the relevant supply occurs: *ibid* reg 116F.

9 'Full cost of the goods' means their full cost to the person (being the person making the relevant supply or any of his predecessors) who, in relation to the VAT on the goods mentioned in the 1994 Act Sch 4 para 5(5) (see PARA 30) is described in that provision as being entitled to credit under ss 25 and 26, or a repayment under the scheme made under s 39: SI 1995/2518 reg 116B.

10 *Ibid* reg 116E. The calculation of the value of a relevant supply made during a new economic life (see NOTE 7) in accordance with the formula set out in the text is varied so that C is the increase in the full cost of the goods resulting from the supply of goods or services giving rise to the new economic life; and U% is the extent, expressed as a percentage, to which the goods are put to any private use or used, or made available for use, for non-business purposes as compared with the total use made of the goods during the part of the prescribed accounting period occurring during the new economic life of the goods: reg 116H. Where a relevant supply occurs in relation to goods that have two or more economic lives at the time when they are put to private use or used, or made available for use, for non-business purposes, the value of that supply is such amount as represents the total of the amounts calculated in accordance with the formula set out in the text (as varied, if appropriate, by reg 116H) in respect of those economic lives: reg 116I.



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ACCOUNTING AND ASSESSMENT/(2) RECORDS AND INFORMATION/238. Duty to keep records.

## **(2) RECORDS AND INFORMATION**

### **238. Duty to keep records.**

Every taxable person<sup>1</sup> must, for the purposes of accounting for value added tax, keep the following records<sup>2</sup>:

- 741 (1) his business and accounting records<sup>3</sup>;
- 742 (2) his VAT account<sup>4</sup>;
- 743 (3) copies of all VAT invoices issued by him<sup>5</sup>;
- 744 (4) all VAT invoices received by him<sup>6</sup>;
- 745 (5) all certificates prepared by him relating to acquisitions by him of goods from other member states<sup>7</sup>;
- 746 (6) all certificates given to him relating to supplies by him of goods or services<sup>8</sup>;
- 747 (7) documentation received by him relating to acquisitions by him of any goods from other member states<sup>9</sup>;
- 748 (8) copy documentation issued by him relating to the transfer, dispatch or transportation of goods by him to other member states<sup>10</sup>;
- 749 (9) documentation received by him relating to the transfer, dispatch or transportation of goods by him to other member states<sup>11</sup>;
- 750 (10) documentation relating to importations and exportations by him<sup>12</sup>;
- 751 (11) all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued, by him<sup>13</sup>;
- 752 (12) a copy of any self-billing agreement<sup>14</sup> to which he is a party<sup>15</sup>; and
- 753 (13) where he is a customer, party to such an agreement, address and VAT registration number of each supplier with whom he has entered into such an agreement<sup>16</sup>.

In relation to a trade or business of a specified description<sup>17</sup> or for the purposes of any scheme established by, or under, regulations<sup>18</sup>, the Commissioners for Her Majesty's Revenue and Customs may supplement the list of records so required by a notice published by them for that purpose<sup>19</sup>.

Additionally, every person who, at a time when he is not a taxable person, acquires in the United Kingdom from another member state any goods which are subject to a duty of excise or consist of a new means of transport<sup>20</sup> must, for the purposes of accounting for VAT, keep such records with respect to the acquisition as may be specified in any notice published by the Commissioners<sup>21</sup>.

The Commissioners may require any such records to be preserved for such period not exceeding six years as they may require<sup>22</sup>. The duty to preserve records may be discharged by the preservation of the information contained in them by such means as the Commissioners may approve<sup>23</sup>, and where that information is so preserved a copy of any document forming part of the records is admissible in evidence in any proceedings, whether civil or criminal, to the same extent as the records themselves<sup>24</sup>.

<sup>1</sup> For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante. A person making supplies of a description falling within the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 4 (as added)

(supplies between taxable persons in relation to investment gold: see PARA 211 ante) is not required to keep in relation to those supplies the records specified in the Value Added Tax Regulations 1995, SI 1995/2518, reg 31 (as amended) (see the text and notes 2-21 infra), save for the business and accounting records specified in reg 31(1)(a): reg 33A (added by SI 1999/3114).

2 le pursuant to the Value Added Tax Act 1994 s 58, Sch 11 para 6(1), which provides that every taxable person must keep such records as the Commissioners for Her Majesty's Revenue and Customs may by regulations require. The regulations may make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice: Sch 11 para 6(2). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. As to the making of regulations generally see PARA 14 ante.

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 31(1)(a).

4 Ibid reg 31(1)(b). For records of supplies of or relating to investment gold see regs 31A-31C, 33A, 33B (as added); and PARA 244 post.

5 Ibid reg 31(1)(c). As to VAT invoices see PARAS 245-246 post. The general duty to keep records does not justify the implication into commercial contracts of a term relating to the prompt and regular issuing of VAT invoices: *Europhone International Ltd (in administrative receivership) v Frontel Communications Ltd (t/a Frontier Communications International)* [2001] STC 1399.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 31(1)(d).

7 Ibid reg 31(1)(da)(i) (reg 31(1)(da) added by SI 1996/1250). For the meaning of 'another member state' see PARA 4 note 15 ante. As to acquisition from another member state see PARA 19 ante. This provision and the Value Added Tax Regulations 1995, SI 1995/2518, reg 31(1)(da)(ii) (see the text and note 8 infra) apply only if, owing to provisions in force which concern fiscal or other warehousing regimes (see PARA 144 et seq ante), those acquisitions or supplies are either zero-rated or treated for VAT purposes as taking place outside the United Kingdom: reg 31(1)(da) (as so added). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante. As to zero-rated supplies see PARA 174 et seq ante.

8 Ibid reg 31(1)(da)(ii) (as added: see note 7 supra).

9 Ibid reg 31(1)(e).

10 Ibid reg 31(1)(f).

11 Ibid reg 31(1)(g).

12 Ibid reg 31(1)(h).

13 Ibid reg 31(1)(i).

14 le an agreement within ibid reg 13(3A) (as added) (see PARA 279 post).

15 Ibid reg 31(1)(j) (reg 31(1)(j), (k) added by SI 2003/3220).

16 Value Added Tax Regulations 1995, SI 1995/2518, reg 31(1)(k) (as added: see note 15 supra).

17 Ibid reg 31(2)(a). For the meaning of 'business' see PARA 23 ante.

18 Ibid reg 31(2)(b).

19 Ibid reg 31(2). The notice currently in force relating to record-keeping is Customs and Excise Notice 700 *The VAT Guide* (April 2002) PARA 19, which explains that the records must be kept up to date and be in sufficient detail to enable the trader correctly to calculate the amount of VAT that he is obliged to pay to, or may claim from, the Commissioners; but that the records need not be kept in any particular form (see PARA 19.2.1). However, it is a requirement that the records be kept in a way which enables the Commissioners easily to check the figures which the trader has used to complete his VAT return; and, if the records fail to satisfy this criterion, the Commissioners will direct the trader to make the necessary changes (see PARA 19.2.1).

20 For the meaning of 'new means of transport' see PARA 19 note 7 ante.

21 Value Added Tax Regulations 1995, SI 1995/2518, reg 31(3). Regulation 31(3) has effect pursuant to the Value Added Tax Act 1994 Sch 11 para 6(1), which empowers the Commissioners by regulations to require

every person who, at a time when he is not a taxable person, acquires in the United Kingdom from another member state any goods which are subject to a duty of excise or consist in a new means of transport to keep such records with respect to the acquisition, if it is a taxable acquisition and is not in pursuance of a taxable supply, as the Commissioners may so require. See Customs and Excise Public Notice 728 *New Means of Transport* (February 2003).

22 Value Added Tax Act 1994, Sch 11 para 6(3). Permission is sometimes given at local level to small traders to preserve some records for a shorter period where the usual requirement would involve the trader in undue expense or cause him serious storage difficulties: Customs and Excise Public Notice 700/21 *Keeping Records and Accounts* (March 2002) PARA 5.3.

23 This provision is intended to enable records to be preserved on microfilms or on computer storage media. As to regulations for facilitating the use of electronic communications see the Value Added Tax Regulations 1995, SI 1995/2518, reg 24(4A)-(4L); and PARA 247 post.

24 Value Added Tax Act 1994 Sch 11 para 6(4). As a condition of approving any means of preserving information contained in any records, the Commissioners may impose such reasonable requirements as appear to them necessary for securing that the information will be as readily available to them as if the records themselves had been preserved: Sch 11 para 6(5).

## UPDATE

### 238 Duty to keep records

TEXT AND NOTES--The Commissioners may direct any taxable person named in the direction to keep such records as they specify in the direction in relation to such goods as they so specify; and such a direction may require the records to be compiled by reference to VAT invoices or any other matter: Value Added Tax Act 1994 Sch 11 para 6A(1), (2) (Sch 11 para 6A added by Finance Act 2006 s 21(6)). The Commissioners may not make a direction unless they have reasonable grounds for believing that the records specified therein might assist in identifying taxable supplies in respect of which the VAT chargeable might not be paid; and the taxable supplies in question may be supplies made by the person named in the direction or any other person: Value Added Tax Act 1994 Sch 11 para 6A(3), (4). A direction must be given by notice in writing to the person named in the direction and must warn that person of the consequences under s 69B (see PARA 331) of failing to comply; and such a direction remains in force until it is revoked or replaced by a further direction: Sch 11 para 6A(5)). The Commissioners may require any records kept in pursuance of such a direction to be preserved for such period, not exceeding six years, as they may require: Sch 11 para 6A(6). Such records are in addition to any required to be kept by virtue of Sch 11 para 6, but these provisions are without prejudice to Sch 11 para 6(1) to make regulations requiring records to be kept; and Sch 11 para 6(4) applies for the purposes of Sch 11 para 6A as it applies for the purposes of Sch 11 para 6: Sch 11 para 6A(7)-(9) (Sch 11 para 6A(7) amended by Finance Act 2008 Sch 37 para 6).

TEXT AND NOTE 22--The period of preservation must now be specified in writing (and different periods may be specified for different cases): Value Added Tax Act 1994 Sch 11 para 6(3) (amended by Finance Act 2008 Sch 37 para 5).

TEXT AND NOTES 23, 24--Replaced. The duty under the Value Added Tax Act 1994 Sch 11 para 6 to preserve records may be discharged by preserving them in any form and by any means, or by preserving the information contained therein in any form and by any means, subject to any conditions or exceptions specified in writing by the Commissioners for Her Majesty's Revenue and Customs: Sch 11 para 6(4) (substituted by Finance Act 2008 Sch 37 para 5).

Value Added Tax Act 1994 Sch 11 paras 6, 6A amended: Finance Act 2008 Sch 37 paras 5, 6.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(2) RECORDS AND INFORMATION/239. Duty to preserve records on transfer of business.

**239. Duty to preserve records on transfer of business.**

Where a business<sup>1</sup> carried on by a taxable person<sup>2</sup> is transferred to another person as a going concern, any records relating to the business which are required<sup>3</sup> to be preserved after the transfer must be preserved by the transferee instead of by the transferor unless the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> at the request of the transferor otherwise direct<sup>5</sup>.

1 For the meaning of 'business' see PARA 23 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 Ie by the Value Added Tax Act 1994 Sch 11 para 6(1): see PARA 238 ante.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 Value Added Tax Act 1994 s 49(1)(b).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(2) RECORDS AND INFORMATION/240. Register of temporary movement of goods.

## **240. Register of temporary movement of goods.**

Every taxable person<sup>1</sup> must keep and maintain a register to be known as the register of temporary movement of goods to and from other member states<sup>2</sup>. Where goods have been moved to or received from another member state<sup>3</sup> and they are to be returned within a period of two years of the date of their first removal or receipt, the register must contain the following information:

- 754 (1) the date of removal of goods to another member state<sup>4</sup>;
- 755 (2) the date of receipt of those goods when they are returned from that or another member state<sup>5</sup>;
- 756 (3) the date of receipt of goods from another member state<sup>6</sup>;
- 757 (4) the date of removal of those goods when they are returned to that or another member state<sup>7</sup>;
- 758 (5) a description of the goods, sufficient to identify them<sup>8</sup>;
- 759 (6) a description of any process, work or other operation carried out on the goods either in the United Kingdom<sup>9</sup> or in another member state<sup>10</sup>;
- 760 (7) the consideration<sup>11</sup> for the supply<sup>12</sup> of the goods<sup>13</sup>; and
- 761 (8) the consideration for the supply of any processing, work or other operation carried out on the goods either in the United Kingdom or another member state<sup>14</sup>.

The Commissioners for Her Majesty's Revenue and Customs<sup>15</sup> may, by a notice published by them for the purpose, supplement this list of information in relation to a trade or business<sup>16</sup> of a description specified by them<sup>17</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 Value Added Tax Regulations 1995, SI 1995/2518, reg 33(1). See also Customs and Excise Public Notice 725 *The Single Market* (October 2002) PARA 12. A person making supplies of a description falling within the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 4 (as added) (supplies between taxable persons in relation to investment gold: see PARA 211 ante) is not required to keep in relation to those supplies the records specified in the Value Added Tax Regulations 1995, SI 1995/2518, reg 33 (see the text and notes 3-17 infra): reg 33A (added by SI 1999/3114).

3 For the meaning of 'another member state' see PARA 4 note 15 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 33(2)(a).

5 Ibid reg 33(2)(b).

6 Ibid reg 33(2)(c).

7 Ibid reg 33(2)(d).

8 Ibid reg 33(2)(e).

9 For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 33(2)(f).

11 For the meaning of 'consideration' generally see PARA 95 ante.

- 12 For the meaning of 'supply' see PARA 27 ante.
- 13 Value Added Tax Regulations 1995, SI 1995/2518, reg 33(2)(g).
- 14 Ibid reg 33(2)(h).
- 15 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.
- 16 For the meaning of 'business' see PARA 23 ante.
- 17 Value Added Tax Regulations 1995, SI 1995/2518, reg 33(2)(h).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(2) RECORDS AND INFORMATION/241. Fiscal warehousing record and stock control.

## **241. Fiscal warehousing record and stock control.**

A fiscal warehousekeeper<sup>1</sup> must maintain<sup>2</sup> a fiscal warehousekeeping record for any fiscal warehouse<sup>3</sup> in respect of which he is the relevant fiscal warehousekeeper<sup>4</sup>. That record may be maintained in any manner acceptable to the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup> and must, in particular, be capable of ready use by any proper officer<sup>6</sup> in the course of his duties<sup>7</sup> and of reproduction into a form suitable for any proper officer readily to use at a place other than the relevant fiscal warehouse<sup>8</sup>.

The fiscal warehousing record must accurately identify:

- 762 (1) any eligible goods<sup>9</sup> which enter or exit the fiscal warehouse, their nature and quantity, and the time and date when they so enter or exit<sup>10</sup>;
- 763 (2) any goods which are not eligible goods and which enter or exit the fiscal warehouse for storage<sup>11</sup>, their nature and quantity, and the time and date when they so enter or exit<sup>12</sup>;
- 764 (3) all eligible goods which are allocated to or removed from the fiscal warehousing regime<sup>13</sup> associated with the relevant fiscal warehousekeeper, the time and date when the allocation or removal takes place, and the location of the eligible goods while they are allocated to the relevant regime<sup>14</sup>;
- 765 (4) as 'transferred goods' all eligible goods which are transferred directly from the fiscal warehousing regime to another fiscal warehousing regime, the time and date when the transfer starts, and the address of the fiscal warehouse to which the goods in question are transferred<sup>15</sup>;
- 766 (5) as 'transferred goods' all eligible goods which are transferred directly from the fiscal warehousing regime to corresponding arrangements in another member state<sup>16</sup>, the date and time when the transfer starts, and the address of the place in the other member state to which the goods in question are transferred<sup>17</sup>;
- 767 (6) as 'transferred goods (by reason of export)' all eligible goods which are directly exported from the fiscal warehousing regime to a place outside the member states<sup>18</sup>, the date and time when the movement of the goods which is directly associated with the export starts, and the address of the place outside the member states to which the goods in question are consigned<sup>19</sup>;
- 768 (7) the nature of any services which are performed on or in relation to eligible goods while those goods are allocated to the relevant fiscal warehousing regime, the date when the services are performed, the particular eligible goods on or in relation to which they are performed, and the name, address and registration number<sup>20</sup>, if any, of the supplier of those services<sup>21</sup>.

The fiscal warehousing record must include the prescribed documents relating to transfers and specified services<sup>22</sup> and must identify the name and address of any person who at any time removes or causes the removal of any goods from the fiscal warehousing regime as well as that person's registration number if he is registered for value added tax<sup>23</sup>. It must incorporate any modifications to the features or requirements set out above<sup>24</sup> which the Commissioners may require in respect of the relevant fiscal warehousekeeper<sup>25</sup>. A fiscal warehousekeeper may, with the prior agreement of the Commissioners, maintain a fiscal warehousing record in which any of those features or requirements are relaxed or dispensed with<sup>26</sup>.



The relevant fiscal warehousing record is not required, in respect of any goods, to record events more than six years following either the transfer or removal of those goods from the relevant fiscal warehousing regime<sup>27</sup> or the exit of those goods from the relevant fiscal warehouse in the case of goods which were not allocated to the relevant fiscal warehousing regime<sup>28</sup>.

A fiscal warehousekeeper may be requested to produce his fiscal warehousing record for inspection<sup>29</sup>.

1 For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante.

2 Ie in addition to the records referred to in the Value Added Tax Regulations 1995, SI 1995/2518, reg 31 (as amended): see PARA 238 ante.

3 For the meaning of 'fiscal warehouse' see PARA 147 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 145F(1) (regs 145A, 145F, Sch 1A added by SI 1996/1250). As to the meaning of 'relevant fiscal warehousekeeper' and related expressions see PARA 148 ante.

5 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 For the meaning of 'proper officer' see PARA 115 note 7 ante.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 145F(2)(a) (as added: see note 4 supra).

8 Ibid reg 145F(2)(b) (as added: see note 4 supra).

9 For the meaning of 'eligible goods' see PARAS 146 note 1, 148 note 1 ante.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 145F(3), Sch 1A para 1(a) (as added: see note 4 supra).

11 Ie other than goods which enter for purposes wholly incidental to such storage: ibid Sch 1A para 1(b) (as added: see note 4 supra).

12 Ibid Sch 1A para 1(b) (as added: see note 4 supra).

13 As to fiscal warehousing regimes see PARA 148 ante.

14 Value Added Tax Regulations 1995, SI 1995/2518, Sch 1A para 1(c) (as added: see note 4 supra).

15 Ibid Sch 1A para 1(d) (as added: see note 4 supra). The record must be adjusted to show a removal, and not a transfer, where the certificate of transfer within the United Kingdom referred to in reg 145G(3)(c) (as added) (see PARA 150 ante) is not received in time from the other fiscal warehousekeeper: Sch 1A para 4(a) (as so added). The record must also evidence any notification made under reg 145H(3)(c) (as added) (see PARA 151 ante) to the person on whose instructions the goods were allowed to leave the fiscal warehouse: Sch 1A para 4(c) (as so added). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

16 Ie under ibid reg 145H(2)(b) (as added): see PARA 151 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

17 Ibid Sch 1A para 1(e) (as added: see note 4 supra). The record must be adjusted to show a removal, and not a transfer, where the document referred to in reg 145H(4)(b) (as added) (see PARA 151 ante) is not received in time: Sch 1A para 4(b) (as so added). As to recording any notification under reg 145H(3)(c) (as added) (see PARA 151 ante) to the person on whose instructions the goods were allowed to leave the fiscal warehouse see Sch 1A para 4(c) (as so added); and note 15 supra.

18 Ie under ibid reg 145H(2)(c) (as added): see PARA 151 ante. As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

19 Ibid Sch 1A para 1(f) (as added: see note 4 supra). The record must be adjusted to show a removal, and not a transfer, where the document referred to in reg 145H(4)(c) (as added) (see PARA 151 ante) is not received in time: Sch 1A para 4(b) (as so added). As to recording any notification under reg 145H(3)(c) (as added) (see PARA 151 ante) to the person on whose instructions the goods were allowed to leave the fiscal warehouse see Sch 1A para 4(c) (as so added); and note 15 supra.

- 20 For the meaning of 'registration number' see PARA 22 note 14 ante.
- 21 Value Added Tax Regulations 1995, SI 1995/2518, Sch 1A para 2 (as added: see note 4 supra).
- 22 Ibid Sch 1A para 3 (as added: see note 4 supra). The record: (1) must include the written undertaking from the other fiscal warehousekeeper relating to a transfer made within the United Kingdom referred to in reg 145G(2) (as added) (see PARA 150 ante) and the certificate from the other fiscal warehousekeeper confirming a transfer so made which is referred to in reg 145G(3)(c) (as added) (see PARA 150 ante) and must relate them to the relevant transfer (Sch 1A para 3(a) (as so added)); (2) must include the copy of the certificate relating to a transfer received by the relevant fiscal warehousekeeper from another fiscal warehousing regime within the United Kingdom referred to in reg 145G(3)(d) (as added) (see PARA 150 ante) and must relate that copy to the relevant allocation to his relevant fiscal warehousing regime (Sch 1A para 3(b) (as so added)); (3) must include the document relating to the completion of a transfer to corresponding arrangements in another member state referred to in reg 145H(4)(b) (as added) (see PARA 151 ante) and must relate that document to the relevant transfer (Sch 1A para 3(c) (as so added)); and (4) must include the document relating to the completion of an export to a place outside the member states referred to in reg 145H(4)(c) (as added) (see PARA 151 ante) and must relate that document to the export in question (Sch 1A para 3(d) (as so added)).
- 23 Ibid Sch 1A para 5(a) (as added: see note 4 supra). The record must also include a copy of the removal document issued by the Commissioners under reg 145J(1) (as added) (see PARA 151 ante) and must relate it to the relevant removal: Sch 1A para 5(b) (as so added).
- 24 Ie the features or requirements set out in ibid Sch 1A paras 1-5 (as added) (see the text and notes 9-23 supra).
- 25 Ibid Sch 1A para 6(a) (as added: see note 4 supra).
- 26 Ibid Sch 1A para 6(b) (as added: see note 4 supra).
- 27 Ibid reg 145F(4)(a) (as added: see note 4 supra).
- 28 Ibid reg 145F(4)(b) (as added: see note 4 supra).
- 29 See ibid reg 145F(5)(a) (as added: see note 4 supra); and PARA 243 post.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(2) RECORDS AND INFORMATION/242. Summary application for furnishing of information.

**242. Summary application for furnishing of information.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may apply in a summary manner<sup>2</sup> to the High Court for the delivery of any accounts, the production of any books or the furnishing of any information, required to be delivered, produced or furnished under the enactments relating to value added tax<sup>3</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the procedure see CPR Sch 1 RSC Ord 77 r 8; and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 128.

3 Crown Proceedings Act 1947 s 14(2)(d) (amended by the Finance Act 1972 s 55(1), (7)). The extent of the obligation to produce accounts where ordered on summary application to the High Court under the Crown Proceedings Act 1947 was considered in *Customs and Excise Comrs v Ingram* [1948] 1 All ER 927, CA (for further related proceedings see [1949] 2 KB 103, [1949] 1 All ER 896, CA). See also CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 128.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(2) RECORDS AND INFORMATION/243. Furnishing of information and production of documents.

### **243. Furnishing of information and production of documents.**

Every person who is concerned, in whatever capacity, in the supply<sup>1</sup> of goods or services in the course or furtherance of a business<sup>2</sup> or to whom such a supply is made, every person who is concerned, in whatever capacity, in the acquisition of goods from another member state<sup>3</sup> and every person who is concerned, in whatever capacity, in the importation of goods from a place outside the member states<sup>4</sup> in the course or furtherance of a business must<sup>5</sup>:

- 769 (1) furnish to the Commissioners for Her Majesty's Revenue and Customs<sup>6</sup>, within such time and in such form as they may reasonably require<sup>7</sup>, such information relating to the goods<sup>8</sup> or services or to the supply, acquisition or importation as the Commissioners may reasonably specify<sup>9</sup>; and
- 770 (2) upon demand made by an authorised person<sup>10</sup>, produce or cause to be produced for inspection by that person, at the principal place of business of the person upon whom the demand is made or at such other place as the authorised person may reasonably require<sup>11</sup>, and at such time as the authorised person may reasonably require<sup>12</sup>, any documents<sup>13</sup> relating to the goods or services or to the supply, acquisition or importation<sup>14</sup>.

Where an authorised person has such power to require the production of any documents from any person, he has the same power to require the production of documents from any other person who appears to him to be in possession of them; but where that other person claims a lien on any document produced by him, the production is without prejudice to the lien<sup>15</sup>.

If it appears to him to be necessary to do so, an authorised person may, at a reasonable time and for a reasonable period, remove any document produced to him under these provisions<sup>16</sup>. Where a lien is claimed on a document produced in response to the demand of the authorised person<sup>17</sup>, his removal of the document (at a reasonable time and for a reasonable period) is not regarded as breaking the lien<sup>18</sup>.

Where any documents removed under these powers are lost or damaged, the Commissioners are liable to compensate their owner for any expenses reasonably incurred by him in replacing or repairing the documents<sup>19</sup>.

A fiscal warehousekeeper<sup>20</sup>, upon receiving a request to do so from any proper officer<sup>21</sup>, must produce his fiscal warehousing record<sup>22</sup> to that officer and permit him to inspect and take copies of it or of any part of it, as that officer may require<sup>23</sup>.

1 For the meaning of 'supply' see PARA 27 ante. For these purposes, a person to whom a right to receive the whole or any part of the consideration for a supply of goods or services has been assigned is treated as a person concerned in the supply: Value Added Tax Act 1994 s 58(1), Sch 11 para 7(9) (added by the Finance Act 1999 s 15(3)). For the meaning of 'consideration' generally see PARA 95 ante.

A trader's claim to have made a supply is sufficient to invoke the statutory provisions regarding disclosure even if the supply itself is to be treated as if it were not a supply for VAT purposes: *Interleasing Ltd v Customs and Excise Comrs* (2002) VAT Decision 17819, [2002] STI 1414.

2 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

3 As to when goods are acquired from another member state see PARA 19 ante.

4 As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante.

5 There is no specific right of appeal against a notice requiring disclosure under these provisions, but the VAT and duties tribunal's jurisdiction to hear appeals against penalties imposed for non-compliance (see the Value Added Tax Act 1994 s 83(n) (as amended); and PARA 298 post) implicitly puts in issue the reasonableness or proportionality of the demand made: *University of Glasgow v Customs and Excise Comrs* (2002) VAT Decision 17744, [2002] STI 1412.

6 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

7 If a demand for information is made in the proper manner the trader is bound to answer the demand within the time and in the form required, whether or not the answer may tend to incriminate him: *Customs and Excise Comrs v Harz* [1967] 1 AC 760 at 816, [1967] 1 All ER 177 at 181, HL, per Lord Reid (a case relating to purchase tax); cf *Customs and Excise Comrs v Ingram* [1948] 1 All ER 927 at 929, CA, per Lord Goddard CJ (also relating to purchase tax) ('it is quite a commonplace of legislation designed to protect the revenue of the Crown, as it is realised that all the information must generally be within the knowledge of the taxpayer or the subject, to put an onus on him or to oblige him to do certain things which may have the effect of incriminating him'). See also *EMI Records Ltd v Spillane* [1986] 2 All ER 1016 at 1022, [1986] 1 WLR 967 at 974 per Browne Wilkinson V-C (there is no room in the legislation for an implied exception for documents which might be self-incriminating). However, the power does appear to give the Commissioners the right to require the person in question to give oral answers to questions asked without any prior warning: *Customs and Excise Comrs v Harz* supra at 816-817 and 181-182 per Lord Reid. Note, however, the effect of the privilege against self-incrimination arising from the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1973); Cmdnd 8969) art 6 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 142).

8 As a matter of ordinary English it is not easy to see why 'relating to the goods' should not mean and include information not only as to the character of the goods but also what has happened to them: *Customs and Excise Comrs v Ingram* [1949] 2 KB 103 at 108, [1949] 1 All ER 896 at 900, CA, per Evershed LJ.

9 Value Added Tax Act 1994 Sch 11 para 7(2)(a).

10 For the meaning of 'authorised person' see PARA 91 note 6 ante.

11 Value Added Tax Act 1994 Sch 11 para 7(2)(b)(i).

12 Ibid Sch 11 para 7(2)(b)(ii).

13 For the meaning of 'document' see PARA 17 note 9 ante.

14 Value Added Tax Act 1994 Sch 11 para 7(2)(b). The authorised person may take copies of, or make extracts from, any document so produced: Sch 11 para 7(5). For these purposes, 'documents relating to the supply of goods or services, to the acquisition of goods from another member state or to the importation of goods from a place outside the member states' includes any profit and loss account and balance sheet relating to the business in the course of which the goods or services are supplied or the goods are imported or (in the case of an acquisition from another member state) relating to any business or other activities of the person by whom the goods are acquired: Sch 11 para 7(4).

15 Ibid Sch 11 para 7(3). The authorised person may take copies of, or make extracts from, any document so produced: Sch 11 para 7(5).

16 Ibid Sch 11 para 7(6). On request, the authorised person must provide a receipt for any document so removed: Sch 11 para 7(6). Where a document so removed is reasonably required for the proper conduct of a business, the authorised person must, as soon as practicable, provide a copy of the document, free of charge, to the person by whom it was produced or caused to be produced: Sch 11 para 7(7).

17 Ie produced under ibid Sch 11 para 7(3): see the text to note 15 supra.

16 Ibid Sch 11 para 7(6). However, where documents are held by solicitors under search order, they may be inspected or copied only with the leave of the court: *Customs and Excise Comrs v AE Hamlin & Co (a firm)* [1983] 3 All ER 654, [1984] 1 WLR 509; cf *EMI Records Ltd v Spillane* [1986] 2 All ER 1016 at 1022, [1986] 1 WLR 967 at 974 per Browne Wilkinson V-C (a person falling within what is now the Value Added Tax Act 1994 Sch 11 para 7(2) can be required to produce documents in the hands of his servants or agents only if they hold those documents to his sole order). Accordingly, production of documents cannot be demanded under Sch 11 para 7(3) (see the text to note 15 supra) from any person who does not hold those documents to the sole order of a person within the description in Sch 11 para 7(2), with the result that, in the ordinary case of documents seized under a search order, the solicitors holding the documents cannot validly be served with a notice to produce under Sch 11 para 7(3). As to search orders see CIVIL PROCEDURE vol 11 (2009) PARA 319.

- 19 Value Added Tax Act 1994 Sch 11 para 7(8).
- 20 For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante.
- 21 For the meaning of 'proper officer' see PARA 115 note 7 ante.
- 22 As to the fiscal warehousing records see PARA 241 ante.
- 23 Value Added Tax Regulations 1995, SI 1995/2518, reg 145F(5)(a) (added by SI 1996/1250).

## **UPDATE**

### **243 Furnishing of information and production of documents**

TEXT AND NOTES--Value Added Tax Act 1994 Sch 11 para 7(2)-(9) repealed: Finance Act 2008 Sch 36 para 87.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(2) RECORDS AND INFORMATION/244. Special provisions concerning supplies of investment gold.

#### **244. Special provisions concerning supplies of investment gold.**

A person who makes a supply<sup>1</sup> of investment gold<sup>2</sup> or makes a supply which subsequently results in the transfer of the possession of investment gold<sup>3</sup> must, in addition to the requirements as to the keeping of accounts and records imposed upon every taxable person<sup>4</sup>:

- 771 (1) issue an invoice in respect of the supply containing such details as may be specified in a notice published by the Commissioners for Her Majesty's Revenue and Customs for these purposes<sup>5</sup>;
- 772 (2) keep and maintain a record of the supply containing such details as may be specified in a notice published by the Commissioners for these purposes<sup>6</sup>;
- 773 (3) retain such documents in relation to the supply as may be specified in a notice published by the Commissioners for these purposes<sup>7</sup>;
- 774 (4) keep and maintain a record of the recipient of the supply containing such particulars pertaining to the recipient as may be specified in a notice published by the Commissioners for these purposes<sup>8</sup>;
- 775 (5) keep and maintain such other records and documents as may be specified in a notice published by the Commissioners for these purposes to allow the proper identification of each recipient of the supply<sup>9</sup>;
- 776 (6) notify the Commissioners in writing that he is making such supplies within 28 days of the first supply<sup>10</sup>; and
- 777 (7) furnish to the Commissioners such information in relation to his making of the supply as may be specified in a notice published by them<sup>11</sup>.

The records required to be kept and the documents required to be retained under these provisions must be preserved for a minimum period of six years<sup>12</sup>.

Where a person receives supply of investment gold or a supply which subsequently results in the transfer of the possession of investment gold he must retain the purchase invoice in relation to that supply for a minimum period of six years<sup>13</sup>. Special provision relating to the issue of invoices and the keeping of accounts concerning supplies of investment gold is also made<sup>14</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 He makes a supply of a description falling within the Value Added Tax Act 1994 Sch 9 Group 15 item 1 (as added) (see PARA 164 ante). 'Investment gold' has the same meaning for these purposes as it has for the purposes of Sch 9 Group 15 (as added) (see PARA 164 note 1 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 24 (amended by SI 1999/3114). These provisions do not apply to any person in respect of a supply by him of a description falling within the Value Added Tax Act 1994 Sch 9 Group 15 item 1 or 2 (as added) (see the text and note 3 infra) the value of which does not exceed £5,000, unless the total value of those supplies to any person over the last 12 months exceeds £10,000 (Value Added Tax Regulations 1995, SI 1995/2518, reg 31A(6) (regs 31A, 31B added by SI 1999/3114)), nor to a person who makes supplies of a description falling within the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 4 (as added) (see PARA 211 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 33A (added by SI 1999/3114)).

3 He makes a supply of a description falling within the Value Added Tax Act 1994 Sch 9 Group 15 item 2 (as added) (see PARA 164 ante). See, however, note 2 supra.

4 He the requirements of the Value Added Tax Regulations 1995, SI 1995/2518, Pt V (regs 24-43) (as amended). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante. These provisions apply only save

as the Commissioners for Her Majesty's Revenue and Customs may otherwise allow in relation to supplies where the value is less than an amount equivalent to 15,000 euros at a rate specified in any notice published by the Commissioners for these purposes: reg 31A(2) (as added: see note 2 supra). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 Ibid reg 31A(1), (2)(a) (as added: see note 2 supra). This requirement is without prejudice to the provisions of regs 13, 14 (as amended) (see PARAS 278, 281 post): reg 31A(2)(a) (as so added).

6 Ibid reg 31A(2)(b) (as added: see note 2 supra).

7 Ibid reg 31A(2)(c) (as added: see note 2 supra).

8 Ibid reg 31A(2)(d) (as added: see note 2 supra).

9 Ibid reg 31A(2)(e) (as added: see note 2 supra).

10 Ibid reg 31A(2)(f) (as added: see note 2 supra).

11 Ibid reg 31A(2)(g) (as added: see note 2 supra).

12 Ibid reg 31A(5) (as added: see note 2 supra).

13 Ibid reg 31B (as added: see note 2 supra).

14 See *ibid* reg 31A(3), (4) (as added); and PARAS 275, 278 post.



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ACCOUNTING AND ASSESSMENT/(3) ACCOUNTING FOR VALUE ADDED TAX/(i) In general/245.  
Provision which may be made by regulations.

### **(3) ACCOUNTING FOR VALUE ADDED TAX**

#### **(i) In general**

#### **245. Provision which may be made by regulations.**

Regulations made by the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may:

- 778 (1) require the keeping of accounts and the making of returns in such form and manner as may be specified in them<sup>2</sup>;
- 779 (2) require taxable persons<sup>3</sup> supplying goods or services to provide the persons supplied with invoices ('VAT invoices')<sup>4</sup>;
- 780 (3) require the submission to the Commissioners by taxable persons of statements containing such particulars of transactions in which the taxable persons are concerned and which involve the movement of goods between member states, and of the persons concerned in those transactions, as may be prescribed<sup>5</sup>;
- 781 (4) make provision for requiring a person who acquires goods which are subject to a duty of excise or consist in a new means of transport<sup>6</sup> to give to the Commissioners such notification of the acquisition, and for requiring any VAT on the acquisition to be paid, at such time and in such form or manner as may be specified in the regulations<sup>7</sup>;
- 782 (5) make special provision for such taxable supplies by retailers of any goods, or of any description of goods, or of services, or any description of services, as may be determined by or under the regulations<sup>8</sup>;
- 783 (6) make provision whereby, in such cases and subject to such conditions as may be determined by or under the regulations, VAT in respect of a supply may be accounted for and paid by reference to the time when consideration<sup>9</sup> for the supply is received<sup>10</sup>;
- 784 (7) make special provision in connection with the accounting for, payment and determination of VAT in respect of supplies of dutiable goods<sup>11</sup>;
- 785 (8) provide for the time when any invoice described in regulations made for the purposes of the time of supply<sup>14</sup> or time of acquisition<sup>15</sup> is to be treated as having been issued and provide for VAT accounted for and paid by reference to the date of issue of such an invoice to be confined to VAT on so much of the value of the supply or acquisition as is shown on the invoice<sup>16</sup>;
- 786 (9) make provision for treating VAT chargeable in one prescribed accounting period as chargeable in another such period<sup>17</sup>; and
- 787 (10) make provision with respect to the making of entries in accounts for the purpose of making adjustments, whether for the correction of errors or otherwise<sup>18</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. Regulations made by the Commissioners for these purposes (other than so far as relating to VAT invoices (see note 4 infra; and PARA 246 post)) may make different provision for different circumstances and may provide for different dates as the commencement of prescribed accounting periods applicable to different persons: Value Added Tax Act 1994 s 58, Sch 11 para 2(11). For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

2 Ibid Sch 11 para 2(1) (amended by the Finance Act 2002 ss 24(1)(b)(i), 141, Sch 40 Pt 2(2)).

3 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 Value Added Tax Act 1994 Sch 11 para 2A(1) (Sch 11 para 2A added by the Finance Act 2002 s 24(2)). For the meaning of 'invoice' see PARA 17 note 9 ante. Such regulations may be framed so as to apply only in prescribed cases or only in relation to supplies made to persons of prescribed descriptions (Value Added Tax Act 1994 Sch 11 para 2A(7)(a) (as so added)) and may make different provision for different circumstances (Sch 11 para 2A(7)(b) (as so added)). As to VAT invoices and the powers of the Commissioners to make regulations concerning them see further PARA 246 post. For the meaning of 'supply' see PARA 27 ante.

5 Ibid Sch 11 para 2(3). For the meaning of 'prescribed' see PARA 16 note 2 ante. Regulations may require such submissions to be made in such cases, at such times and intervals, and in such form and manner, as may be specified therein (Sch 11 para 2(3)(a)) or determined by the Commissioners in accordance with powers conferred by the regulations (Sch 11 para 2(3)(b)).

6 For the meaning of 'new means of transport' see PARA 19 note 7 ante.

7 Value Added Tax Act 1994 Sch 11 para 2(4). See further PARA 58 ante. Regulations may make such provision in relation to cases where any goods which are subject to a duty of excise or consist in a new means of transport are acquired in the United Kingdom from another member state by any person (Sch 11 para 2(4)(a)), the acquisition of the goods is a taxable acquisition and is not in pursuance of a taxable supply (Sch 11 para 2(4)(b)), and that person is not a taxable person at the time of the acquisition (Sch 11 para 2(4)(c)). They may provide for any notification so required to contain such particulars relating to the notified acquisition and any VAT chargeable thereon as may be specified in the regulations (Sch 11 para 2(5)(a)) and to be given, in prescribed cases, by the personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting in a representative capacity in relation to the person who makes that acquisition (Sch 11 para 2(5)(b)). Where regulations make provision for requiring VAT on the acquisition to be paid, they may specify the time and form or manner of payment: Sch 11 para 2(4). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante. For the meaning of 'another member state' see PARA 4 note 15 ante. As to acquisitions from another member state see PARA 19 ante. For the meaning of 'taxable acquisition' see PARA 19 ante. For the meaning of 'taxable supply' see PARA 18 note 3 ante.

8 Ibid Sch 11 para 2(6). In particular, the regulations may make provision for permitting the value which is to be taken as the value of the supplies in any prescribed accounting period or part of it to be determined, subject to any limitations or restrictions, by such method or one of such methods as may have been described in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice or as may be agreed with the Commissioners (Sch 11 para 2(6)(a)), for determining the proportion of the value of the supplies which is to be attributed to any description of supplies (Sch 11 para 2(6)(b)), and for adjusting that value and proportion for periods comprising two or more prescribed accounting periods or parts of them (Sch 11 para 2(6)(c)). An appeal lies to a VAT and duties tribunal against any refusal to permit the value of supplies to be determined by a method described in a notice published under these provisions: see s 83(x); and PARA 346 post.

9 For the meaning of 'consideration' generally see PARA 95 ante.

10 Value Added Tax Act 1994 Sch 11 para 2(7). Any such regulations may make such modifications of the provisions of the Value Added Tax Act 1994, including in particular, but without prejudice to the generality of this power, the provisions as to the time when, and the circumstances in which, credit for input tax is to be allowed, as appear to the Commissioners necessary or expedient: Sch 11 para 2(7). An appeal lies to a VAT and duties tribunal against any refusal of authorisation or termination of authorisation in connection with the scheme made under this provision: see s 83(y); and PARA 346 post. For the meaning of 'input tax' see PARAS 4, 215 ante.

11 Ibid Sch 11 para 2(8)(a), (b). For the meaning of 'dutiable goods' see PARA 98 note 8 ante (definition applied by Sch 11 para 2(8)). Regulations may make this provision in such cases and subject to such conditions as may be determined by or under the regulations, and may specifically provide for VAT in respect of any supply by a taxable person of dutiable goods and VAT in respect of an acquisition by any person from another member state of dutiable goods to be accounted for and paid, and any question as to the inclusion of any duty or agricultural levy in the value of the supply or acquisition determined, by reference to the duty point, or to such later time as the Commissioners may allow: Sch 11 para 2(8). For the meaning of 'duty point' see PARA 98 note 10 ante (definition applied by Sch 11 para 2(8)).

14 Ie for the purposes of ibid s 6(8)(b): see PARA 44 ante.

15 Ie for the purposes of ibid s 12(1)(b): see PARA 44 ante.

16 Ibid Sch 11 para 2(9).

17 Ibid Sch 11 para 2(10)(a). See PARA 248 post.

18 Ibid Sch 11 para 2(10)(b). Regulations may also make provision: (1) for the making of financial adjustments in connection with the making of entries in accounts for this purpose (Sch 11 para 2(10)(c)); (2) for a person, for purposes connected with the making of any such entry or financial adjustment, to be required to provide to any prescribed person, or to retain, a document in the prescribed form containing prescribed particulars of the matters to which the entry or adjustment relates (Sch 11 para 2(10)(d) (Sch 11 para 2(10)(d), (e) added by the Finance Act 1996 s 38(1), (3)); and (3) for enabling the Commissioners, in such cases as they may think fit, to dispense with or relax a requirement so imposed (Sch 11 para 2(10)(e) (as so added)). For the meaning of 'document' see PARA 17 note 9 ante.

## **UPDATE**

### **245 Provision which may be made by regulations**

TEXT AND NOTES--Regulations under the Value Added Tax Act 1994 Sch 11 para 2 may require the submission to the Commissioners by taxable persons, at such times and intervals, in such cases and in such form and manner as may be specified in the regulations or determined by the Commissioners in accordance with powers conferred by the regulations, of statements containing such particulars of supplies to which s 55A(6) (see PARA 34A) applies in which the taxable persons are concerned, and of the persons concerned in those supplies, as may be prescribed: Sch 11 para 2(3A) (Sch 11 para 2(3A), (3B) added by Finance Act 2006 s 19(7)). Such regulations may also make provision, in relation to the first occasion on which a person makes a supply of goods to which the 1994 Act s 55A(6) applies, for requiring the person to give to the Commissioners such notification of the supply at such time and in such form and manner as may be specified in the regulations: Sch 11 para 2(3B).

TEXT AND NOTE 5--Head (3) now applies not only to transactions involving the movement of goods between member states but also to transactions involving the supply of services to a person in a member state other than the United Kingdom who is required to pay VAT on the supply in accordance with provisions of the law of that other member state giving effect to EC Council Directive 2006/112 art 196: Value Added Tax Act 1994 Sch 11 para 2(3), (3ZA) (Sch 11 para 2(3) amended, Sch 11 para 2(3ZA) added, by Finance Act 2009 s 78).

NOTE 18--See Value Added Tax etc (Correction of Errors etc) Regulations 2008, SI 2008/1482.

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ACCOUNTING AND ASSESSMENT/(3) ACCOUNTING FOR VALUE ADDED TAX/(i) In general/246.  
Further provision relating to VAT invoices.

## **246. Further provision relating to VAT invoices.**

A VAT invoice<sup>1</sup> must give such particulars as may be prescribed<sup>2</sup> of the supply<sup>3</sup>, the supplier and the person supplied<sup>4</sup>, such an indication as may be prescribed of whether value added tax is chargeable<sup>5</sup> on the supply<sup>6</sup>, and such particulars of any VAT which is so chargeable as may be prescribed<sup>7</sup>. Where the Commissioners for Her Majesty's Revenue and Customs exercise their powers to make regulations requiring taxable persons<sup>8</sup> who supply goods or services to provide the persons supplied with VAT invoices<sup>9</sup>, they may also make regulations<sup>10</sup>:

- 788 (1) conferring power on the Commissioners to allow the requirements of any regulations as to the information to be given in a VAT invoice to be relaxed or dispensed with<sup>11</sup>;
- 789 (2) providing that the VAT invoice that is required to be provided in connection with a particular description of supply must be provided within a prescribed time after the supply is treated as taking place, or at such time before the supply is treated as taking place as may be prescribed<sup>12</sup>;
- 790 (3) allow for the invoice to be issued later than required by the regulations where it is issued in accordance with general or special directions given by the Commissioners<sup>13</sup>;
- 791 (4) make provision about the manner in which a VAT invoice may be provided, including provision prescribing conditions that must be complied with in the case of an invoice issued by a third party on behalf of the supplier<sup>14</sup>;
- 792 (5) prescribe conditions that must be complied with in the case of a VAT invoice that relates to more than one supply<sup>15</sup>;
- 793 (6) make, in relation to a document that refers to a VAT invoice and is intended to amend it, such provision corresponding to that which may be made in relation to a VAT invoice as appears to the Commissioners to be appropriate<sup>16</sup>; and
- 794 (7) confer power on the Commissioners to require a person who has received in the United Kingdom<sup>17</sup> a VAT invoice that is (or part of which is) in a language other than English to provide them with an English translation of the invoice (or part)<sup>18</sup>.

Where a taxable person provides to himself a document (a 'self-billed invoice') that purports to be a VAT invoice in respect of a supply of goods or services to him by another taxable person<sup>19</sup>, then subject to compliance with such conditions as may be prescribed<sup>20</sup>, specified in a notice published by the Commissioners<sup>21</sup>, or imposed in a particular case in accordance with regulations<sup>22</sup>, it will be treated as the VAT invoice required by regulations<sup>23</sup> to be provided by the supplier<sup>24</sup>.

1 As to the power of the Commissioners for Her Majesty's Revenue and Customs to make regulations requiring the provision of VAT invoices see PARA 245 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'prescribed' see PARA 16 note 2 ante.

3 For the meaning of 'supply' see PARA 27 ante.

4 Value Added Tax Act 1994 s 58, Sch 11 para 2A(2)(a) (Sch 11 paras 2A, 2B added by the Finance Act 2002 s 24(2)).

5     Ie under the Value Added Tax Act 1994 or the law of another member state: Sch 11 para 2A(2)(b) (as added: see note 4 supra). For the meaning of 'another member state' see PARA 4 note 15 ante. As to references to the law of another member state see PARA 17 ante.

6     Ibid Sch 11 para 2A(2)(b) (as added: see note 4 supra).

7     Ibid Sch 11 para 2A(2)(c) (as added: see note 4 supra).

8     For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

9     Ie pursuant to the Value Added Tax Act 1994 Sch 11 para 2A(1) (as added) (see PARA 245 ante).

10    Such regulations may be framed so as to apply only in prescribed cases or only in relation to supplies made to persons of prescribed descriptions (ibid Sch 11 para 2A(7)(a) (as added: see note 4 supra)) and may make different provision for different circumstances (Sch 11 para 2A(7)(b) (as so added)).

11    Ibid Sch 11 para 2A(3) (as added: see note 4 supra). As to the information to be given in a VAT invoice see the text and notes 1-7 supra.

12    Ibid Sch 11 para 2A(4)(a) (as added: see note 4 supra).

13    Ibid Sch 11 para 2A(4)(b) (as added: see note 4 supra).

14    Ibid Sch 11 para 2A(5)(a) (as added: see note 4 supra).

15    Ibid Sch 11 para 2A(5)(b) (as added: see note 4 supra).

16    Ibid Sch 11 para 2A(5)(c) (as added: see note 4 supra).

17    As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

18    Value Added Tax Act 1994 Sch 11 para 2A(5)(c) (as added: see note 4 supra).

19    Ibid Sch 11 para 2B(1) (as added: see note 4 supra).

20    Ibid Sch 11 para 2B(2)(a) (as added: see note 4 supra). Regulations under Sch 11 para 2B (as added) may be framed so as to apply only in prescribed cases or only in relation to supplies made to persons of prescribed descriptions (Sch 11 para 2B(5)(a) (as so added)) and may make different provision for different circumstances (Sch 11 para 2B(5)(b) (as so added)).

21    Ibid Sch 11 para 2B(2)(b) (as added: see note 4 supra).

22    Ibid Sch 11 para 2B(2)(c) (as added: see note 4 supra). An appeal lies to a VAT and duties tribunal against any conditions imposed by the Commissioners in a particular case by virtue of this provision: see s 83(z) (substituted by the Finance Act 2002 s 24(4)(b)); and PARA 346 post.

23    Ie regulations under the Value Added Tax Act 1994 Sch 11 para 2A (as added) (see the text and notes 1-18 supra; and PARA 245 text and notes 3, 4 ante).

24    Ibid Sch 11 para 2B(2) (as added: see note 4 supra). A self-billed invoice will not be treated as issued by the supplier for the purposes of s 6(4) (under which the time of supply can be determined by the prior issue of an invoice: see PARA 35 ante) (Sch 11 para 2B(3) (as so added)) but will be so treated for the purposes of 6(5), (6) (under which the time of supply can be determined by the subsequent issue of an invoice: see PARA 35 ante) provided the conditions mentioned in Sch 11 para 2B(2) (as added) (see the text and notes 20-22 supra), and such further conditions as may be prescribed, are complied with (Sch 11 para 2B(4) (as so added)). In such a case, any notice of election given or request made for the purposes of s 6(5) or (6) by the person providing the self-billed invoice will be treated for those purposes as given or made by the supplier: Sch 11 para 2B(4) (as so added).

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The value added tax return.

## **247. The value added tax return.**

The general rule is that a taxable person<sup>1</sup> must, for each prescribed accounting period<sup>2</sup>, account for and pay VAT both in respect of supplies<sup>3</sup> made by him, and in respect of the acquisition by him of goods from other member states<sup>4</sup>. Every person who is registered<sup>5</sup>, or who was or is required to be registered, must make a return<sup>6</sup>, not later than the last day of the month next following the end of the period to which it relates<sup>7</sup>. The relevant period is a period of a quarter or, in the case of a person who is registered, a period of three months ending on the dates notified either in the certificate of registration<sup>8</sup> issued to him or otherwise<sup>9</sup>. The return must be made on the prescribed form<sup>10</sup> showing the amount of VAT payable by or to him and containing full information in respect of the other matters specified in the form and a declaration, signed by him, that the return is true and complete<sup>11</sup>. The first return must be for the period which includes the effective date<sup>12</sup> upon which the person was or should have been registered and that period begins on that date<sup>13</sup>.

The Commissioners for Her Majesty's Revenue and Customs may allow or direct a person to make returns in respect of periods of one month and to make those returns within one month of the periods to which they relate<sup>14</sup>. Any person to whom the Commissioners give such a direction must comply with it<sup>15</sup>.

A person may also make the return required by these provisions using electronic communications<sup>16</sup>. An electronic return system<sup>17</sup> must incorporate an electronic validation process<sup>18</sup>, and may be used only on the condition that the system takes a form approved by the Commissioners in a specific or general direction<sup>19</sup> and the person using it remains authorised to use it by the Commissioners<sup>20</sup>; no return will be treated as having been made using an electronic return system unless these conditions are satisfied<sup>21</sup>. Subject to this, the use of an electronic return system will be proved to have resulted in the making of the return only if this has been successfully recorded as such by the relevant electronic validation process<sup>22</sup>. Additional time is allowed to make a return for which any related payment is made solely by means of electronic communications<sup>23</sup>.

Any person who ceases to be liable to be registered<sup>24</sup>, or to be entitled<sup>25</sup> to be registered<sup>26</sup>, must, unless another person has been registered with his registration number<sup>27</sup> in substitution for him<sup>28</sup>, make a final return<sup>29</sup>. In the case of a person who was or is registered, that return must be made within one month of the effective date for cancellation of his registration, and in the case of any other person, within one month of the date upon which he ceases to be liable to be registered, and in either case must be in respect of the final period ending on that date and in substitution for the return for the period in which that date occurs<sup>30</sup>. The final return must contain full information in respect of the matters specified in the prescribed form<sup>31</sup> and a declaration, signed by the person making it, that the return is true and complete<sup>32</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante. Regulations made for the purposes of accounting for VAT, in relation to VAT invoices (see PARAS 245-246 ante) and for the payment of VAT may make different provision for different circumstances and may provide for different dates as the commencement of prescribed accounting periods applicable to different persons: see the Value Added Tax Act 1994 s 58, Sch 11 para 2(11); and PARA 245 ante.

3 For the meaning of 'supply' see PARA 27 ante.

4 See the Value Added Tax Act 1994 s 25(1); and PARA 216 ante. As to acquisitions from other member states see PARA 19 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

5 For the meaning of 'registered' see PARA 64 note 2 ante.

6 For the meaning of 'return' see PARA 115 note 13 ante. Where the Commissioners for Her Majesty's Revenue and Customs consider it necessary, in any particular case, they may allow or direct a person to make returns to a specified address (Value Added Tax Regulations 1995, SI 1995/2518, reg 25(1)(d)); and any person to whom they give any such direction must comply with it (reg 25(2)). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

7 Ibid reg 25(1). Where the Commissioners consider it necessary in any particular case to vary the date by which any return must be made, they may allow or direct any person to make returns accordingly, whether or not the period so varied has ended (reg 25(1)(c)); and any person to whom they give any such direction must comply with it (reg 25(2)). Since a payment can be required in the absence of a return it would be unreal to treat reg 25(1)(c) as applicable only where there has been a return, and accordingly, in a case where the Commissioners had raised an assessment for 10 months (reckoned from the time when the trader was assumed to have exceeded the registration threshold), that assessment was not invalid: *Hindle (t/a DJ Baker Bar) v Customs and Excise Comrs* [2003] EWHC 1665 (Ch), [2004] STC 412. Where the Commissioners wish to make a direction under the Value Added Tax Regulations 1995, SI 1995/2518, reg 25(1)(c), they must make clear that they are varying or altering to some other period the period with which the trader is already legally bound to comply: *Weston v Customs and Excise Comrs* (2003) VAT Decision 18190, [2003] STI 1582.

8 As to registration see PARA 64 et seq ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 25(1). Where the Commissioners consider it necessary in any particular case to vary the length of any period or the date on which any period begins or ends, they may allow or direct any person to make returns accordingly, whether or not the period so varied has ended: reg 25(1)(c). This can be convenient for traders (eg retailers) who wish to draw up their accounts by reference to cycles of weeks, rather than on a monthly basis. In *Bjellica (t/a Eddy's Domestic Appliances) v Customs and Excise Comrs* [1995] STC 329, CA, it was held that the Commissioners could validly require a trader to make a return for a period of 12.5 years (decided under EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 22(4), which permits member states to fix different intervals at which a trader must make a VAT return, provided that such intervals do not exceed a year). As to the Sixth Directive see PARA 1 note 1 ante.

10 For the prescribed form see the Value Added Tax Regulations 1995, SI 1995/2518, reg 25(1), Sch 1, Form 4 (substituted by SI 2004/1675). A copy of this form is automatically sent to the registered person for each prescribed accounting period. A return made using an electronic return system (see the text and notes 16-23 infra) carries the same consequences as a return made on the prescribed form, except in relation to any matter for which alternative or additional provision is made by or under the Value Added Tax Regulations 1995, SI 1995/2518, reg 25(4C)-(4F) (as added, substituted and amended): reg 25(4K) (reg 25(4A)-(4L) added by SI 2000/258; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 25(4A), (4F) amended, and reg 25(4D), (4J)-(4L) substituted by SI 2004/1675).

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 25(1) (amended by SI 2000/258). Where a person is so required to make a return, the amounts to be entered on that return must be determined as follows: (1) in the box opposite the legend 'VAT due in this period on sales and other outputs' must be entered the aggregate of all the entries in the VAT payable portion of that part of the VAT account which relates to the prescribed accounting period for which the return is made, except that the total of the output tax due in that period on acquisitions from other member states must be entered instead in the box opposite the legend 'VAT due in this period on acquisitions from other EC member states' (Value Added Tax Regulations 1995, SI 1995/2518, reg 39(1), (2)); (2) in the box opposite the legend 'VAT reclaimed in this period on purchases and other inputs' (including acquisitions from other member states) must be entered the aggregate of all the entries in the VAT allowable portion of that part of the VAT account which relates to the prescribed accounting period for which the return is made (reg 39(3)); and (3) where any correction has been made and a return calculated in accordance with the regulations, then any such return is regarded as correcting any earlier returns to which regs 34, 35 (reg 34 as amended) (see PARA 276 post) apply (reg 39(4)). As to the VAT account see PARA 275 post; for the meaning of 'output tax' see PARAS 4, 215 ante; and as to goods acquired in another member state see PARA 19 ante.

Returns must be made as long as a person remains registered for VAT, notwithstanding that he has ceased trading: *Keogh v Gordon* [1979] 1 All ER 89, [1978] STC 340. In *Aikman v White* [1986] STC 1, and *Hayman v Griffiths, Walker v Hanby* [1988] QB 97, [1987] STC 649, it was held that a return was 'furnished' (in the words of the regulation then applicable) when it was posted in the prepaid envelope provided by the Commissioners for the purpose, since the Commissioners thereby adopted the Post Office agent to receive the return. However, these decisions substantially turned on the wording of the statutory form, as it then stood; and that form was amended as a result of the two decisions. The decisions were not followed in *Customs and Excise Comrs v W*

*Timms & Son (Builders) Ltd* [1992] STC 374, where MacPherson J held that, in the context of a claim for repayment supplement on a repayment of tax allegedly delayed by the Commissioners (see PARA 315 post), a return was not 'received' until it was actually received, since only then could it be processed by the Commissioners.

12    Ie determined in accordance with the Value Added Tax Act 1994 Schs 1-3A (as added and amended): see PARA 64 et seq ante.

13    Value Added Tax Regulations 1995, SI 1995/2518, reg 25(1)(b) (amended by SI 2000/794).

14    Value Added Tax Regulations 1995, SI 1995/2518, reg 25(1)(a). Persons (commonly known as 'repayment traders') whose input tax regularly exceeds their output tax (eg because their supplies are zero-rated) will often request monthly accounting since they thereby recover their excess input tax more rapidly.

15    Ibid reg 25(2).

16    Ibid reg 25(4A) (as added and amended: see note 10 supra).

17    For the purposes of ibid Pt V (regs 24-43) (as amended), an 'electronic return system' is a method of making a return using electronic communications pursuant to reg 25(4A) (as added): reg 25(4B) (as added: see note 10 supra).

18    Ibid reg 25(4E) (as added: see note 10 supra).

19    Ibid reg 25(4C)(a) (as added: see note 10 supra). 'Direction' refers only to a current direction, and a direction is not current to the extent that it is varied, replaced or revoked by another Commissioners' direction: reg 25(4M) (added by SI 2004/1675). This condition incorporates the requirements that a direction may in particular modify or dispense with any requirement of Form 4 or Form 5 (as appropriate) (Value Added Tax Regulations 1995, SI 1995/2518, reg 25(4D)(a), (4J) (as added and substituted: see note 10 supra)), for which purposes it may specify different circumstances for different cases (reg 25(4D) (as so added and substituted)), and may specify circumstances in which the electronic return system may be used, or not used, by or on behalf of the person required to make the return (reg 25(4D)(b) (as so added and substituted)).

20    Ibid reg 25(4C)(b) (as added: see note 10 supra). The Commissioners may on application authorise a person to make returns using an electronic return system and may revoke any such authorisation: reg 25(4G) (as so added). Before authorising a person or revoking an authorisation under this provision, the Commissioners must pay proper regard to the state of development of any relevant electronic return system (reg 25(4H)(a) (as so added)), the protection of the revenue (reg 25(4H)(b) (as so added)), the degree of compliance of the person concerned with Pt V (as amended) (reg 25(4H)(c) (as so added)), and any other relevant factor (reg 25(4H)(d) (as so added)). A person is not authorised to make returns using an electronic return system only by reason of being registered under reg 6 (as amended) (transfer of a going concern: see PARA 83 ante) in substitution for a person who has been so authorised (reg 25(4I)(a) (as so added)) or required by the Commissioners under reg 30 (person acting in a representative capacity: see PARA 285 post) to comply with the requirements of Pt V (reg 25(4I)(b) (as so added)).

21    Ibid reg 25(4J) (as added and substituted: see note 10 supra).

22    Ibid reg 25(4F)(a) (as added and amended: see note 10 supra). The time of making the return using an electronic return system will be conclusively presumed to be the time recorded as such by the relevant electronic validation process (reg 25(4F)(b) (as so added)) and the person delivering the return will be presumed to be the person identified as such by any relevant feature of the electronic return system (reg 25(4F)(c) (as so added and amended)).

23    Ibid reg 25(4L) (as added and substituted: see note 10 supra). The additional time is only as the Commissioners may allow in a specific or general direction (which the Commissioners are not obliged to give), and such a direction may allow different times for different means of payment: reg 25(4L) (as so added and substituted).

24    Ibid reg 25(4)(a). See PARA 80 et seq ante.

25    Ie under either one or both of the Value Added Tax Act 1994 Sch 1 paras 9, 10: see PARA 67 ante.

26    Value Added Tax Regulations 1995, SI 1995/2518, reg 25(4)(b).

27    For the meaning of 'registration number' see PARA 22 note 14 ante.

28    Ie under the Value Added Tax Regulations 1995, SI 1995/2518, reg 6 (as amended): see PARA 83 ante.



29 Ibid reg 25(4).

30 Ibid reg 25(4).

31 For the prescribed form see *ibid* reg 25(4), Sch 1, Form 5 (substituted by SI 2004/1675). A return made using an electronic return system (see the text and notes 16-23 *supra*) carries the same consequences as a return made on the prescribed form, except in relation to any matter for which alternative or additional provision is made by or under the Value Added Tax Regulations 1995, SI 1995/2518, reg 25(4C)-(4F) (as added, substituted and amended); reg 25(4K) (as added and substituted: see note 10 *supra*).

32 Ibid reg 25(4).

## **UPDATE**

### **247 The value added tax return**

NOTE 9--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 23--See *RHC Lifting Ltd v HMRC Comrs* (2006) VAT Decision 19433, [2006] STI 1370; *Beir (t/a Contract Audio Visual Sales) v HMRC Comrs* (2006) VAT Decision 19441, [2006] STI 1370 (VAT Guide para 21.3 allows seven days' grace if payment of VAT due made by electronic means: a 'specific or general direction' for purposes of SI 1995/2518 reg 25(4L)).

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ACCOUNTING AND ASSESSMENT/(3) ACCOUNTING FOR VALUE ADDED TAX/(i) In general/248.  
Payment of value added tax; in general.

#### **248. Payment of value added tax; in general.**

Save as the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may otherwise allow or direct<sup>2</sup>, any person making a return<sup>3</sup> must, in respect of the period to which the return relates, account in that return for:

- 795 (1) all his output tax<sup>4</sup>;
  - 796 (2) all value added tax for which he is accountable by virtue of the regulations relating to importations, exportations and removals<sup>5</sup>;
  - 797 (3) all VAT which he is required to pay as a result of the removal of goods from a fiscal warehousing regime<sup>6</sup>; and
  - 798 (4) all VAT which he is required to pay as a result of a supply of specified services, performed on or in relation to goods at a time when they are subject to a warehousing regime<sup>7</sup>, being zero-rated<sup>8</sup> where:
- 23
- 49. (a) that warehousing regime is one where goods are stored without payment of any duty of excise<sup>9</sup>;
  - 50. (b) those goods are subject to a duty of excise<sup>10</sup>;
  - 51. (c) those goods have been subject to an acquisition from another member state<sup>11</sup> and the material time for that acquisition was while those goods were subject to that warehousing regime<sup>12</sup>; and
  - 52. (d) there was no supply<sup>13</sup> of those goods while they were subject to that warehousing regime<sup>14</sup>.
- 24

The amount to be entered on that return must be determined in accordance with the relevant regulations<sup>15</sup>.

Any person required to make a return must pay, not later than the last day on which he is required to make that return, such amount of VAT as is payable by him in respect of the period to which the return relates<sup>16</sup> (although the Commissioners may allow VAT chargeable in any period to be treated as being chargeable in such later period as they may specify<sup>17</sup>); where a return is made using an electronic return system<sup>18</sup>, the relevant payment must be made solely by means of electronic communications that are acceptable to the Commissioners for this purpose<sup>19</sup>.

<sup>1</sup> As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

<sup>2</sup> Value Added Tax Regulations 1995, SI 1995/2518, reg 40(3) (reg 40 substituted by SI 1996/1250).

<sup>3</sup> For the meaning of 'return' see PARA 115 note 13 ante.

<sup>4</sup> Value Added Tax Regulations 1995, SI 1995/2518, reg 40(1)(a) (as substituted: see note 2 supra). For the meaning of 'output tax' see PARAS 4, 215 ante.

<sup>5</sup> Ibid reg 40(1)(b) (as substituted: see note 2 supra). As to the regulations relating to importations, exportations and removals see Pt XVI (regs 117-145) (as amended); and PARAS 17, 114 et seq ante.

6 Ibid reg 40(1)(b) (as substituted: see note 2 supra). As to fiscal warehousing regimes see PARA 148 ante; and as to removals from fiscal warehousing see PARA 151 ante.

7 For the meaning of 'subject to a warehousing regime' see PARA 144 note 6 ante.

8 For the meaning of 'zero-rated' see PARA 174 ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 40(1)(d)(i) (as substituted: see note 2 supra).

10 Ibid reg 40(1)(d)(ii) (as substituted: see note 2 supra).

11 As to the acquisition of goods from another member state see PARA 19 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

12 Value Added Tax Regulations 1995, SI 1995/2518, reg 40(1)(d)(iii) (as substituted: see note 2 supra).

13 For the meaning of 'supply' see PARA 27 ante.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 40(1)(d)(iv) (as substituted: see note 2 supra).

15 Ibid reg 40(1) (as substituted: see note 2 supra).

16 Ibid reg 40(2) (as substituted: see note 2 supra).

17 Ibid reg 25(5). As to the power to make such provision see the Value Added Tax Act 1994 s 58, Sch 11 para 2(10)(a); and PARA 245 ante. The Commissioners' decision in this regard does not affect the time of the supply, and must be communicated to the taxpayer: *Inchcape Management Services Ltd v Customs and Excise Comrs* [1999] V & DR 397.

18 Ie in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 25 (as amended) (see PARA 247 ante).

19 Ibid reg 40(2A) (added by SI 2000/258). A direction under the Value Added Tax Regulations 1995, SI 1995/2518, reg 40(3) (as substituted) (see the text and notes 1-2 supra) may in particular allow additional time for a payment mentioned in reg 40(2) (as substituted) (see the text and note 16 supra) that is made by means of electronic communications, and may allow different times for different means of payment: reg 40(4) (reg 40(4), (5) added by SI 2004/1675). Later payment so allowed does not of itself constitute a default for the purposes of the Value Added Tax Act 1994 s 59 (as amended) (default surcharge: see PARA 332 post): Value Added Tax Regulations 1995, SI 1995/2518, reg 40(5) (as so added).

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## (ii) The Cash Accounting Scheme

### 249. The scheme.

The effect of the value added tax rules is that a trader is obliged to account for and pay to the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> VAT which he may not have received from his customers, since VAT is charged on supplies made during the prescribed accounting period<sup>2</sup> and the time of supply of goods and services is, as a general rule<sup>3</sup>, when the goods are removed or made available and when the services are performed<sup>4</sup>. In order to relieve the small trader from the burden of accounting for VAT which he has not received, the cash accounting scheme was introduced<sup>5</sup>, enabling a taxable person<sup>6</sup>, subject to such conditions as are described in a notice published by the Commissioners<sup>7</sup> and other than in relation to any supplies or purchases for which he accounts and pays VAT in accordance with the flat-rate scheme<sup>8</sup>, to account for VAT in accordance with a scheme ('the scheme') by which the operative dates for VAT accounting purposes are:

- 799 (1) for output tax<sup>9</sup>, the day on which payment or other consideration<sup>10</sup> is received or the date of any cheque, if later<sup>11</sup>; and
- 800 (2) for input tax<sup>12</sup>, the date on which payment is made or other consideration is given, or the date of any cheque, if later<sup>13</sup>.

The scheme does not apply to lease purchase agreements<sup>14</sup>, hire purchase agreements<sup>15</sup>, conditional sale agreements<sup>16</sup>, credit sale agreements<sup>17</sup>, supplies where a VAT invoice<sup>18</sup> is issued and full payment of the amount shown on the invoice is not due for a period in excess of six months from the date of the issue of the invoice<sup>19</sup>, and supplies of goods or services in respect of which a VAT invoice is issued in advance of the delivery or making available of the goods or the performance of the services, as the case may be<sup>20</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

3 As to the rules determining the time of supply for VAT purposes see PARAS 35-44 ante.

4 See PARA 35 ante.

5 As to the cash accounting scheme see the text and notes 6-20 infra; and PARAS 250-251 post.

6 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

7 For these purposes, 'notice' means any notice published pursuant to the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIII (regs 56-65) (as amended): reg 56. The relevant notice is Customs and Excise Public Notice 731 *Cash Accounting* (April 2004). Without prejudice to the right of a person to withdraw from the scheme, the Commissioners may vary its terms by publishing a fresh notice or publishing a notice which amends an existing notice: Value Added Tax Regulations 1995, SI 1995/2518, reg 59 (amended by SI 1997/1614).

8 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 57A (added by SI 2002/1142), which provides that a person may not account for VAT in accordance with the cash accounting scheme in respect of

any supplies or purchases of his which are 'relevant' for the purposes of the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see PARA 260 et seq post).

9 For the meaning of 'output tax' see PARAS 4, 215 ante.

10 For the meaning of 'consideration' generally see PARA 95 ante.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 57(a). Regulation 57 implements the Value Added Tax Act 1994 s 58, Sch 11 para 2(7) (see PARA 245 ante).

12 For the meaning of 'input tax' see PARAS 4, 215 ante.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 57(b). See note 11 supra.

14 Ibid reg 58(1)(a) (reg 58 substituted by SI 1997/1614).

15 Ibid reg 58(1)(b) (as substituted: see note 14 supra). As to hire purchase agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 95.

16 Ibid reg 58(1)(c) (as substituted: see note 14 supra). As to conditional sale agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 93.

17 Ibid reg 58(1)(d) (as substituted: see note 14 supra). As to credit sale agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 93.

18 For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

19 Value Added Tax Regulations 1995, SI 1995/2518, reg 58(1)(e) (as substituted: see note 14 supra).

20 Ibid reg 58(1)(f) (as substituted: see note 14 supra). This does not apply where goods have been delivered or made available in part or where services have been performed in part and the VAT invoice in question relates solely to that part of the goods which have been delivered or made available or that part of the services which have been performed: reg 58(3) (as so substituted).

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## **250. Operating the scheme.**

A taxable person<sup>1</sup> is eligible to begin to operate the cash accounting scheme<sup>2</sup> from the beginning of any prescribed accounting period<sup>3</sup> if:

- 801 (1) he has reasonable grounds for believing that the value of taxable supplies<sup>4</sup> to be made by him in the period of one year then beginning will not exceed £660,000<sup>5</sup>;
- 802 (2) he has made all returns<sup>6</sup> which he is required to make and has satisfied certain other administrative requirements<sup>7</sup>; and
- 803 (3) he has not in the period of one year preceding that time been convicted of any offence in relation to VAT<sup>8</sup>, made any payment to compound proceedings in respect of VAT<sup>9</sup>, been assessed to a penalty<sup>10</sup> or ceased to be entitled<sup>11</sup> to continue to operate the scheme<sup>12</sup>.

A person may not, however, be entitled to begin to operate the scheme if the Commissioners for Her Majesty's Revenue and Customs consider it is necessary for the protection of the revenue that he should not be so entitled<sup>13</sup>.

Where the scheme is operated, VAT must be accounted for and paid to the Commissioners by the due date prescribed for the accounting period in which payment or other consideration<sup>14</sup> for the supply is received<sup>15</sup>. Input tax may be credited<sup>16</sup> either in the prescribed accounting period in which payment or consideration for a supply is given, or in such later period as may be agreed with the Commissioners<sup>17</sup>. A person operating the scheme must obtain and keep for a period of six years, or such longer period as the Commissioners may allow, a receipted and dated VAT invoice from any taxable person to whom he has made a payment in money<sup>18</sup> in respect of a taxable supply; and, in such circumstances, a taxable person must on request provide such a receipted and dated VAT invoice<sup>19</sup>. Special provisions for accounting and payment apply where a person ceases to operate the scheme, ceases to trade or becomes insolvent<sup>20</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 As to the cash accounting scheme see PARA 249 ante.

3 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

4 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 58(1)(a) (reg 58 substituted by SI 1997/1614; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 58(1)(a) amended by SI 2004/767).

6 For the meaning of 'return' see PARA 115 note 13 ante.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 58(1)(b) (as substituted: see note 5 supra). The other requirements are that he has: (1) paid to the Commissioners for Her Majesty's Revenue and Customs all such sums shown as due on those returns and on any assessments made either under the Value Added Tax Act 1994 s 76 (as amended) (see PARA 298 post) or Sch 11 (as amended) (see PARAS 243, 245 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 58(1)(b)(i) (as so substituted)); or (2) agreed an arrangement with the Commissioners for any outstanding amount of such sums as are referred to in head (1) supra to be paid in instalments over a specified period (reg 58(1)(b)(ii) (as so substituted)). As to the Commissioners for Her

Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 Ibid reg 58(1)(c)(i) (as substituted: see note 5 supra). As to offences see PARA 316 et seq post.

9 Ibid reg 58(1)(c)(ii) (as substituted: see note 5 supra). Payments to compound proceedings in respect of VAT are made under the Customs and Excise Management Act 1979 s 152 (as amended): see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1188.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 58(1)(c)(iii) (as substituted: see note 5 supra). As to penalties see the Value Added Tax Act 1994 s 60; and PARA 321 post.

11 Ie by virtue of the Value Added Tax Regulations 1995, SI 1995/2518, reg 64(1) as substituted) (see PARA 251 post).

12 Ibid reg 58(1)(c)(iv) (as substituted: see note 5 supra).

13 Ibid reg 58(4) (as substituted: see note 5 supra).

14 For the meaning of 'consideration' generally see PARA 95 ante.

15 Value Added Tax Regulations 1995, SI 1995/2518, reg 65(1).

16 For the meaning of 'input tax' see PARAS 4 ante, 215 ante. As to the rules determining the right to claim credit for input tax see PARA 217 et seq ante.

17 Value Added Tax Regulations 1995, SI 1995/2518, reg 65(2).

18 For these purposes, 'money' means banknotes or coins: ibid reg 56.

19 Ibid reg 65(3). A person operating the scheme must keep for a period of six years, or such lesser period as the Commissioners may allow, a copy of any receipt which he gives under reg 65(3): reg 65(4).

20 See ibid regs 61-63 (as substituted and amended); and PARA 251 post.

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## **251. Ceasing to operate, and withdrawal from, the scheme.**

A person is not entitled to continue to operate the cash accounting scheme<sup>1</sup> if the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> consider it necessary for the protection of the revenue that he should not be so entitled<sup>3</sup> or where while operating the scheme he has been convicted of any offence in relation to value added tax<sup>4</sup>, made any payment to compound proceedings in respect of VAT<sup>5</sup>, or been assessed to a penalty<sup>6</sup>. Without prejudice to this, a person must, unless the Commissioners allow or direct otherwise<sup>7</sup>, withdraw from the scheme immediately at the end of a prescribed accounting period<sup>8</sup> of his if the value of taxable supplies<sup>9</sup> made by him in the period of one year ending at the end of the prescribed accounting period in question has exceeded £825,000<sup>10</sup>, and may in any case withdraw at the end of any prescribed accounting period<sup>11</sup>.

A person who ceases either to operate the scheme<sup>12</sup> or to be entitled to continue to operate it<sup>13</sup> must 'settle up', that is, account for and pay on a return made for the prescribed accounting period in which he so ceased all VAT that he would have been required to pay to the Commissioners during the time when he operated the scheme, if he had not then been operating the scheme<sup>14</sup>, less all VAT accounted for and paid to the Commissioners in accordance with the scheme, subject to any adjustment for credit for input tax<sup>15</sup>. A person who ceases to operate the scheme (but not a person whose entitlement ceases) may alternatively (unless the value of taxable supplies made by him in the period of three months ending at the end of the prescribed accounting period in which he ceased to operate the scheme has exceeded £660,000<sup>16</sup>) continue to operate the scheme in respect of his scheme supplies<sup>17</sup> for six months after the end of the prescribed accounting period in which he ceased to operate the scheme<sup>18</sup>; a person who chooses this option is then required to settle up on a return made for the first prescribed accounting period that ends six months or more after the end of the prescribed accounting period in which he ceased to operate the scheme<sup>19</sup>, and is additionally entitled to deduct from the VAT that he would have been required to pay to the Commissioners during the time when he operated the scheme any VAT accounted for and paid because he opted to continue to operate the scheme in this way<sup>20</sup>. Where a person accounts for and pays VAT in relation to a supply in accordance with these provisions<sup>21</sup>, he is treated<sup>22</sup> as having accounted for and paid VAT on the supply in the prescribed accounting period in which he ceased to operate the scheme<sup>23</sup>.

Where a person operating the scheme becomes insolvent, ceases business<sup>24</sup> or ceases to be registered<sup>25</sup> he must within two months of the date of insolvency or cessation<sup>26</sup> account for VAT due on all supplies made and received up to that date which has not otherwise been accounted for, subject to any credit for input tax<sup>27</sup>. Where a business or part of a business carried on by a person operating the scheme is transferred as a going concern, special provisions apply<sup>28</sup>.

1 As to the cash accounting scheme see PARA 249 ante.

2 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 Value Added Tax Regulations 1995, SI 1995/2518, reg 64(1)(d) (regs 60, 62, 63(1), (2), 64 substituted, and reg 63(3) amended, by SI 1997/1614). As to offences see PARA 316 et seq post.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 64(1)(a) (as substituted: see note 3 supra).



- 5 Ibid reg 64(1)(a) (as substituted: see note 3 supra). Payments to compound proceedings in respect of VAT are made under the Customs and Excise Management Act 1979 s 152 (as amended): see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1188.
- 6 Value Added Tax Regulations 1995, SI 1995/2518, reg 64(1)(b) (as substituted: see note 3 supra). As to penalties see the Value Added Tax Act 1994 s 60; and PARA 321 post.
- 7 Value Added Tax Regulations 1995, SI 1995/2518, reg 60(3) (as substituted: see note 3 supra).
- 8 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.
- 9 For the meaning of 'taxable supply' see PARA 18 note 3 ante.
- 10 Value Added Tax Regulations 1995, SI 1995/2518, reg 60(1) (as substituted (see note 3 supra); and amended by SI 2004/767). A person who fails to leave the scheme by virtue of this provision is not entitled to continue to operate the scheme: Value Added Tax Regulations 1995, SI 1995/2518, reg 64(1)(c) (as substituted: see note 3 supra).
- 11 Ibid reg 60(2) (as substituted: see note 3 supra).
- 12 Ie either of his own volition or because the value of taxable supplies made by him exceeds £825,000: ibid reg 61(1) (reg 61 substituted by SI 2004/767).
- 13 Ie by virtue of the Value Added Tax Regulations 1995, SI 1995/2518, reg 64(1) (see the text and notes 1-6, 10 supra).
- 14 Ibid reg 61(1)(a), (3)(a) (as substituted: see note 3 supra), reg 64(2)(a) (as substituted: see note 12 supra).
- 15 Ibid reg 61(3)(b) (as substituted: see note 3 supra), reg 64(2)(b) (as substituted: see note 12 supra). For the meaning of 'input tax' see PARAS 4 ante, 215 ante. As to the rules determining the right to claim credit for input tax see PARA 217 et seq ante.
- 16 Ibid reg 61(2) (as substituted: see note 12 supra).
- 17 Ie supplies made and received while the person operated the scheme that are not excluded from the scheme by virtue of ibid reg 57A (as added) (see PARA 249 ante) or reg 58 (as substituted and amended) (see PARAS 249-250 ante) or conditions described in a notice: reg 61(5) (as substituted: see note 12 supra).
- 18 Ibid reg 61(1)(b), (4) (as substituted: see note 12 supra). This is known as 'applying transitional arrangements'.
- 19 Ibid reg 61(6)(a) (as substituted: see note 12 supra).
- 20 Ibid reg 61(6)(b) (as substituted: see note 12 supra).
- 21 Ie in accordance with ibid reg 61(3) or (6) (as substituted) or reg 64(2) (as substituted) (see the text and notes 12-20 supra).
- 22 Ie for the purposes of the Value Added Tax Act 1994 s 36(1)(a) (as amended) (bad debt relief: see PARA 307 post).
- 23 Value Added Tax Regulations 1995, SI 1995/2518, reg 64A (added by SI 2004/767).
- 24 For the meaning of 'business' see PARA 23 ante.
- 25 As to registration see PARA 64 et seq ante.
- 26 The Commissioners may allow a longer period in the case of a person who has ceased business or ceased to be registered: Value Added Tax Regulations 1995, SI 1995/2518, reg 63(1) (as substituted: see note 3 supra).
- 27 Ibid regs 62, 63(1) (as substituted: see note 3 supra).
- 28 Where a business or part of a business carried on by a person operating the scheme is transferred as a going concern and ibid reg 6(1) (see PARA 83 ante) does not apply, the transferor must within two months (or such longer period as the Commissioners may allow) make a return accounting for, and paying, VAT due on all supplies made and received which has not otherwise been accounted for, subject to any adjustment for credit for input tax: reg 63(2) (as substituted: see note 3 supra). Where a business carried on by a person operating

the scheme is transferred in circumstances where reg 6(1) does apply, the transferee must continue to account for and pay VAT as if he were a person operating the scheme on supplies made and received by the transferor prior to the date of transfer: reg 63(3) (as so amended).

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### **(iii) Payments on Account**

#### **252. Liability to make payments on account of value added tax.**

A taxable person<sup>1</sup> is liable to make payments on account<sup>2</sup> if:

- 804 (1) the total amount of tax which he was liable to pay in respect of the prescribed accounting periods, the ends of which fell within the period of one year<sup>3</sup> ending on the last day of his last prescribed accounting period ending before the previous 1 December, exceeded £2 million<sup>4</sup>; or
- 805 (2) he does not fall within head (1) above but the total amount of tax which he was liable to pay in respect of the prescribed accounting periods, the ends of which fell within any one period of one year<sup>5</sup> ending on the last day of a prescribed accounting period of his ending after 30 November of the previous year, exceeded £2 million<sup>6</sup>.

The payments on account must be made in respect of any VAT the taxable person may become liable to pay in respect of each prescribed accounting period exceeding one month beginning on or after 1 April each year, but in the case of a taxable person falling within head (2) above there is no duty to pay such amounts in respect of a prescribed accounting period other than one beginning after the basic period<sup>7</sup>. Where the taxable person has a prescribed accounting period exceeding one month which begins on or after 2 March each year and ends on or before 30 June each year, he is under a like duty to make payments on account in respect of that prescribed accounting period<sup>8</sup>. If, however, the total amount of tax which a taxable person who is under a duty to make payments on account was liable to pay in respect of the prescribed accounting periods the ends of which fell within any one period of one year ending after the end of the basic period was less than £1,600,000, then, with effect from the date of the written approval by the Commissioners for Her Majesty's Revenue and Customs of a written application by the taxable person to that effect, he ceases to be under a duty to make payments on account<sup>9</sup>.

<sup>1</sup> For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

<sup>2</sup> The amounts determined in accordance with the Value Added Tax (Payments on Account) Order 1993, SI 1993/2001 (as amended) at times so determined: art 4(1). This provision was made under the Value Added Tax Act 1994 s 28(1), (2), which empowers the Treasury, where it considers it desirable so to do in the interests of the national economy, to make an order providing that a taxable person of a description specified in the order is to be under a duty to pay, on account of any value added tax he may become liable to pay in respect of a prescribed accounting period, amounts determined in accordance with the order, and to do so at such times as are so determined. An order may make different provision for different circumstances: s 28(5). A provision of such an order may be made in such way as the Treasury may think fit, whether by amending provisions of, or made under, the enactments relating to VAT or otherwise: s 28(4). An order may provide for the matters with respect to which an appeal under s 83 (as amended) lies to a tribunal to include such decisions of the Commissioners for Her Majesty's Revenue and Customs under that or any other order under s 28 (as amended) as may be specified in the order: s 28(2AA) (added by the Finance Act 1997 s 43). As to the calculation of the payments and the time for payment see PARA 253 et seq post. For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. As to the making of orders generally see PARA 14 ante.

The power to demand payments on account arises from EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 22(5), which enables member states to demand interim payments. For a case where national provisions supposedly implementing art 22(5) were held to be invalid see Case C-10/92 *Balocchi v Ministero delle Finanze dello Stato* [1993] ECR I-5105, [1997] STC 640, ECJ. As to the Sixth Directive see PARA 1 note 1 ante.

3 Where in any year ending 30 November a prescribed accounting period of the taxable person did not begin on the first day, or did not end on the last day, of a month, the period of one year is to be regarded as having comprised those prescribed accounting periods which related to the tax periods ending within the year ending 30 November of that year to which references are shown in the certificate of registration issued to him: Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 5(2) (arts 4(1), 6(1) amended, and arts 4(2), 5 substituted, by SI 1995/291). As to the meaning of 'tax year' cf para 224 note 5 ante; and as to registration see PARA 64 et seq ante.

4 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 5(1) (as substituted: see note 3 supra). This provision is subject to art 16 (as amended): see PARA 255 post.

5 Where, in the period of the year referred to in head (2) in the text, a prescribed accounting period of the taxable person did not begin on the first day or did not end on the last day of a month, that period of one year is to be regarded for these purposes as having comprised those prescribed accounting periods which related to the tax periods ending within that period of one year to which references are shown in the certificate of registration issued to him: *ibid* art 6(2).

6 *Ibid* art 6(1) (as amended: see note 3 supra). This provision is subject to art 16 (as amended): see PARA 255 post.

7 *Ibid* art 4(1) (as amended: see note 3 supra). 'The basic period' means, in relation to a taxable person falling within art 5 (as substituted) or art 6 (as amended), the period of one year in which there ended the prescribed accounting periods in respect of which his liability to pay a total amount of tax exceeding £2 million caused him to become such a taxable person: art 2(1).

8 *Ibid* art 4(2) (as substituted: see note 3 supra).

9 *Ibid* art 7.

## UPDATE

### 252 Liability to make payments on account of value added tax

NOTE 2--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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### **253. Time for, and manner of, payment.**

A payment on account<sup>1</sup> must be made in respect of each prescribed accounting period<sup>2</sup> not later than the last day of the month next following the end of the first complete month included in it<sup>3</sup> and the last day of the month next following the end of the second complete month included in it<sup>4</sup>. Where, however, a prescribed accounting period does not begin on the first day or does not end on the last day of a month, the first payment on account must be made not later than the last day of the month next following the end of the first complete month included in it<sup>5</sup> and the second payment on account must be made not later than the last day of the month next following the end of the second complete month included in it<sup>6</sup>. This rule is subject to exceptions where a prescribed accounting period:

- 806 (1) does not comprise more complete months than one, in which case the first payment on account must be made not later than the last day of that month and the second payment on account must be made not later than the end of the prescribed accounting period<sup>7</sup>;
- 807 (2) comprises an incomplete month followed by two complete months, in which case the first payment must be made not later than the end of the first complete month and the second not later than the end of the second complete month<sup>8</sup>; or
- 808 (3) comprises an incomplete month followed by two complete months and an incomplete month, in which case the first payment must be made not later than the end of the first complete month and the second not later than the end of the second complete month<sup>9</sup>.

The Commissioners for Her Majesty's Revenue and Customs<sup>10</sup> may give directions to persons who are or may become liable<sup>11</sup> to make payments on account of VAT about the manner in which they are to make such payments<sup>12</sup>, and where the Commissioners have given such a direction a person who is liable to make such payments must also pay any amount of VAT payable in respect of a return<sup>13</sup> for any prescribed accounting period in the like manner<sup>14</sup>. A payment on account and a payment in respect of such a return are not treated as having been made by the last day on which they are required to be made<sup>15</sup> unless they are made in such a manner as secures that all transactions that need to be completed can be completed before the whole of the amount becomes available to the Commissioners<sup>16</sup>.

Where a taxable person<sup>17</sup> fails to make a payment on account by the last day by which he is required to make it, that payment on account is recoverable as if it were VAT due from him<sup>18</sup>.

1 For the meaning of 'payment on account' see PARA 252 note 2 ante.

2 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

3 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 8(a). As to the making of this order see PARA 252 note 2 ante. Article 8 is subject to art 9 (as amended) (see heads (1)-(3) in the text): art 8 (amended by SI 1996/1196).

4 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 8(b). Two payments are therefore required to be made in respect of each prescribed accounting period.

5 Ibid art 9(a).

6 Ibid art 9(b).

7 Ibid art 9(i).

8 Ibid art 9(ii).

9 Ibid art 9(iii).

10 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

11 Ie by virtue of an order under the Value Added Tax Act 1994 s 28 (as amended) (see PARA 252 note 2 ante). Where an order is so made, the Commissioners may also make regulations containing such supplementary, incidental or consequential provisions as appear to them to be necessary or expedient: s 28(3). A provision of an order or regulations under s 28 (as amended) may be made in such way as the Commissioners may think fit, whether by amending provisions of, or made under, the enactments relating to VAT or otherwise: s 28(4). Such an order or such regulations may make different provision for different circumstances: s 28(5). As to the making of orders and regulations generally see PARA 14 ante.

12 Ibid s 28(2A) (added by the Finance Act 1996 s 34). Where such a direction has been given to any person and has not subsequently been withdrawn, any duty of that person by virtue of such an order to make such a payment has effect as if it included a requirement for the payment to be made in the manner directed: Value Added Tax Act 1994 s 28(2A) (as so added).

13 For the meaning of 'return' see PARA 115 note 13 ante.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 40A (added by SI 1996/1198).

15 For these purposes and the purposes of the Value Added Tax Regulations 1995, SI 1995/2518, reg 47 (see the text and notes 17-18 infra), references to a payment being made by any day include references to its being made on that day: reg 46A(2) (reg 46 added by SI 1996/1198).

16 Value Added Tax Regulations 1995, SI 1995/2518, reg 46A(1) (as added: see note 15 supra).

17 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

18 Value Added Tax Regulations 1995, SI 1995/2518, reg 47.

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## **254. Calculation of payments on account.**

The amount of each payment on account<sup>1</sup> to be made by a taxable person<sup>2</sup> equals one twenty-fourth of the total amount of value added tax, excluding the tax on goods imported from countries other than member states, which he was liable to pay in respect of the prescribed accounting periods<sup>3</sup> the ends of which fell either within a specified period ('the reference period')<sup>4</sup> or the basic period<sup>5</sup>, depending on the head of liability<sup>6</sup> within which he falls<sup>7</sup>. If, however, the total amount of such tax which he was liable to pay in respect of the prescribed accounting periods the ends of which fell within any one period of one year ending after the end of either his reference period or the basic period, as applicable, was less than 80 per cent of the total amount of tax relevant in his case<sup>8</sup>, then the total amount of tax by reference to which his payments on account fall to be calculated is reduced accordingly<sup>9</sup> with effect from the date of the written approval by the Commissioners for Her Majesty's Revenue and Customs<sup>10</sup> of a written application by him to that effect<sup>11</sup>. That amount is also to be so reduced where such a period of one year has not ended but the Commissioners are satisfied that the total amount of tax, excluding the tax on goods imported from countries other than member states, which the taxable person will be liable to pay in respect of the prescribed accounting periods the ends of which fall within that year will be less than 80 per cent of the total amount of tax relevant in his case<sup>12</sup>.

If the total amount of tax, excluding the tax on goods imported from countries other than member states, which the taxable person was liable to pay in respect of the prescribed accounting periods the ends of which fell within any one period of one year ending after the end of either his reference period or the basic period, as applicable, exceeded by 20 per cent or more the total amount of tax by reference to which his payments on account are currently calculated, then, with effect from the end of that period of one year, the total amount of tax by reference to which his payments on account fall to be calculated is to be increased accordingly<sup>13</sup> and the amount of each payment on account beginning with the first payment on account which falls to be made after the end of that period of one year equals one twenty-fourth of the increased amount<sup>14</sup>. Where the payments on account payable by a taxable person have been so increased and:

- 809 (1) the total amount of tax, excluding the tax on goods imported from countries other than member states, which he was liable to pay in respect of the prescribed accounting periods the ends of which fell within any one period of one year ending after that increase has taken effect was less than 80 per cent of the total amount of tax by reference to which his payments on account are currently calculated<sup>15</sup>; or
- 810 (2) where such a period of one year has not ended, the Commissioners are satisfied that the total amount of tax, excluding the tax on goods imported from countries other than member states, which he will be liable to pay in respect of the prescribed accounting periods the ends of which fall within that year will be less than 80 per cent of the total amount of tax by reference to which his payments on account are currently calculated<sup>16</sup>,

then, with effect from the date of the written approval by the Commissioners of a written application by the taxable person to that effect, the total amount of tax by reference to which his payments on account fall to be calculated is reduced accordingly and the amount of each

payment on account beginning with the first payment on account which falls to be made after the date of that approval equals one twenty-fourth of the reduced amount<sup>17</sup>.

Instead of paying the amount calculated in accordance with these rules<sup>18</sup>, a taxable person who is under a duty to make payment on account may elect to pay an amount equal to his liability to VAT, excluding the tax on goods imported from countries other than member states, for the preceding month<sup>19</sup>. A person making such an election must notify the Commissioners in writing of the election<sup>20</sup> and of the date, being a date not less than 30 days after the date of the notification, on which it is to take effect<sup>21</sup>. The election continues to have effect until a later date notified by the taxable person in writing to the Commissioners, which may not be earlier than the first anniversary of the date on which the election took effect<sup>22</sup>.

Where the Commissioners are satisfied that an amount paid by a taxable person who has made such an election is less than the amount required to be paid<sup>23</sup>, they may notify him in writing that his election is to cease to have effect from a date specified in the notification<sup>24</sup>. An appeal lies to a VAT and duties tribunal against a decision of the Commissioners contained in such a notification<sup>25</sup>.

The Commissioners must give to a taxable person who is under a duty to make payments on account notification in writing of the amounts that he is under a duty to pay<sup>26</sup>, how those amounts have been calculated<sup>27</sup> and the times for payment of those amounts<sup>28</sup>. If in respect of a prescribed accounting period the total amount of the payments on account made by the taxable person exceeds the amount of VAT due from him in respect of that period, the amount of excess must be paid to him by the Commissioners if, and to the extent that, it is not required<sup>29</sup> to be set against any sum which he is liable to pay to them<sup>30</sup>.

1 For the meaning of 'payment on account' see PARA 252 note 2 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

4 I.e. in the case of a taxable person who falls within the Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 5 (as substituted) (see PARA 252 ante): art 11(1) (arts 11(1), 12, 13-15 amended, and art 12A added, by SI 1996/1196). The reference period is: (1) 1 October to 30 September in the basic period where he has a prescribed accounting period beginning in April in any year in which he is under a duty to make payments on account (Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 11(1)(a) (art 11(1)(a)-(c) substituted by SI 1995/291)); (2) 1 November to 31 October in the basic period where he has a prescribed accounting period beginning in May in any such year (Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 11(1)(b) (as so substituted)); and (3) 1 December to 30 November in the basic period where he has a prescribed accounting period beginning in June in any such year (art 11(1)(c) (as so substituted)). Where in the period of the year mentioned in heads (1)-(3) supra a prescribed accounting period of the taxable person did not begin on the first day or did not end on the last day of a month, the reference period is regarded for these purposes as having comprised those prescribed accounting periods which related to the tax periods ending within the period of the year mentioned in head (1), (2) or (3) supra as appropriate to which references are shown in the certificate of registration issued to him: art 11(2). For the meaning of 'basic period' see PARA 252 note 7 ante; and as to registration see PARA 64 et seq ante.

5 I.e. in the case of a taxable person falling within *ibid* art 6 (as amended) (see PARA 252 ante): art 12 (amended by SI 1996/1196).

6 I.e. depending on whether the taxable person falls within the Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 5 (as substituted), in which case his liability is calculated in respect of prescribed accounting periods the ends of which fell within the reference period, or within art 6 (as amended), in which case it is calculated in respect of prescribed accounting periods the ends of which fell within the basic period: see arts 11(1), 12 (as amended: see note 4 supra). See further arts 13-15 (as amended); and the text and notes 8-30 *infra*.

7 *Ibid* arts 11(1), 12 (as amended: see note 4 supra). This provision is subject to art 12A (as added) and arts 13-15 (as amended) (see the text and notes 8-24 *infra*).

8 I.e. the total amount relevant under *ibid* art 11 (as amended) or the total amount referred to in art 12 (as amended): art 13(a)(i), (ii).



9 Any reference in *ibid* arts 13-15 (as amended) to the total amount of tax by reference to which a taxable person's payments on account fall to be calculated being 'reduced accordingly' or 'increased accordingly' is in each case a reference to a reduction or increase of the same proportion as the difference between the total amount of tax by reference to which his payments on account are currently calculated and the total amount of tax, excluding the tax on goods imported from countries other than member states, which he was, or which the Commissioners are satisfied that he will be, liable to pay in respect of the prescribed accounting periods the ends of which fall within the year referred to in the relevant provisions of the article in question: art 2(2).

10 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see *PARA 13 ante*.

11 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 13(a). The amount of each payment on account beginning with the first payment on account which falls to be made after the date of the Commissioners' written approval equals one twenty-fourth of the reduced amount: art 13 (as amended: see note 4 *supra*).

12 See *ibid* art 13(b); and see also note 11 *supra*.

13 See note 9 *supra*.

14 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 14 (as amended: see note 4 *supra*).

15 *Ibid* art 15(a).

16 *Ibid* art 15(b).

17 *Ibid* art 15 (as amended: see note 4 *supra*).

18 *Ie* calculated in accordance with *ibid* arts 11, 12 (as amended): see the text and notes 1-7 *supra*.

19 *Ibid* art 12A(1) (as added: see note 4 *supra*). A person may not make such an election within 12 months of the date on which any previous election made by him ceased to have effect by virtue of art 12A(4) (as added) (see the text to note 24 *infra*): art 12A(5) (as so added).

20 *Ibid* art 12A(2)(a) (as added: see note 4 *supra*).

21 *Ibid* art 12A(2)(b) (as added: see note 4 *supra*).

22 *Ibid* art 12A(3) (as added: see note 4 *supra*).

23 *Ie* by virtue of *ibid* art 12A(1) (as added) (see the text and notes 18-19 *supra*).

24 *Ibid* art 12A(4) (as added: see note 4 *supra*). See note 19 *supra*.

25 See the Value Added Tax Act 1994 s 83(fa) (added by the Value Added Tax (Payments on Account) (Appeals) Order 1997, SI 1997/2542, art 2); and *PARA 346 post*.

26 Value Added Tax Regulations 1995, SI 1995/2518, reg 45(a). Regulation 45 does not apply in a case to which reg 48 (see *PARA 255 post*) applies: reg 45.

27 *Ibid* reg 45(b). See note 26 *supra*.

28 *Ibid* reg 45(c). See note 26 *supra*. As to the time for payment see *PARA 253 ante*.

29 *Ie* by the Value Added Tax Act 1994 s 81 (as amended): see *PARA 301 post*.

30 Value Added Tax Regulations 1995, SI 1995/2518, reg 46. Regulation 46 does not apply in a case to which reg 48 (see *PARA 255 post*) applies: reg 46.

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## **255. Special provisions relating to bodies corporate.**

Where the registration<sup>1</sup> of a body corporate is, and was throughout the relevant prescribed accounting periods<sup>2</sup>, in the names of divisions<sup>3</sup> and those divisions are the same divisions, that body corporate is not under a duty to make payments on account<sup>4</sup> by virtue of falling within either of the heads of liability<sup>5</sup>. It is, however, under a duty to make payments on account by reference to the business<sup>6</sup> of any division if the total amount of tax which it was liable to pay in respect of the prescribed accounting periods of that division the ends of which fell within the period of one year<sup>7</sup> ending on the last day of: (1) that division's last prescribed accounting period ending before 1 December of the previous year<sup>8</sup>; or (2) a prescribed accounting period of that division ending after 30 November of the previous year<sup>9</sup>, and which was referable to the business of that division, exceeded £2 million<sup>10</sup>. Where a relevant division<sup>11</sup> has a prescribed accounting period exceeding one month which begins on or after 2 March each year and ends on or before 30 June each year, the body corporate is under a like duty to make payments on account in respect of that prescribed accounting period<sup>12</sup>.

Where payments on account so fall to be made, they must be calculated and made separately in the case of each relevant division as if it were a taxable person and must be remitted through that division<sup>13</sup>. The Commissioners for Her Majesty's Revenue and Customs<sup>14</sup> must notify a relevant division in writing of the amounts of the payments on account that the body is under a duty to make by reference to the business of that division<sup>15</sup>, how those amounts have been calculated<sup>16</sup>, and the times for payment of those amounts<sup>17</sup>. If, in respect of a prescribed accounting period, the total amount of the payments on account made by a body corporate by reference to the business of a particular relevant division exceeds the amount of VAT due from the body corporate in respect of that period by reference to that business, the amount of the excess must be paid to the body corporate by the Commissioners if, and to the extent that, it is not required<sup>18</sup> to be set against any sum which the body corporate is liable to pay to them<sup>19</sup>.

The provisions relating to payments on account apply to any bodies corporate which are treated as members of a group<sup>20</sup> as if those bodies were one taxable person; and where there is a duty to make a payment on account it is the responsibility of the representative member<sup>21</sup>, except that in default of payment by the representative member it is the joint and several responsibility of each member of the group<sup>22</sup>.

1 As to registration see PARA 64 et seq ante.

2 I.e. the prescribed accounting periods mentioned in the Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 5(1) (as substituted) or art 6(1) (as amended): see PARA 252 ante. For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

3 I.e. under the Value Added Tax Act 1994 s 46(1): see PARA 76 ante.

4 For the meaning of 'payment on account' see PARA 252 note 2 ante.

5 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 16(1). The heads of liability referred to in the text are art 5 (as substituted) and art 6 (as amended): see PARA 252 ante.

6 For the meaning of 'business' see PARA 23 ante.

7 The Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 5(2) (as substituted) and art 6(2) (period of one year to be regarded as having comprised certain prescribed accounting periods: see PARA 252 ante) apply for these purposes as if for the references therein to the taxable person there were substituted

references to a relevant division (see note 11 infra): art 16(3). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

8 Ibid art 16(1)(a) (art 16(1)(a), (b) amended, and art 16(2) substituted, by SI 1995/291).

9 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 16(1)(b) (as amended: see note 8 supra).

10 Ibid art 16(1).

11 For these purposes, 'relevant division' means a division by reference to the business of which a body corporate is under a duty to make payments on account by virtue of ibid art 16(1) (as amended): art 16(6); Value Added Tax Regulations 1995, SI 1995/2518, reg 44.

12 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 16(2) (as substituted: see note 8 supra).

13 Ibid art 16(4). In relation to a body corporate to which art 16 (as amended) applies, references in art 7 (see PARA 252 ante) and arts 13-15 (as amended) (see PARA 254 ante) to: (1) the total amount of tax which a taxable person was or will be liable to pay are to be construed as references to the total amount of such tax referable to the business of a relevant division (art 16(5)(a)); and (2) an application by the taxable person are to be construed as references to an application by the division in respect of which the application is made (art 16(5)(b)).

14 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

15 Value Added Tax Regulations 1995, SI 1995/2518, reg 48(1)(a).

16 Ibid reg 48(1)(b).

17 Ibid reg 48(1)(c).

18 Ie by the Value Added Tax Act 1994 s 81 (as amended): see PARA 301 post. Section 81 (as amended) does not require any amount which is due to be so paid by the Commissioners to a body corporate by reference to the business of a particular relevant division to be set against any sum due from the body corporate otherwise than by reference to that business or to the liabilities of the body corporate arising in connection with that division: Value Added Tax Regulations 1995, SI 1995/2518, reg 48(3).

19 Ibid reg 48(2).

20 Ie under the Value Added Tax Act 1994 s 43 (as amended): see PARAS 75, 205 ante.

21 For the meaning of 'the representative member' see PARA 75 ante.

22 Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 17 (amended by SI 1996/1196).

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#### **(iv) The Annual Accounting Scheme**

##### **256. The scheme.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may authorise a taxable person<sup>2</sup> to pay and account for value added tax by reference to any transitional accounting period<sup>3</sup> and any subsequent current accounting year<sup>4</sup> at such times, and for such amounts, as may be determined in accordance with the annual accounting scheme<sup>5</sup> ('the scheme')<sup>6</sup>. Subject to such an arrangement being agreed with the Commissioners, a taxable person authorised to pay and account for VAT in accordance with the scheme must pay to the Commissioners by credit transfer<sup>7</sup> the quarterly sum<sup>8</sup>, or as the case may be the agreed quarterly sum<sup>9</sup>, no later than the last working day of each of the fourth, seventh and tenth months of his current accounting year<sup>10</sup>; where there is no such agreement he must pay to the Commissioners by credit transfer the monthly sum<sup>11</sup>, or as the case may be, the agreed monthly sum<sup>12</sup>, in nine equal monthly instalments, commencing on the last working day of the fourth month of his current accounting year<sup>13</sup>. In either case, the taxable person must make, by the last working day<sup>14</sup> of the second month following the end of that current accounting year, a return<sup>15</sup> in respect of that year, together with any outstanding payment due to the Commissioners in respect of his liability for VAT for the current accounting year declared on that return<sup>16</sup>. Similar provisions apply in relation to transitional accounting periods of four months or more<sup>17</sup>. Where the transitional accounting period is less than four months, the authorised person must make a return in respect of that period by the last working day of the first month following the end of his transitional accounting period, together with any outstanding payment due to the Commissioners in respect of his liability for VAT declared on that return<sup>18</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 'Transitional accounting period' means the period commencing on the first day of a person's prescribed accounting period in which the Commissioners authorise him to use the annual accounting scheme and ending on the day immediately preceding the first day of that person's first current accounting year, and is a prescribed accounting period within the meaning of the Value Added Tax Act 1994 s 25(1) (see PARA 216 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 49 (regs 49, 50, 51 substituted by SI 1996/542). For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante; and for the meaning of 'current accounting year' see note 4 infra.

4 'Current accounting year' means the period of 12 months commencing on a date indicated by the Commissioners in their notification of authorisation of a person, or, while a person remains authorised, the most recent anniversary of it, and is a prescribed accounting period within the meaning of the Value Added Tax Act 1994 s 25(1) (see PARA 216 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 49 (as substituted: see note 3 supra).

5 Ie the annual accounting scheme established by *ibid* regs 50, 51 (as substituted and amended): reg 49 (as substituted: see note 3 supra).

6 *Ibid* reg 50(1) (as substituted: see note 3 supra). Such a person is known as an 'authorised person': reg 49 (as substituted: see note 3 supra).

7 'Credit transfer' means the transfer of funds from one bank account to another under a mandate given by the payer to the bank making the transfer: *ibid* reg 49 (as substituted: see note 3 supra).

8 'The quarterly sum' means: (1) in the case of a taxable person who has been registered for at least 12 months either immediately preceding the first day of his current accounting year or (for the purposes of *ibid* reg 51 (as substituted): see the text and notes 17-18 *infra*) immediately preceding the first day of his transitional accounting period, a sum equal to 25% of the total amount of VAT that he was liable to pay to the Commissioners in respect of those 12 months; or (2) in any other case, a sum equal to 25% of the total amount of VAT that the Commissioners are satisfied he will be liable to pay to the Commissioners in respect of the next 12 months: reg 49 (as substituted (see note 3 *supra*); definition further substituted by SI 2002/1142). For the meaning of 'registered' see PARA 64 note 2 *ante*.

9 'The agreed quarterly sum' means a sum agreed with the Commissioners, not being less than 25% of a taxable person's estimated liability for VAT in his current accounting year: Value Added Tax Regulations 1995, SI 1995/2518, reg 49 (as substituted (see note 3 *supra*); definition amended by SI 2002/1142).

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 50(2)(a)(i) (as substituted (see note 3 *supra*); and further substituted by SI 2002/1142).

11 'The monthly sum' means: (1) in the case of a taxable person who has been registered for at least 12 months either immediately preceding the first day of his current accounting year or (for the purposes of *ibid* reg 51 (as substituted): see the text and notes 17-18 *infra*) immediately preceding the first day of his transitional accounting period, a sum equal to 10% of the total amount of VAT that he was liable to pay to the Commissioners in respect of those 12 months; or (2) in any other case, a sum equal to 10% of the total amount of VAT that the Commissioners are satisfied he will be liable to pay to the Commissioners in respect of the next 12 months: reg 49 (as substituted (see note 3 *supra*); definition further substituted by SI 2002/1142).

12 'The agreed monthly sum' means a sum agreed with the Commissioners, not being less than 10% of a taxable person's estimated liability for VAT in his current accounting year: Value Added Tax Regulations 1995, SI 1995/2518, reg 49 (as substituted: see note 3 *supra*).

13 *Ibid* reg 50(2)(a)(ii) (as substituted: see note 3 *supra*).

14 'Working day' means any day of the week other than Saturday, Sunday, a bank holiday or a public holiday: *ibid* reg 49 (as substituted: see note 3 *supra*).

15 For the meaning of 'return' see PARA 115 note 13 *ante*.

16 Value Added Tax Regulations 1995, SI 1995/2518, reg 50(2)(b) (as substituted: see note 3 *supra*).

17 In such a case the taxable person must, provided he and the Commissioners agree to such payment pattern, pay to the Commissioners by credit transfer on each relevant quarterly date the quarterly sum (*ibid* reg 51(a)(i) (as substituted (see note 3 *supra*); and further substituted by SI 2002/1142)); where there is no such agreement he must pay to the Commissioners by credit transfer on each relevant monthly date the monthly sum (Value Added Tax Regulations 1995, SI 1995/2518, reg 51(a)(ii) (as so substituted)). In either case he must make, by the last working day of the second month following the end of his transitional accounting period, a return in respect of that period, together with any outstanding payment due to the Commissioners in respect of his liability for VAT declared on that return: reg 51(a)(iii) (as so substituted).

18 *Ibid* reg 51(b) (as substituted: see note 3 *supra*).

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## **257. Admission to the scheme.**

A taxable person<sup>1</sup> is eligible to apply for authorisation under the annual accounting scheme<sup>2</sup> if:

- 811 (1) he has been registered<sup>3</sup> for at least one year at the date of his application for authorisation<sup>4</sup> (unless he has reasonable grounds for believing that the value of taxable supplies<sup>5</sup> made or to be made by him in the period of 12 months beginning on the date of his application for authorisation will not exceed £150,000<sup>6</sup>);
- 812 (2) he has reasonable grounds for believing that the value of taxable supplies made, or to be made, by him in the period of 12 months beginning on the date of his application for authorisation will not exceed £660,000<sup>7</sup>;
- 813 (3) his registration is not in the name of a group<sup>8</sup>;
- 814 (4) his registration is not in the name of a division<sup>9</sup>; and
- 815 (5) he has not in the 12 months preceding the date of his application for authorisation ceased to operate the scheme<sup>10</sup>.

The Commissioners for Her Majesty's Revenue and Customs<sup>11</sup> may refuse to authorise a person where they consider it necessary to do so for the protection of the revenue<sup>12</sup>.

An authorised person<sup>13</sup> must continue to account for VAT in accordance with the scheme unless he ceases to be authorised<sup>14</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 As to the annual accounting scheme see PARA 256 ante.

3 For the meaning of 'registered' see PARA 64 note 2 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 52(1)(a) (regs 52, 53 substituted by SI 1996/542).

5 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 52(1A) (reg 52 as substituted (see note 4 supra); and reg 52(1A) added by SI 2002/1142; and amended by SI 2003/1069).

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 52(1)(b) (reg 52 as substituted (see note 4 supra); and reg 52(1)(b) amended by SI 2004/767).

8 Value Added Tax Regulations 1995, SI 1995/2518, reg 52(1)(c) (as substituted: see note 4 supra). As to the registration of groups see the Value Added Tax Act 1994 s 43(1) (as amended); and PARAS 75, 205 ante.

9 Value Added Tax Regulations 1995, SI 1995/2518, reg 52(1)(d) (as substituted: see note 4 supra). As to the registration of divisions see the Value Added Tax Act 1994 s 46(1); and PARA 76 ante.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 52(1)(e) (as substituted: see note 4 supra).

11 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

12 Value Added Tax Regulations 1995, SI 1995/2518, reg 52(2) (as substituted: see note 4 supra).

13 As to authorised persons see PARA 256 notes 1-6 ante.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 53(1) (as substituted: see note 4 supra). As to cessation of authorisation see PARA 258 post.

## **UPDATE**

### **257 Admission to the scheme**

TEXT AND NOTES 3-6--Head (1) omitted: SI 1995/2518 reg 52(1A) revoked by SI 2006/587.

TEXT AND NOTE 7--Now £1,350,000: SI 1995/2518 reg 52(1)(b) (amended by SI 2006/587).

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## **258. Cessation and termination of authorisation.**

An authorised person<sup>1</sup> ceases to be authorised when:

- 816 (1) at the end of any transitional accounting period<sup>2</sup> or current accounting year<sup>3</sup> the value of taxable supplies<sup>4</sup> made by him in that period or, as the case may be, that year, has exceeded £825,000<sup>5</sup>;
- 817 (2) he becomes insolvent and ceases to trade, other than for the purpose of disposing of stocks and assets<sup>6</sup>;
- 818 (3) he ceases business<sup>7</sup> or ceases to be registered<sup>8</sup>;
- 819 (4) he dies, becomes bankrupt or incapacitated<sup>9</sup>; or
- 820 (5) he ceases to operate the scheme of his own volition<sup>10</sup>.

The Commissioners for Her Majesty's Revenue and Customs may terminate an authorisation in any case where:

- 821 (a) a false statement has been made by or on behalf of an authorised person in relation to his application for authorisation<sup>11</sup>;
- 822 (b) an authorised person fails to make a return<sup>12</sup> by the due date<sup>13</sup>;
- 823 (c) such a person fails to make any prescribed<sup>14</sup> payment<sup>15</sup>;
- 824 (d) they receive a notification from the authorised person that he has reason to believe that the value of taxable supplies made by him during a transitional accounting period or current accounting year will exceed £825,000<sup>16</sup>;
- 825 (e) at any time during an authorised person's transitional accounting period or current accounting year they have reason to believe that the value of taxable supplies he will make during the period or year will exceed £825,000<sup>17</sup>;
- 826 (f) it is necessary to do so for the protection of the revenue<sup>18</sup>;
- 827 (g) an authorised person has not, in relation to a return made by him prior to authorisation, paid to the Commissioners all such sums shown as due on it<sup>19</sup>; or
- 828 (h) an authorised person has not, in relation to any assessment<sup>20</sup>, paid to the Commissioners all such sums shown as due on it<sup>21</sup>.

Where a person's authorisation is terminated in accordance with any of these provisions, he ceases to be authorised<sup>22</sup> as from the day on which the Commissioners terminated his authorisation<sup>23</sup>.

Where an authorised person ceases to be authorised he, or, as the case may be, his representative, must make a return together with any outstanding payment due to the Commissioners in respect of his liability for value added tax<sup>24</sup> and account for and pay VAT from the day following the day on which he ceases to be authorised, as provided for otherwise than under the annual accounting scheme<sup>25</sup>.

1 As to authorised persons see PARA 256 notes 1-6 ante.

2 For the meaning of 'transitional accounting period' see PARA 256 note 3 ante.

3 For the meaning of 'current accounting year' see PARA 256 note 4 ante.



4 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 53(2)(a) (regs 53-55 substituted by SI 1996/542; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 53(2)(a) amended by SI 2003/1069; SI 2004/767). The authorised person then ceases to be authorised from the day following the last day of the relevant transitional accounting period or the current accounting year: see the Value Added Tax Regulations 1995, SI 1995/2518, reg 55(1)(a) (as so substituted).

6 Ibid reg 53(2)(c)(i) (as substituted: see note 5 supra). Where reg 53(2)(c) (as substituted) applies, the authorised person ceases to be authorised from the day on which the relevant event occurs: reg 55(1)(c) (as so substituted).

7 For the meaning of 'business' see PARA 23 ante.

8 Value Added Tax Regulations 1995, SI 1995/2518, reg 53(2)(c)(ii) (as substituted: see note 5 supra). See note 6 supra. For the meaning of 'registered' see PARA 64 note 2 ante.

9 Ibid reg 53(2)(c)(iii) (as substituted: see note 5 supra). See note 6 supra.

10 Ibid reg 53(2)(d) (as substituted: see note 5 supra). The authorised person then ceases to be authorised from the date on which the Commissioners for Her Majesty's Revenue and Customs are notified in writing of his decision to cease using the scheme: reg 55(1)(d) (as so substituted). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

11 Ibid reg 54(1)(a) (as substituted: see note 5 supra).

12 Ie in accordance with ibid reg 50(2)(b) (as substituted) or reg 51(a)(iii) or (b) (as substituted): see PARA 256 ante. For the meaning of 'return' see PARA 115 note 13 ante.

13 Ibid reg 54(1)(b) (as substituted: see note 5 supra).

14 Ie any payment prescribed in ibid reg 50 (as substituted and amended) or reg 51 (as substituted and amended): see PARA 256 ante.

15 Ibid reg 54(1)(c) (as substituted: see note 5 supra).

16 Ibid reg 54(1)(d), (2) (as substituted (see note 5 supra); and reg 54(2) amended by SI 2004/767). Where an authorised person has reason to believe that the value of taxable supplies made by him during a transitional accounting period or current accounting year will exceed £825,000, he must within 30 days notify the Commissioners in writing: Value Added Tax Regulations 1995, SI 1995/2518, reg 54(2) (as so substituted and amended).

17 Ibid reg 54(1)(e) (as substituted (see note 5 supra); and amended by SI 2004/767).

18 Value Added Tax Regulations 1995, SI 1995/2518, reg 54(1)(f) (as substituted: see note 5 supra).

19 Ibid reg 54(1)(g) (as substituted: see note 5 supra).

20 Ie any assessment made under either the Value Added Tax Act 1994 s 73 (as amended) (see PARAS 294, 299 post) or s 76 (as amended) (see PARA 298 post): Value Added Tax Regulations 1995, SI 1995/2518, reg 54(1)(h) (as substituted: see note 5 supra).

21 Ibid reg 54(1)(h) (as substituted: see note 5 supra).

22 Ibid reg 53(2)(b) (as substituted: see note 5 supra).

23 Ibid reg 55(1)(b) (as substituted: see note 5 supra).

24 If his authorisation ceases before the end of his transitional accounting period or current accounting year, he must make a return within two months of the date specified in ibid reg 55(1)(b), (c) or (d) (as substituted) (see the text and notes 6, 10, 23 supra), together with any outstanding payment due to the Commissioners in respect of his liability for VAT for that part of the period or year arising before the date he ceased to be authorised: reg 55(2)(a) (as substituted: see note 5 supra). If his authorisation ceases at the end of his transitional accounting period or current accounting year, he must make a return together with any outstanding payment due to the Commissioners in respect of his liability for VAT in accordance with reg 50 (as substituted and amended) or reg 51 (as substituted and amended) (see PARA 256 ante): reg 55(2)(b) (as so substituted).

25 Ibid reg 55(2) (as substituted: see note 5 supra).

## **UPDATE**

### **258 Cessation and termination of authorisation**

TEXT AND NOTES--In heads (1), (d) and (e) for '£825,000' read '£1,350,000': SI 1995/2516 regs 53(2)(a), 54(1)(e), (2) (all amended by SI 2006/587).

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## **(v) Flat-rate Scheme for Small Businesses**

### **259. Power to provide for schemes.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may by regulations make provision under which, when a taxable person<sup>2</sup> so elects, the amount of his liability to value added tax in respect of his relevant supplies<sup>3</sup> in any prescribed accounting period is to be the appropriate percentage<sup>4</sup> of his relevant turnover<sup>5</sup> for that period; and a person whose liability to VAT is to any extent so determined is referred to in these provisions as participating in the flat-rate scheme<sup>6</sup>. Subject to such exceptions as the regulations may provide for, a participant in the flat-rate scheme is not entitled to credit for input tax<sup>7</sup>.

Such regulations:

- 829 (1) may provide for persons to be eligible to participate in the flat-rate scheme only in such cases and subject to such conditions and exceptions as may be specified in, or determined by or under, the regulations<sup>8</sup>;
- 830 (2) may: (a) provide for the appropriate percentage to be determined by reference to the category of business that a person is expected, on reasonable grounds, to carry on in a particular period; (b) provide, in such circumstances as may be prescribed, for different percentages to apply in relation to different parts of the same prescribed accounting period; (c) make provision for determining the category of business to be regarded as carried on by a person carrying on businesses in more than one category<sup>9</sup>;
- 831 (3) may provide for the following matters to be determined in accordance with notices published by the Commissioners: (a) when supplies are to be treated as taking place for the purposes of ascertaining a person's relevant turnover for a particular period; (b) the method of calculating any adjustments that fall to be made in accordance with the regulations in a case where a person begins or ceases to participate in the flat-rate scheme<sup>10</sup>;
- 832 (4) may make provision enabling the Commissioners: (a) to authorise a person to participate in the flat-rate scheme with effect from: (i) a day before the date of his election to participate; or (ii) a day that is not earlier than that date but is before the date of the authorisation; (b) to direct that a person cease to be a participant in the scheme with effect from a day before the date of the direction<sup>11</sup>;
- 833 (5) may: (a) make different provision for different circumstances; (b) make such incidental, supplemental, consequential or transitional provision as the Commissioners think fit, including provision disapplying or applying with modifications any provision contained in or made under the Value Added Tax Act 1994<sup>12</sup>.

<sup>1</sup> As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

<sup>2</sup> For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

<sup>3</sup> I.e. all supplies made by that person except supplies made at such times or of such descriptions as may be specified in the regulations: Value Added Tax Act 1994 s 26B(2)(a) (s 26B added by the Finance Act 2002 s 23(1)). As to relevant supplies and purchases for these purposes see PARA 262 post.

4     le the percentage specified in the regulations for the category of business carried on by the person in question: Value Added Tax Act 1994 s 26B(2)(b) (as added: see note 3 supra). As to the calculation of percentages see PARA 264 post.

5     A person's 'relevant turnover' is the total of: (1) the value of those of his relevant supplies that are taxable supplies, together with the VAT chargeable on them; and (2) the value of those of his relevant supplies that are exempt supplies: *ibid* s 26B(2)(c) (as added: see note 3 supra). As to the determination of turnover see PARA 263 post.

6     *Ibid* s 26B(1) (as added: see note 3 supra). The regulations may designate certain categories of business as categories in relation to which the references in s 26B(1) (as added) to liability to VAT are to be read as references to entitlement to credit for VAT: s 26B(3) (as so added).

7     *Ibid* s 26B(5) (as added: see note 3 supra). This provision is without prejudice to s 26B(3) (as added) (see note 6 supra). See, however, the Value Added Tax Regulations 1995, SI 1995/2518, regs 55E(3), 55F (as added); and PARA 262 post.

8     Value Added Tax Act 1994 s 26B(4) (as added: see note 3 supra).

9     *Ibid* s 26B(6) (as added: see note 3 supra).

10    *Ibid* s 26B(7) (as added: see note 3 supra).

11    *Ibid* s 26B(8) (as added: see note 3 supra). The day mentioned in head (4)(a)(i) in the text may be a day before the date on which the regulations come into force: s 26B(8) (as so added).

12    *Ibid* s 26B(9) (as added: see note 3 supra). See the Value Added Tax Regulations 1995, SI 1995/2518, regs 55A-55V (as added and amended); and PARA 260 et seq post.

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## **260. Eligibility for and admission to the scheme.**

A flat-rate scheme for small businesses has been established<sup>1</sup>, and the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> may authorise a taxable person<sup>3</sup> to account for and pay value added tax in accordance with the scheme<sup>4</sup> if:

- 834 (1) there are reasonable grounds for believing that the value of taxable supplies<sup>5</sup> to be made by him in the period of one year then beginning will not exceed £150,000<sup>6</sup>;
- 835 (2) there are reasonable grounds for believing that the total value of his income in the period of one year then beginning will not exceed £187,500<sup>7</sup>;
- 836 (3) he is not a tour operator<sup>8</sup>;
- 837 (4) he is not required to carry out adjustments<sup>9</sup> in relation to a capital item<sup>10</sup>;
- 838 (5) he does not intend to opt to account for the VAT chargeable on a supply made by him by reference<sup>11</sup> to the profit margin on the supply<sup>12</sup>;
- 839 (6) he has not in the period of one year preceding that time been convicted of any offence in relation to VAT<sup>13</sup>, made any payment to compound proceedings in respect of VAT<sup>14</sup>, been assessed to a penalty<sup>15</sup>, or ceased to operate the scheme<sup>16</sup>; and
- 840 (7) he is not, and has not been within the past 24 months, either eligible to be registered for VAT in the name of a group<sup>17</sup>, registered for VAT in the name of a division<sup>18</sup>, or associated with another person<sup>19</sup>,

although a person rendered ineligible for authorisation by virtue of having failed to comply with any of the elements of head (7) above in the period of 24 months before the date of his application may be eligible to be authorised if the Commissioners at their discretion are satisfied that such authorisation poses no risk to the revenue<sup>20</sup>. The Commissioners may refuse to authorise a person for the purposes of the flat-rate scheme if they consider it is necessary for the protection of the revenue that he is not so authorised<sup>21</sup>.

An appeal lies to a VAT and duties tribunal against a decision of the Commissioners refusing to authorise a person to account for and pay value added tax in accordance with the flat-rate scheme<sup>22</sup>.

1    Ie pursuant to the Value Added Tax Act 1994 s 26B (as added) (see PARA 259 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see the text and notes 2-21 infra; and PARA 262 et seq post).

2    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3    For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4    Value Added Tax Regulations 1995, SI 1995/2518, reg 55B(1) (regs 55A, 55B, 55L, 55Q added by SI 2002/1142). Authorisations take effect from either the beginning of the person's next prescribed accounting period after the date on which the Commissioners are notified of his desire to be so authorised (reg 55B(1)(a) (as so added; and amended by SI 2003/3220)) or such earlier or later date as may be agreed between him and the Commissioners (Value Added Tax Regulations 1995, SI 1995/2518, reg 55B(1)(b) (as so added)). The date with effect from which a person is so authorised is known as his start date: regs 55A(1), 55B(2) (as so added). A flat-rate trader (ie a person who is, for the time being, authorised by the Commissioners in accordance with reg 55B(1) (as added) (see reg 55A(1) (as so added))) continues to account for VAT in accordance with the flat-rate

scheme until his end date (ie the date on which he ceases to be authorised to operate the scheme (see regs 55A(1), 55Q(2) (as so added); and PARA 266 post)); reg 55B(4) (as so added). For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

5 For the meaning of 'taxable supply' see PARA 18 note 3 ante. As to a trader's relevant supplies and purchases for the purposes of the flat-rate scheme see PARA 262 post.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(1)(a)(i) (as added (see note 4 supra); and amended by SI 2003/1069). In determining the value of a person's taxable supplies or income for the purposes of the Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(1)(a) (as added), there must be disregarded any supply of goods or services that are capital assets of the business in the course or furtherance of which they are supplied (see reg 55L(2)(a) (as so added)), and any supply of services treated as made by the recipient by virtue of the Value Added Tax Act 1994 s 8 (as amended) (reverse charge on supplies from abroad: see PARA 33 ante) (see the Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(2)(b) (as so added)). For the meaning of 'supply' see PARA 27 ante.

7 Ibid reg 55L(1)(a)(ii) (as added (see note 4 supra); and amended by SI 2003/1069). As to the calculation of percentages see PARA 264 post; and as to the determination of turnover see PARA 263 post.

8 Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(1)(b)(i) (as added: see note 4 supra). For the meaning of 'tour operator' see PARA 214 note 3 ante.

9 Ie adjustments to the deduction of input tax under ibid Pt XV (regs 112-116) (as amended) (see PARAS 235-237 ante).

10 Ibid reg 55L(1)(b)(ii) (as added: see note 4 supra).

11 Ie in accordance with the provisions of any order made under the Value Added Tax Act 1994 s 50A (as added) (see PARA 202 ante).

12 Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(1)(b)(iii) (as added: see note 4 supra).

13 Ibid reg 55L(1)(c)(i) (as added: see note 4 supra). As to offences see PARA 316 et seq post.

14 Ibid reg 55L(1)(c)(ii) (as added: see note 4 supra). Payments to compound proceedings in respect of VAT are made under the Customs and Excise Management Act 1979 s 152 (as amended): see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1188.

15 Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(1)(c)(iii) (as added: see note 4 supra). As to penalties see the Value Added Tax Act 1994 s 60; and PARA 321 post.

16 Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(1)(c)(iv) (as added: see note 4 supra).

17 Ibid reg 55L(1)(d)(i), (3)(a) (as added: see note 4 supra). As to the registration of groups see the Value Added Tax Act 1994 s 43A (as added); and PARA 75 ante.

18 Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(1)(d)(ii), (3)(b) (as added: see note 4 supra). As to the registration of divisions see the Value Added Tax Act 1994 s 46(1); and PARA 76 ante.

19 Value Added Tax Regulations 1995, SI 1995/2518, reg 55L(1)(d)(iii), (3)(c) (as added: see note 4 supra). For these purposes, a person is associated with another person at any time if that other person makes supplies in the course or furtherance of a business carried on by him, and either: (1) the business of one is under the dominant influence of the other (reg 55A(2)(a) (as so added)); or (2) the persons are closely bound to one another by financial, economic and organisational links (reg 55A(2)(b) (as so added)).

20 Ibid reg 55L(3) (as added: see note 4 supra).

21 Ibid reg 55B(3) (as added: see note 4 supra).

22 See the Value Added Tax Act 1994 s 83(fza)(i) (added by the Finance Act 2002 s 23(2)); and PARA 346 post.

## UPDATE

### 260 Eligibility for and admission to the scheme

NOTE 6--Reference to income omitted: SI 1995/2518 reg 55L(2) (amended by SI 2009/586).

TEXT AND NOTE 7--Head (2) omitted: SI 2009/586.

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## **261. Accounting for output tax and input tax.**

The output tax<sup>1</sup> due for any prescribed accounting period<sup>2</sup> from a flat-rate trader<sup>3</sup> in respect of his relevant supplies<sup>4</sup> is deemed to be the appropriate percentage<sup>5</sup> of his relevant turnover<sup>6</sup> for that period<sup>7</sup>, and a flat-rate trader is entitled, for any prescribed accounting period, to credit for input tax<sup>8</sup> in respect of any relevant purchase of his of capital expenditure goods<sup>9</sup> with a value, together with the VAT chargeable, of more than £2,000<sup>10</sup> (although this does not give an entitlement to credit for input tax where entitlement in respect of the supplies, acquisitions or importations in question is excluded by order of the Treasury<sup>11</sup>).

1 For the meaning of 'output tax' see PARAS 4, 215 ante.

2 For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

3 I.e. a trader authorised to account for any value added tax in accordance with the flat-rate scheme established pursuant to the Value Added Tax Act 1994 s 26B (as added) (see PARA 259 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see the text and notes 4-11 infra; and PARAS 260 ante, 262 et seq post).

4 As to a trader's relevant supplies and purchases for the purposes of the flat-rate scheme see PARA 262 post.

5 As to the calculation of percentages see PARA 264 post.

6 As to the determination of turnover see PARA 263 post.

7 Value Added Tax Regulations 1995, SI 1995/2518, regs 55D (regs 55A, 55D, 55E, 55F added by SI 2002/1142; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 55D amended by SI 2003/3220).

8 For the meaning of 'input tax' see PARAS 4 ante, 215 ante. As to the rules determining the right to claim credit for input tax see PARA 217 et seq ante.

9 'Capital expenditure goods' means any goods of a capital nature but does not include any goods acquired by a flat-rate trader (whether before he is a flat-rate trader or not) for the purpose of resale or incorporation into goods supplied by him, for consumption by him within one year, or to generate income by being leased, let or hired: Value Added Tax Regulations 1995, SI 1995/2518, reg 55A(1) (as added: see note 7 supra).

10 Ibid reg 55E(1) (as added: see note 7 supra). Where this provision applies, the whole of the input tax on the goods concerned is regarded as used or to be used by the flat-rate trader exclusively in making taxable supplies: reg 55E(2) (as so added). The Value Added Tax Act 1994 s 26B(5) (as added) (see PARA 259 ante) does not apply: (1) to prevent a taxable person from being entitled to credit for input tax in respect of any supply, acquisition or importation by him that is not a relevant purchase of his (Value Added Tax Regulations 1995, SI 1995/2518, reg 55E(3) (as so added)); and (2) to prevent a taxable person from being entitled to credit for input tax in relation to the matters for which he makes an exceptional claim for VAT relief (ie in accordance with reg 111 (as amended) (see PARA 234 ante)) where the first prescribed accounting period for which he is authorised to account for and pay VAT in accordance with the flat-rate scheme is the first prescribed accounting period for which he is, or is required to be, registered under the Value Added Tax Act 1994 (Value Added Tax Regulations 1995, SI 1995/2518, reg 55F(1), (2) (as so added)). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante. As to registration see PARA 64 et seq ante. Where head (2) supra applies and the Commissioners for Her Majesty's Revenue and Customs authorise the exceptional claim for relief, the whole of the input tax on the goods or services concerned is regarded as used or to be used by the taxable person exclusively in making taxable supplies: reg 55F(3) (as so added)). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. For the meaning of 'taxable supply' see PARA 18 note 3 ante.

11 Ibid reg 55E(4) (as added: see note 7 supra). As to such orders see the Value Added Tax Act 1994 s 25(7); and PARA 218 ante.





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## **262. Relevant purchases and supplies.**

For the purposes of the flat-rate scheme for small businesses<sup>1</sup> a 'relevant purchase' is any supply<sup>2</sup> of any goods or services to a flat-rate trader<sup>3</sup> and any acquisition of any goods from another member state<sup>4</sup> or importation of any goods from a place outside the member states by such a trader<sup>5</sup>. Also qualifying as 'relevant supplies' or 'relevant purchases' for these purposes are supplies made to or by a person at a time when he is not a flat-rate trader<sup>6</sup> but the operative date for value added tax accounting purposes is<sup>7</sup> a date when he is such a trader<sup>8</sup>, although any supply made by a person when he is not a flat-rate trader in circumstances other than these is not a relevant supply of his<sup>9</sup>; nor is a supply made by a person which would otherwise be a relevant supply for these purposes a relevant supply if the person is entitled to any credit for input tax<sup>10</sup> in respect of the supply to, or acquisition or importation by, him of capital expenditure goods<sup>11</sup>, claims any such credit<sup>12</sup>, and makes a supply of those capital expenditure goods<sup>13</sup>; nor is a supply a relevant supply or a relevant purchase of a flat-rate trader where it is treated<sup>14</sup> as made by such a trader<sup>15</sup>.

The statutory provisions imposing reverse charges on supplies from abroad<sup>16</sup> do not apply to any relevant supply or relevant purchase of a flat-rate trader<sup>17</sup>.

1    Ie the flat-rate scheme established pursuant to the Value Added Tax Act 1994 s 26B (as added) (see PARA 259 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see the text and notes 2-17 infra; and PARAS 260-261 ante, 263 et seq post).

2    For the meaning of 'supply' see PARA 27 ante.

3    Value Added Tax Regulations 1995, SI 1995/2518, regs 55A(1), 55C(1)(a) (regs 55A, 55C, 55U added by SI 2002/1142). For the meaning of 'flat-rate trader' see PARA 260 note 4 ante.

4    Value Added Tax Regulations 1995, SI 1995/2518, reg 55C(1)(b) (as added: see note 3 supra). For the meaning of 'another member state' see PARA 4 note 15 ante.

5    Ibid reg 55C(1)(c) (as added: see note 3 supra).

6    Ibid reg 55C(3)(a) (as added: see note 3 supra).

7    Ie by virtue of ibid reg 57 (as added) (cash accounting scheme: see PARA 249 ante).

8    Ibid reg 55C(3)(b) (as added: see note 3 supra).

9    Ibid reg 55C(2) (as added: see note 3 supra).

10   For the meaning of 'input tax' see PARAS 4 ante, 215 ante. As to the rules determining the right to claim credit for input tax see PARA 217 et seq ante.

11   Value Added Tax Regulations 1995, SI 1995/2518, reg 55C(4)(a) (as added: see note 3 supra). For the meaning of 'capital expenditure goods' see PARA 261 note 9 ante.

12   Ibid reg 55C(4)(b) (as added: see note 3 supra).

13   Ibid reg 55C(4)(c) (as added: see note 3 supra).

14   Ie by virtue of any provision of, or made under, the Value Added Tax Act 1994.

15   Value Added Tax Regulations 1995, SI 1995/2518, reg 55C(5) (as added: see note 3 supra).

16     le the Value Added Tax Act 1994 s 8 (as amended) (see PARA 33 ante).

17     Value Added Tax Regulations 1995, SI 1995/2518, reg 55U (as added: see note 3 supra).

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### **263. Relevant turnover.**

The amount of a flat-rate trader's<sup>1</sup> liability to value added tax in respect of his relevant supplies<sup>2</sup> in any prescribed accounting period<sup>3</sup> is the appropriate percentage<sup>4</sup> of his relevant turnover for that period<sup>5</sup>, and the trader must, in any such period, use one of the basic turnover method<sup>6</sup>, the cash turnover method<sup>7</sup>, or the retailer's turnover method<sup>8</sup>, to determine the value of his relevant turnover for these purposes, each of these being methods required to be prescribed by the Commissioners for Her Majesty's Revenue and Customs<sup>9</sup> for the purposes of determining when supplies are to be treated as taking place for the purpose of ascertaining the relevant turnover of a flat-rate trader for a particular period<sup>10</sup>.

1    Ie a trader authorised to account for value added tax in accordance with the flat-rate scheme established pursuant to the Value Added Tax Act 1994 s 26B (as added) (see PARA 259 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see the text and notes 2-10 infra; and PARAS 260-262 ante, 264 et seq post).

2    As to a trader's relevant supplies and purchases for the purposes of the flat-rate scheme see PARA 262 ante.

3    For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

4    As to the calculation of percentages see PARA 264 post.

5    See the Value Added Tax Act 1994 s 26B(2) (as added); and PARA 259 ante.

6    The basic turnover method is a method based on consideration for supplies taking place in a period: Value Added Tax Regulations 1995, SI 1995/2518, reg 55G(1)(a), (3) (regs 55G added by SI 2002/1142). For the meaning of 'consideration' see PARA 95 ante.

7    The cash turnover method is a method based on the actual consideration received in a period: Value Added Tax Regulations 1995, SI 1995/2518, reg 55G(1)(b) (as added: see note 6 supra).

8    The retailer's turnover method is a method based on the daily gross takings of a retailer: *ibid* reg 55G(1)(c) (as added: see note 6 supra).

9    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

10   Value Added Tax Regulations 1995, SI 1995/2518, reg 55G(1) (as added: see note 6 supra). When exercising their power to prescribe these methods, the Commissioners must prescribe what rules are to apply when a flat-rate trader ceases to use one of the methods and begins to use a different method: reg 55G(2) (as so added). The Commissioners may vary the terms of any method prescribed by them for these purposes by publishing a fresh notice or publishing a notice that amends an existing notice: reg 55T (added by SI 2002/1142).

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## **264. The appropriate percentage.**

The amount of a flat-rate trader's<sup>1</sup> liability to value added tax in respect of his relevant supplies<sup>2</sup> in any prescribed accounting period<sup>3</sup> is the appropriate percentage of his relevant turnover<sup>4</sup> for that period<sup>5</sup>, and what is to be the appropriate percentage for any prescribed accounting period is determined by the category of business<sup>6</sup> the trader is expected, on reasonable grounds, to carry on during that period<sup>7</sup>. This is the case whether the prescribed accounting period in question begins on the trader's start date<sup>8</sup>, the first day of the prescribed accounting period current at any anniversary of the trader's start date<sup>9</sup>, or any day on which the trader first carries on a new business activity<sup>10</sup> or no longer carries on an existing business activity<sup>11</sup> (any of these dates being a 'relevant date' for these purposes<sup>12</sup>); where, however, a prescribed accounting period is current at a trader's start date but does not begin with it, the appropriate percentage is that specified for the category of business that the trader is expected, at his start date, on reasonable grounds, to carry on in the remainder of the period<sup>13</sup>; and where none of these situations obtains, the appropriate percentage for a prescribed accounting period is that applicable to the trader's relevant turnover at the end of the previous prescribed accounting period<sup>14</sup>. Special provision is also made for circumstances where a relevant date other than the trader's start date occurs on a day other than the first day of a prescribed accounting period<sup>15</sup> and where a flat-rate trader's start date falls within one year of the day with effect from which he is registered for VAT<sup>16</sup> (provided the Commissioners for Her Majesty's Revenue and Customs received notification of, or otherwise became fully aware of, the trader's liability to be registered more than one year after that date<sup>17</sup>).

An appeal lies to a VAT and duties tribunal against a decision of the Commissioners as to the appropriate percentage or percentages applicable in a person's case<sup>18</sup>.

1    Ie a trader authorised to account for value added tax in accordance with the flat-rate scheme established pursuant to the Value Added Tax Act 1994 s 26B (as added) (see PARA 259 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see the text and notes 2-18 infra; and PARAS 260-263 ante, 265 et seq post).

2    As to a trader's relevant supplies and purchases for the purposes of the flat-rate scheme see PARA 262 ante.

3    For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

4    As to the determination of turnover see PARA 263 ante.

5    See the Value Added Tax Act 1994 s 26B(2) (as added); and PARA 259 ante.

6    The categories of business, and the percentages appropriate thereto, are specified in regulations: see the Value Added Tax Regulations 1995, SI 1995/2518, reg 55K, Table (reg 55K added by SI 2002/1142; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 55K, Table substituted by SI 2003/3220; and amended by SI 2004/767), specifying the following percentages for the specified categories of business: 2% (post offices; retailing food, confectionery, tobacco, newspapers or children's clothing); 5.5% (membership organisation; pubs; wholesaling food); 6% (farming or agriculture that is not listed elsewhere; retailing that is not listed elsewhere; wholesaling agricultural products); 7% (retailing pharmaceuticals, medical goods, cosmetics or toiletries; retailing vehicles or fuel; sport or recreation; wholesaling that is not listed elsewhere); 7.5% (agricultural services; library, archive, museum or other cultural activity; manufacturing food; printing; repairing vehicles); 8.5% (general building or construction services (ie any building or construction services that are not 'labour-only building or construction services' (see below)); hiring or renting goods; manufacturing that is not listed elsewhere; manufacturing yarn, textiles or clothing; packaging; repairing personal or household goods; social work); 9% (forestry or fishing; mining or quarrying; transport or storage, including couriers, freight,

removals and taxis; travel agency); 9.5% (advertising; dealing in waste or scrap; hotel or accommodation; photography; publishing; veterinary medicine); 10% (any other activity not listed elsewhere; investigation or security; manufacturing fabricated metal products); 10.5% (boarding or care of animals; film, radio, television or video production); 11% (business services that are not listed elsewhere; computer repair services; entertainment or journalism; estate agency or property management services; laundry or dry-cleaning services; secretarial services); 11.5% (financial services); 12% (catering services, including restaurants and takeaways; hairdressing or other beauty treatment services; real estate activity not listed elsewhere); 12.5% (architect, civil and structural engineer or surveyor; management consultancy); 13% (accountancy or book-keeping; computer and IT consultancy or data processing; lawyer or legal services); 13.5% (labour-only building or construction services (ie building or construction services where the value of materials supplied is less than 10% of relevant turnover from such services; any other building or construction services are 'general building or construction services' (see above))).

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 55H(1), (2)(a) (reg 55H added by SI 2002/1142; and substituted by SI 2003/3220). Where, at a relevant date, a flat-rate trader is expected, on reasonable grounds, to carry on business in more than one category in the period concerned, he is to be regarded as being expected, on reasonable grounds, to carry on that category of business which is expected, on reasonable grounds, to be his main business activity in that period: Value Added Tax Regulations 1995, SI 1995/2518, reg 55K(1), (3) (as added: see note 6 supra). For these purposes, a trader's main business activity in a period is to be determined by reference to the respective proportions of his relevant turnover expected, on reasonable grounds, to be generated by each business activity expected, on reasonable grounds, to be carried on in the period: reg 55K(4) (as so added).

A trader may be required to notify the Commissioners for Her Majesty's Revenue and Customs if at the anniversary of his start date the appropriate percentage to be applied by him for the prescribed accounting period just beginning differs from that applicable to his relevant turnover at the end of the previous prescribed accounting period: see reg 55N(1) (as added and substituted); and PARA 265 post. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. For the meaning of 'start date' see PARA 260 note 4 ante.

8 Ibid reg 55A(3)(a) (reg 55A added by SI 2002/1142; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 55A(3) added by SI 2003/3220); Value Added Tax Regulations 1995, SI 1995/2518, reg 55H(2) (a) (as added and substituted: see note 7 supra).

9 Ibid reg 55A(3)(b) (as added: see note 8 supra).

10 Ibid reg 55A(3)(c) (as added: see note 8 supra). A flat-rate trader who begins to carry on a new business activity is required to notify the Commissioners of and supply them with information as to the appropriate percentage: see reg 55N(2) (as added and substituted); and PARA 265 post.

11 Ibid reg 55A(3)(d) (as added: see note 8 supra). A flat-rate trader who ceases to carry on an existing business activity is required to notify the Commissioners of and supply them with information as to the appropriate percentage: see reg 55N(2) (as added and substituted); and PARA 265 post.

12 Ibid reg 55A(3) (as added: see note 8 supra). The day with effect from which the Table set out in reg 55K (as added, substituted and amended) (see note 6 supra) is amended in relation to a trader may also, if applicable, be a 'relevant date' for these purposes: reg 55A(3)(e) (as so added).

13 Ibid reg 55H(2)(b) (as added and substituted: see note 7 supra).

14 Ibid reg 55H(2)(c) (as added and substituted: see note 7 supra).

15 In these circumstances, the appropriate percentage for the remaining portion of the prescribed accounting period (ie that part of the period in which the relevant date occurs, starting with the relevant date (ibid reg 55H(3)(b)(i) (as added and substituted: see note 7 supra)) and ending on the last day of that period (reg 55H(3)(b)(ii) (as so added and substituted))), is that specified for the category of business that the trader is expected, at the relevant date, on reasonable grounds, to carry on in that period (reg 55H(3)(a) (as so added and substituted)), that percentage to be applied to the trader's relevant turnover in the remaining portion described (reg 55H(3)(c) (as so added and substituted)). If these rules apply and then another relevant date occurs in the same prescribed accounting period, the existing remaining portion ends on the day before the latest relevant date (reg 55H(3)(d)(i) (as so added and substituted)), another remaining portion begins on the latest relevant date (reg 55H(3)(d)(ii) (as so added and substituted)), and the rules set out above are applied again in respect of the latest remaining portion (reg 55H(3)(d)(iii) (as so added and substituted)).

16 Ibid reg 55JB(1) (reg 55JB added by SI 2003/3220). As to registration see PARA 64 et seq ante. The day with effect from which a person is registered for VAT is known for these purposes as his 'EDR' (Value Added Tax Regulations 1995, SI 1995/2518, reg 55A(1) (as added (see note 6 supra); and amended by SI 2003/3220)); and where a flat-rate trader's start date falls within one year of that day, then at any relevant date falling within the

period beginning with the later of his start date (Value Added Tax Regulations 1995, SI 1995/2518, reg 55JB(4)(a)(i) (as so added)) and the day the Commissioners received notification of, or otherwise became fully aware of, his liability to be registered (reg 55JB(4)(a)(ii) (as so added)), and ending on the day before the first anniversary of his EDR (reg 55JB(4)(b) (as so added)) (the 'newly registered period'), the percentages specified for each business category are reduced by 1% (reg 55JB(3) (as so added)). Where these provisions apply, 'relevant date' can mean either the day that the trader's newly registered period begins (reg 55A(3)(f)(i) (as added: see note 8 supra)) or the first anniversary of his EDR (reg 55A(3)(f)(ii) (as so added)).

17 Ibid reg 55JB (as added) does not apply where the Commissioners received notification of, or otherwise became fully aware of, a trader's liability to be registered more than one year after his EDR: reg 55JB(2)(a) (as added: see note 16 supra).

18 See the Value Added Tax Act 1994 s 83(fza)(ii) (added by the Finance Act 2002 s 23(2)); and PARA 346 post.

## **UPDATE**

### **264 The appropriate percentage**

NOTE 6--The categories and rates are now as follows: 2% (post offices; retailing food, confectionery, tobacco, newspapers or children's clothing; 5% (wholesaling food); 5.5% (farming or agriculture not listed elsewhere; retailing vehicles or fuel; membership organisations; pubs; retailing not listed elsewhere; wholesaling agricultural products); 6% (retailing pharmaceuticals, medical goods, cosmetics or toiletries; sport or recreation; wholesaling not listed elsewhere); 7% (agricultural services; manufacturing food); 6.5% (printing; repairing vehicles); 7.5% (general building or construction services; hiring or renting goods; library, archive, museum or other cultural activities; manufacturing not listed elsewhere; manufacturing yarn, textiles or clothing; packaging; repairing personal or household goods); 8% (forestry or fishing; mining or quarrying; social work; transport or storage (including couriers, freight, removals and taxis); travel agency; veterinary medicine); 8.5% (advertising; dealing in waste or scrap; hotels or accommodation; manufacturing fabricated metal products; photography; publishing); 9% (any other activity not listed elsewhere; investigation or security); 9.5% (boarding or care of animals; business services not listed elsewhere; entertainment or journalism; estate agency or property management services; film, radio, television or video production; laundry or dry-cleaning services; secretarial services); 10% (computer repair services); 10.5% (catering services (including restaurants and takeaways; financial services; hairdressing or other beauty treatment services); 11% (architects, civil and structural engineers and surveyors; management consultancy; real property activity not listed elsewhere); 11.5% (accountancy or book-keeping; computer and information technology consultancy or data processing; labour-only building or construction services); 12% (lawyers or legal services): SI 1995/2518 reg 55K (amended by SI 2008/3021).

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## **265. Duty to notify Commissioners of change, commencement or cessation of business activity.**

Where, at the first day of the prescribed accounting period<sup>1</sup> current at any anniversary of a flat-rate trader's<sup>2</sup> start date<sup>3</sup> the appropriate percentage to be applied by him<sup>4</sup> for the prescribed accounting period just beginning differs from that applicable to his relevant turnover<sup>5</sup> at the end of the previous prescribed accounting period<sup>6</sup>, he must notify the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup> of that fact within 30 days of the first day of the prescribed accounting period current at the anniversary of his start date<sup>8</sup>.

Where a flat-rate trader begins to carry on a new business activity or ceases to carry on an existing business activity, he must, within 30 days of the relevant date<sup>9</sup>, notify the Commissioners of that fact<sup>10</sup>, of the date that is the relevant date<sup>11</sup>, and of the appropriate percentage to be applied to the period immediately before that relevant date and immediately after it<sup>12</sup>.

Any notification required by these provisions must be given in writing<sup>13</sup>.

1 For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

2 A 'flat-rate trader' is a trader authorised to account for value added tax in accordance with the flat-rate scheme established pursuant to the Value Added Tax Act 1994 s 26B (as added) (see PARA 259 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see the text and notes 2-13 infra; and PARAS 260-264 ante, 266 et seq post).

3 Ibid reg 55N(1)(a) (reg 55N added by SI 2002/1142; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 55N(1), (2) substituted by SI 2003/3220). For the meaning of 'start date' see PARA 260 note 4 ante.

4 Ie in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 55H(2)(a) (as added and substituted) (see PARA 264 ante).

5 As to the determination of turnover see PARA 263 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 55N(1)(b) (as added and substituted: see note 3 supra).

7 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 Value Added Tax Regulations 1995, SI 1995/2518, reg 55N(1) (as added and substituted: see note 3 supra).

9 As to the relevant date see PARA 264 ante.

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 55N(2)(a) (as added and substituted: see note 3 supra).

11 Ibid reg 55N(2)(b) (as added and substituted: see note 3 supra). The date that is the relevant date for these purposes is that described by reg 55A(3)(c) or (d) (as added), as the case may be (see PARA 264 ante): reg 55N(2)(b) (as so added and substituted).

12 Ibid reg 55N(2)(c) (as added and substituted: see note 3 supra).

13 Ibid reg 55N(4) (as added: see note 3 supra).





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## **266. Cessation and termination of authorisation.**

A flat-rate trader<sup>1</sup> ceases to be eligible to be authorised to account for value added tax in accordance with the flat-rate scheme where:

- 841 (1) at any anniversary of his start date<sup>2</sup>, the total value of his income<sup>3</sup> in the period of one year then ending is more than £225,000<sup>4</sup>;
- 842 (2) there are reasonable grounds to believe that the total value of his income<sup>5</sup> in the period of 30 days then beginning will exceed £225,000<sup>6</sup>;
- 843 (3) he becomes a tour operator<sup>7</sup>;
- 844 (4) he intends to acquire, construct or otherwise obtain a capital item<sup>8</sup>;
- 845 (5) he opts to account for the VAT chargeable on a supply<sup>9</sup> made by him by reference<sup>10</sup> to the profit margin on the supply<sup>11</sup>;
- 846 (6) he becomes either eligible to be registered for VAT in the name of a group<sup>12</sup>, registered for VAT in the name of a division<sup>13</sup>, or associated with another person<sup>14</sup>;
- or
- 847 (7) he opts to withdraw from the scheme<sup>15</sup>.

Where any of these provisions applies, the trader must notify the Commissioners for Her Majesty's Revenue and Customs of that fact within 30 days<sup>16</sup>, and must continue to account for VAT in accordance with the flat-rate scheme until his end date<sup>17</sup> (that is, the date on which he ceases to be authorised to operate the scheme<sup>18</sup>).

The Commissioners may terminate the authorisation of a flat-rate trader at any time if either they consider it necessary to do so for the protection of the revenue<sup>19</sup> or a false statement was made by, or on behalf of, him in relation to his application for authorisation<sup>20</sup>; and a trader whose authorisation is so terminated ceases to be eligible to be authorised to account for VAT in accordance with the flat-rate scheme<sup>21</sup> on either the date of issue of a notice of termination by the Commissioners or such earlier or later date as may be directed in the notification<sup>22</sup>. An appeal lies to a VAT and duties tribunal against a decision of the Commissioners to terminate a person's authorisation<sup>23</sup>.

1    le a trader authorised to account for value added tax in accordance with the flat-rate scheme established pursuant to the Value Added Tax Act 1994 s 26B (as added) (see PARA 259 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see the text and notes 2-22 infra; and PARAS 260-265 ante, 267 et seq post).

2    For the meaning of 'start date' see PARA 260 note 4 ante.

3    In determining the value of a flat-rate trader's income for these purposes any supply of goods or services that are capital assets of the business in the course or furtherance of which they are supplied are disregarded: Value Added Tax Regulations 1995, SI 1995/2518, reg 55M(3) (regs 55B, 55M, 55N, 55P, 55Q added by SI 2002/1142). For the meaning of 'business' see PARA 23 ante. For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

4    Value Added Tax Regulations 1995, SI 1995/2518, reg 55M(1)(a) (as added (see note 3 supra); and amended by SI 2003/1069). The date on which a trader's authorisation ceases by virtue of this provision is either: (1) the end of the prescribed accounting period in which the relevant anniversary occurred, or the end of the month next following, whichever is the earlier (in the case of a person who is authorised in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 50(1) (as substituted) (annual accounting scheme: see PARA 256 ante)) (reg 55Q(1)(a)(i) (as added: see note 3 supra)); or (2) the end of the prescribed accounting

period in which the relevant anniversary occurred (in all other cases) (reg 55Q(1)(a)(ii) (as so added)). A flat-rate trader does not cease to be eligible to be authorised by virtue of this provision if the Commissioners for Her Majesty's Revenue and Customs are satisfied that the total value of his income in the period of one year then beginning will not exceed £187,500: reg 55M(2) (as so added; and amended by SI 2003/1069). For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 See note 3 supra.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 55M(1)(b) (as added (see note 3 supra); and amended by SI 2003/1069). The date on which a trader's authorisation ceases by virtue of this provision is the beginning of the period of 30 days in question: Value Added Tax Regulations 1995, SI 1995/2518, reg 55Q(1)(b) (as added: see note 3 supra).

7 Ibid reg 55M(1)(c) (as added: see note 3 supra). For the meaning of 'tour operator' see PARA 214 note 3 ante. The date on which a trader's authorisation ceases by virtue of this provision is the date the event occurred: reg 55Q(1)(c) (as added: see note 3 supra).

8 Ibid reg 55M(1)(d) (as added: see note 3 supra). For the meaning of 'capital item' see PARA 235 note 2 ante (definition applied by reg 55M(1)(d) (as so added)). The date on which a trader's authorisation ceases by virtue of this provision is the date the event occurred: reg 55Q(1)(c) (as added: see note 3 supra).

9 For the meaning of 'supply' see PARA 27 post.

10 In accordance with the provisions of any order made under the Value Added Tax Act 1994 s 50A (as added) (see PARA 202 ante).

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 55M(1)(e) (as added: see note 3 supra). The date on which a trader's authorisation ceases by virtue of this provision is the beginning of the prescribed accounting period for which he makes the election: reg 55Q(1)(d) (as added: see note 3 supra).

12 Ibid reg 55M(1)(f)(i) (as added: see note 3 supra). The date on which a trader's authorisation ceases by virtue of reg 55M(1)(f) (as added) (see the text and notes 13-14 infra) is the date the event occurred: reg 55Q(1)(c) (as added: see note 3 supra). As to the registration of groups see the Value Added Tax Act 1994 s 43A (as added); and PARA 75 ante.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 55M(1)(f)(ii) (as added: see note 3 supra). See note 12 supra. As to the registration of divisions see the Value Added Tax Act 1994 s 46(1); and PARA 76 ante.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 55M(1)(f)(iii) (as added: see note 3 supra). See note 12 supra. As to when a person is 'associated' with another see PARA 260 note 19 ante.

15 Ibid reg 55M(1)(g) (as added: see note 3 supra). The date on which a trader's authorisation ceases by virtue of this provision is the date on which the Commissioners are notified in writing of his decision to cease using the scheme, or such earlier or later date as may be agreed between them and him: reg 55Q(1)(e) (as added: see note 3 supra).

16 Ibid reg 55N(3) (as added: see note 3 supra).

17 Ibid reg 55B(4) (as added: see note 3 supra).

18 Ibid reg 55Q(2) (as added: see note 3 supra).

19 Ibid reg 55P(a) (as added: see note 3 supra).

20 Ibid reg 55P(b) (as added: see note 3 supra).

21 Ibid reg 55M(1)(h) (as added: see note 3 supra).

22 Ibid reg 55Q(1)(f) (as added: see note 3 supra).

23 See the Value Added Tax Act 1994 s 83(fza)(i) (added by the Finance Act 2002 s 23(2)); and PARA 346 post.

## UPDATE

### 266 Cessation and termination of authorisation

NOTE 3--For the purposes of SI 1995/2518 reg 55M, 'income' must be calculated in accordance with the method specified in reg 55G(1) (see PARA 263) used by the business to determine the value of its turnover while accounting for VAT under the scheme; and where a business has used more than one such method, the method used for this purpose must be the most recent used: reg 55M(4), (5) (added by SI 2009/586).

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## **267. Self-supply and adjustments in respect of stock on hand following withdrawal.**

Where a person who has withdrawn from the flat-rate scheme<sup>1</sup> continues to be a taxable person<sup>2</sup> after his end date<sup>3</sup>, was entitled to, and claimed, credit for input tax<sup>4</sup> in respect of any capital expenditure goods<sup>5</sup> for any prescribed accounting period<sup>6</sup> for which he was a flat-rate trader<sup>7</sup>, and did not, whilst he was a flat-rate trader, make a supply<sup>8</sup> of those goods<sup>9</sup>, those goods are be treated for value added tax purposes as being, on the day after his end date, both supplied to him for the purpose of his business and supplied by him in the course or furtherance of his business<sup>10</sup>.

Where a person who has withdrawn from the flat-rate scheme continues to be a taxable person after his end date<sup>11</sup> and at that date has stock on hand in respect of which he is not entitled to credit for input tax<sup>12</sup> the value of which exceeds the value of his stock on hand in respect of which he was entitled to credit for input tax at his start date<sup>13</sup>, he is entitled, for the prescribed accounting period following that in which his end date falls, to credit for input tax in respect of his stock on hand in such amount as may be determined in accordance with a notice published by the Commissioners for Her Majesty's Revenue and Customs<sup>14</sup>.

1    le the flat-rate scheme established pursuant to the Value Added Tax Act 1994 s 26B (as added) (see PARA 259 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, Pt VIIA (regs 55A-55V) (as added and amended) (see the text and notes 2-14 infra; and PARAS 260-266 ante, 268 post). As to withdrawal from the flat-rate scheme see PARA 266 ante.

2    For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3    Value Added Tax Regulations 1995, SI 1995/2518, reg 55R(1)(a) (regs 55R, 55S, 55T added by SI 2002/1142). For the meaning of 'end date' see PARA 260 note 4 ante.

4    For the meaning of 'input tax' see PARAS 4 ante, 215 ante. As to the rules determining the right to claim credit for input tax see PARA 217 et seq ante.

5    For the meaning of 'capital expenditure goods' see PARA 261 note 9 ante.

6    For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

7    Value Added Tax Regulations 1995, SI 1995/2518, reg 55R(1)(b) (as added: see note 3 supra).

8    For the meaning of 'supply' see PARA 27 ante.

9    Value Added Tax Regulations 1995, SI 1995/2518, reg 55R(1)(c) (as added: see note 3 supra).

10   Ibid reg 55R(2) (as added: see note 3 supra). For the meaning of 'business' see PARA 23 ante. For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante. The value of a supply of goods treated under this provision as made to or by a person is determined as though it were a supply falling within the Value Added Tax Act 1994 Sch 6 para 6(1) (see PARA 100 ante); Value Added Tax Regulations 1995, SI 1995/2518, reg 55R(3) (as so added).

11   Ibid reg 55S(1)(a) (as added: see note 3 supra).

12   Ibid reg 55S(1)(b) (as added: see note 3 supra).

13   Ibid reg 55S(1)(c) (as added: see note 3 supra). For the meaning of 'start date' see PARA 260 note 4 ante.

14 Ibid reg 55S(2) (as added: see note 3 supra). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. The Commissioners may vary the terms of any method prescribed by them for these purposes by publishing a fresh notice or publishing a notice that amends an existing notice: reg 55T (as added: see note 3 supra).

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## **268. Bad debt relief.**

Where:

- 848 (1) a person has made a relevant supply<sup>1</sup>;
- 849 (2) he has used the cash turnover method<sup>2</sup> to determine the value of his relevant turnover for the prescribed accounting period<sup>3</sup> in which the relevant supply was made<sup>4</sup>;
- 850 (3) he has not accounted for and paid value added tax on the supply<sup>5</sup>;
- 851 (4) the whole or any part of the consideration<sup>6</sup> for the supply has been written off in his accounts as a bad debt<sup>7</sup>; and
- 852 (5) a period of six months (beginning with the date of the supply) has elapsed<sup>8</sup>,

the statutory provisions concerning the refunding of VAT in circumstances where consideration for supply has been written off as a bad debt<sup>9</sup> apply<sup>10</sup>, the amount of refund of VAT to which the person is entitled thereunder being the VAT chargeable on the relevant supply less the flat-rate amount<sup>11</sup>.

1 Value Added Tax Regulations 1995, SI 1995/2518, reg 55V(1)(a) (reg 55V added by SI 2002/1142). For the meaning of 'supply' see PARA 27 ante. As to a trader's relevant supplies and purchases for these purposes see PARA 262 ante.

2 As to the cash turnover method, and the calculation of turnover generally, see PARA 263 ante.

3 For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 55V(1)(b) (as added: see note 1 supra).

5 Ibid reg 55V(1)(c) (as added: see note 1 supra).

6 For the meaning of 'consideration' generally see PARA 95 ante.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 55V(1)(d) (as added: see note 1 supra).

8 Ibid reg 55V(1)(e) (as added: see note 1 supra).

9 I.e. the Value Added Tax Act 1994 s 36 (as amended), and any regulations made thereunder (see PARA 307 post).

10 Value Added Tax Regulations 1995, SI 1995/2518, reg 55V(2)(a) (as added: see note 1 supra). The statutory provisions (see note 9 supra) apply as if the conditions set out in the Value Added Tax Act 1994 s 36(1) (as amended) (see PARA 307 post) are satisfied: Value Added Tax Regulations 1995, SI 1995/2518, reg 55V(2)(a) (as so added).

11 Ibid reg 55V(2)(b) (as added: see note 1 supra). The 'flat-rate amount' is the appropriate percentage applicable for the prescribed accounting period, or part thereof, in which the relevant supply was made, multiplied by the value of the relevant supply together with the VAT chargeable thereon: reg 55V(3) (as so added). As to the appropriate percentage see PARA 262 ante.

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## **(vi) Special Accounting Scheme for Electronically Supplied Services**

### **269. Eligibility and registration.**

Certain persons who supply<sup>1</sup> electronically supplied services<sup>2</sup> to a person who belongs in the United Kingdom<sup>3</sup> or another member state<sup>4</sup> and receives those services otherwise than for the purposes of a business carried on by him<sup>5</sup> ('qualifying supplies') are entitled to account for and pay value added tax in the United Kingdom on those supplies in accordance with a special scheme<sup>6</sup>. A person may be registered to use the scheme if:

- 853 (1) he makes or intends to make qualifying supplies in the course of a business carried on by him<sup>7</sup>;
- 854 (2) he has neither his business establishment nor a fixed establishment<sup>8</sup> in the United Kingdom or in another member state in relation to any supply of goods or services<sup>9</sup>;
- 855 (3) he is neither registered<sup>10</sup> for VAT<sup>11</sup> nor identified for VAT purposes in accordance with the law of another member state<sup>12</sup>;
- 856 (4) he is not required to be so registered or identified<sup>13</sup>, or is so required solely by reason of the fact that he makes or intends to make qualifying supplies<sup>14</sup>;
- 857 (5) he is not identified under any provision of the law of another member state which implements the special scheme for non-established taxable persons supplying electronic services to non-taxable persons<sup>15</sup>.

If a person satisfying these conditions<sup>16</sup> makes a request (a 'registration request')<sup>17</sup>, the Commissioners for Her Majesty's Revenue and Customs must (unless he is a persistent defaulter<sup>18</sup>) register him under these provision, in a single register kept for the purpose<sup>19</sup>. Registration takes effect either on the date on which the registration request is made<sup>20</sup> or on such earlier or later date as may be agreed between the person concerned and the Commissioners<sup>21</sup>; and on registering such a person, the Commissioners must allocate a registration number to him<sup>22</sup>, of which he must be electronically notified<sup>23</sup>.

The Commissioners are not permitted to direct a participant in the special scheme to appoint a VAT representative<sup>24</sup>.

1 For the meaning of 'supply' see PARA 27 ante.

2 Examples of electronically supplied services are: (1) website supply, web-hosting and distance maintenance of programmes and equipment; (2) the supply and updating of software; (3) the supply of images, text and information, and the making available of databases; (4) the supply of music, films and games (including games of chance and gambling games); (5) the supply of political, cultural, artistic, sporting, scientific and entertainment broadcasts (including broadcasts of events); and (6) the supply of distance teaching: Value Added Tax Act 1994 Sch 5 para 7C(a)-(f) (added by the Value Added Tax (Reverse Charge) (Amendment) Order 2003, SI 2003/863, art 2(1), (3)); definition applied by the Value Added Tax Act 1994 Sch 3B para 3 (s 3A, Sch 3B added by the Finance Act 2003 s 23(1), Sch 2 paras 1, 2, 4). Where the supplier of a service and his customer communicate via electronic mail, this does not of itself mean that the service performed is an electronically supplied service: Value Added Tax Act 1994 Sch 5 para 7C (as so added and applied).

3 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.



4 Value Added Tax Act 1994 Sch 3B para 3(a) (as added: see note 2 supra). For the meaning of 'another member state' see PARA 4 note 15 ante.

5 Ibid Sch 3B para 3(b) (as added: see note 2 supra). For the meaning of 'business' see PARA 23 ante.

6 See ibid s 3A(1), Sch 3B (as added: see note 2 supra). See also the text and notes 7-24 infra; and PARA 270 et seq post. The Treasury may by order amend the Value Added Tax Act 1994 Sch 3B (as added) (s 3A(2) (as so added)); and this power includes power to make such incidental, supplemental, consequential and transitional provision in connection with any amendment of that Schedule as it thinks fit (s 3A(3) (as so added)).

7 Ibid Sch 3B para 2(1), (2) (as added: see note 2 supra).

8 As to the meanings of, and distinctions between, 'business establishment' and 'fixed establishment' see PARA 53 note 5 ante.

9 Value Added Tax Act 1994 Sch 3B para 2(3) (as added: see note 2 supra).

10 Ie under the Value Added Tax Act 1994 (see PARA 64 et seq ante) (Sch 3B para 2(4)(a) (as added: see note 2 supra)) or under an Act of Tynwald for the purpose of any tax imposed by or under such an Act which corresponds to VAT (Sch 3B para 2(4)(c) (as so added)). References in Sch 3B (as added) to a person's being registered under the Value Added Tax Act 1994 do not include a reference to that person's being registered under Sch 3B (as added): Sch 3B para 2(8) (as so added).

11 Ibid Sch 3B para 2(4)(a), (c) (as added: see note 2 supra).

12 Ibid Sch 3B para 2(4)(b) (as added: see note 2 supra). As to references to the law of another member state see PARA 17 note 2 ante.

13 Ibid Sch 3B para 2(5)(a) (as added: see note 2 supra).

14 Ibid Sch 3B para 2(5)(b) (as added: see note 2 supra).

15 Ibid Sch 3B para 2(6) (as added: see note 2 supra). The scheme referred to in the text is EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 26c (added by EC Council Directive 2002/38 (OJ L128, 15.5.2002, p 41): Value Added Tax Act 1994 Sch 3B para 2(7) (as so added). As to the Sixth Directive see PARA 1 note 1 ante. Notwithstanding any provision in the Value Added Tax Act 1994 to the contrary, a participant in the special scheme (ie a person who either is registered under the Value Added Tax Act 1994 Sch 3B (as added) (Sch 3B para 16(5)(a) (as so added)) or is identified under any provision of the law of another member state which implements EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 26c (as added) (Value Added Tax Act 1994 Sch 3B para 16(5)(b) (as so added))) is not required to be registered thereunder by virtue of making qualifying supplies: Sch 3B para 17 (as so added). Where a person who is registered under Sch 1 (as amended) (see PARA 64 et seq ante) satisfies the Commissioners for Her Majesty's Revenue and Customs that he intends to apply for either registration under Sch 3B (as added) (Sch 3B para 18(a) (as so added)), or identification under any provision of the law of another member state which implements EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 26c (as added) (Value Added Tax Act 1994 Sch 3B para 18(b) (as so added)) they may, if he so requests, cancel his registration under Sch 1 (as amended) from the day on which the request is made, or from such later date as may be agreed between him and the Commissioners (Sch 3B para 18 (as so added)). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

16 Ibid Sch 3B para 4(1)(a) (as added: see note 2 supra).

17 Ibid Sch 3B para 4(1)(b) (as added: see note 2 supra). A registration request must be made by such electronic means, and in such manner, as the Commissioners may direct or by regulations prescribe (Sch 3B para 4(5) (as so added)) and must contain: (1) the name of the person making it (Sch 3B para 4(3)(a) (as so added)); (2) his postal address (Sch 3B para 4(3)(b) (as so added)); (3) his electronic addresses (including any websites) (Sch 3B para 4(3)(c) (as so added)); (4) where he has been allocated a number by the tax authorities in the country in which he belongs, that number (Sch 3B para 4(3)(d) (as so added)); (5) the date on which he began, or intends to begin, making qualifying supplies (Sch 3B para 4(3)(e) (as so added)); and (6) a statement that he is neither registered for VAT nor identified for VAT purposes in accordance with the law of another member state (ie as specified in the text and notes 10-12 supra) (Sch 3B para 4(4)(a)-(c) (as so added)). A person who has made a registration request must notify the Commissioners if subsequently: (a) there is a change in any of these particulars (Sch 3B para 7(1)(a) (as so added)); (b) he ceases to make, or to have the intention of making, qualifying supplies (Sch 3B para 7(1)(b) (as so added)); or (c) he ceases to satisfy any of the conditions set out in heads (1)-(5) in the text (Sch 3B para 7(1)(c) (as so added)). Such notification must be given within the period of 30 days beginning with the date of the change or cessation (Sch 3B para 7(2) (as so added)).

added)) by such electronic means, and in such manner, as the Commissioners may direct or by regulations prescribe (Sch 3B para 7(3) (as so added)).

18 If the person is a persistent defaulter, the Commissioners are not required to register him (ibid Sch 3B para 9(1)(a) (as added: see note 2 supra)) but have the power to do so if they see fit (Sch 3B para 9(1)(b) (as so added)). A persistent defaulter is a person: (1) whose previous registration under Sch 3B (as added) has been cancelled under Sch 3B para 8(1)(e) (as added) (see PARA 273 post) due to persistent failure to comply with his obligations under Sch 3B (as added) (Sch 3B paras 4(2), 9(2)(a) (as so added)); or (2) who has been excluded from the identification register under any provision of the law of another member state which implements EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 26c(B)(4)(d) (as added) (persistent failure to comply with rules concerning the special scheme) (Value Added Tax Act 1994 Sch 3B para 9(2)(b) (as so added)).

19 Ibid Sch 3B para 1 (as added: see note 2 supra). An appeal lies to a VAT and duties tribunal with respect to the registration of any person under these provisions: see s 83(a), Sch 3B para 20(1)(a), (2) (as so added). As to appeals see generally para 343 et seq post.

20 Ibid Sch 3B para 5(1)(a) (as added: see note 2 supra).

21 Ibid Sch 3B para 5(1)(b) (as added: see note 2 supra).

22 Ibid Sch 3B para 6(a) (as added: see note 2 supra).

23 Ibid Sch 3B para 6(b) (as added: see note 2 supra).

24 Ibid Sch 3B para 19 (as added: see note 2 supra). As to the appointment of VAT representatives see s 48(1) (as amended); and PARA 71 ante.

## **UPDATE**

### **269 Eligibility and registration**

NOTES 15, 18--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## **270. Operating the scheme.**

If a person who is registered for the purposes of the special accounting scheme<sup>1</sup> makes a qualifying supply<sup>2</sup> which is treated as made in the United Kingdom<sup>3</sup>, the amount of value added tax which he is liable to pay is that which would have been charged on the supply if the person had been registered for VAT<sup>4</sup> at the time when he made the supply<sup>5</sup>. If such a person makes a qualifying supply which is treated as made in another member state<sup>6</sup>, the amount payable is that which would have been charged on the supply in accordance with the law of that member state if the person had been identified for VAT purposes in that member state when he made the supply<sup>7</sup>.

A registered person must submit a return<sup>8</sup>, specifying for each member state in which he is treated as having made qualifying supplies for the reporting period:

858 (1) the total value of his qualifying supplies treated as made in that member state in that period<sup>9</sup>, apart from the VAT which he is liable to pay by virtue of these provisions in respect of those supplies<sup>10</sup>;

859 (2) the rate of VAT applicable<sup>11</sup> to those supplies<sup>12</sup>; and

860 (3) the total amount of VAT payable by him under these provisions in respect of those supplies in that period<sup>13</sup>.

At the same time, the person submitting the return must pay in sterling the amount referred to in head (3) above<sup>14</sup>.

1    Ie the scheme established under the Value Added Tax Act 1994 s 3A, Sch 3B (as added): see the text and notes 2-14 infra; and PARAS 269 ante, 271 et seq post.

2    For the meaning of 'qualifying supply' see PARA 269 ante.

3    Ie by virtue of the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16A (as added) (see PARA 57 ante): see the Value Added Tax Act 1994 s 3A(1), Sch 3B para 23(2)(a), (3) (s 3A, Sch 3B added by the Finance Act 2003 s 23(1), Sch 2 paras 1, 2, 4), which provides that references in the Value Added Tax Act 1994 Sch 3B (as added) to a qualifying supply being treated as made in the United Kingdom are references to its being so treated by virtue of any provision which gives effect in the United Kingdom to EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 9(2)(f) (as amended), such provision being, at the date at which this volume states the law, the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121, art 16A (as added). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante. As to the Sixth Directive see PARA 1 note 1 ante.

4    Ie under the Value Added Tax Act 1994 (see PARA 64 et seq ante).

5    Ibid Sch 3B para 10(1)-(3) (as added: see note 3 supra). Where a person is liable to pay VAT by virtue of these provisions, any amount falling to be determined in accordance with Sch 3B para 10(3) (as added) is regarded as VAT charged in accordance with the Value Added Tax Act 1994: Sch 3B para 10(5)(a) (as so added).

6    For the meaning of 'another member state' see PARA 4 note 15 ante. References in ibid Sch 3B (as added) to a qualifying supply being treated as made in another member state are references to its being treated as so made by virtue of any provision of the law of that state which gives effect to EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 9 (as amended): Value Added Tax Act 1994 Sch 3B para 23(2)(b) (as added: see note 3 supra).

7 Ibid Sch 3B para 10(1), (2), (4) (as added: see note 3 supra). Where a person is liable to pay VAT by virtue of these provisions, any amount falling to be determined in accordance with Sch 3B para 10(4) (as added) in relation to another member state is regarded as VAT charged in accordance with the law of that member state: Sch 3B para 10(5)(b) (as so added).

8 Ibid Sch 3B para 11(1) (as added: see note 3 supra). This return is known as a 'special accounting return' (Sch 3B para 11(7) (as so added)) and is required to be submitted, stating the registered person's registration number (Sch 3B para 11(3) (as so added)), for each quarter for the whole or any part of which the person is registered (a 'reporting period') (Sch 3B para 11(2) (as so added)) by such electronic means, and in such manner, as the Commissioners for Her Majesty's Revenue and Customs may direct or by regulations prescribe (Sch 3B para 12(4) (as so added)), within the period of 20 days after the last day of the reporting period to which it relates (Sch 3B para 12(3) (as so added)). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

9 If a person is registered for part only of a reporting period, references to his qualifying supplies in that period are references to his qualifying supplies in that part of that period: ibid Sch 3B para 11(6) (as added: see note 3 supra).

10 Ibid Sch 3B para 11(4)(a) (as added: see note 3 supra). The amounts must be stated in sterling (Sch 3B para 12(1) (as so added)) and any necessary conversion from one currency to another must be made by using the exchange rates published by the European Central Bank either for the last day of the reporting period to which the return relates (Sch 3B para 12(2)(a) (as so added)) or, if no such rate is published for that day, for the next day for which such a rate is published (Sch 3B para 12(2)(b) (as so added)).

11 Ie by virtue of ibid Sch 3B para 10(3) or (4) (as added), as the case may be (see the text and notes 1-7 supra).

12 Ibid Sch 3B para 11(4)(b) (as added: see note 3 supra).

13 Ibid Sch 3B para 11(4)(c) (as added: see note 3 supra). See note 10 supra. The special accounting return must state the total amount of VAT which the registered person is liable to pay by virtue of Sch 3B (as added) in respect of all qualifying supplies treated as made by him in all member states in the reporting period: Sch 3B para 11(5) (as so added).

14 Ibid Sch 3B para 13(1) (as added: see note 3 supra). Such a payment must be made in such manner as the Commissioners may direct or may by regulations prescribe: Sch 3B para 13(2) (as so added).

## **UPDATE**

### **270 Operating the scheme**

NOTES 3, 6--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## **271. Maintenance and production of records.**

A person who is registered for the purposes of the special accounting scheme<sup>1</sup> must keep records of the transactions which he enters into for the purposes of, or in connection with, qualifying supplies<sup>2</sup> made by him at any time when he is so registered<sup>3</sup>; and those records must be such as will enable the tax authorities for the member state in which a qualifying supply is treated as made<sup>4</sup> to determine whether any special accounting return<sup>5</sup> which is submitted in respect of that supply is correct<sup>6</sup>. Records required to be kept under these provisions must be made available<sup>7</sup>, on request, to the tax authorities for the member state in which the qualifying supply to which the records relate was treated as made<sup>8</sup> or to the Commissioners for Her Majesty's Revenue and Customs<sup>9</sup>, and must be retained for ten years beginning with the 1 January following the day on which the transaction was entered into<sup>10</sup>. The Commissioners may request a person to make available to them electronically records of the transactions entered into by him for the purposes of, or in connection with, certain qualifying supplies<sup>11</sup>.

1   Ie the scheme established under the Value Added Tax Act 1994 s 3A, Sch 3B (as added): see the text and notes 2-11 *infra*; and PARAS 269-270 *ante*, 272 *et seq post*.

2   For the meaning of 'qualifying supply' see PARA 269 *ante*.

3   Value Added Tax Act 1994 s 3A, Sch 3B para 14(1) (s 3A, Sch 3B added by the Finance Act 2003 s 23(1), Sch 2 paras 1, 2, 4).

4   As to references to a qualifying supply being 'treated' as made in the United Kingdom see PARA 270 note 3 *ante*; and as to references to a qualifying supply being 'treated' as made in other member states see PARA 270 note 6 *ante*. As to the meaning of 'United Kingdom' see PARA 4 note 3 *ante*.

5   For the meaning of 'special accounting return' see PARA 270 note 8 *ante*.

6   Value Added Tax Act 1994 Sch 3B para 14(2) (as added: see note 3 *supra*).

7   Records must be made available electronically: *ibid* Sch 3B para 14(4) (as added: see note 3 *supra*).

8   *Ibid* Sch 3B para 14(3)(a) (as added: see note 3 *supra*).

9   *Ibid* Sch 3B para 14(3)(b) (as added: see note 3 *supra*). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 *ante*.

10   *Ibid* Sch 3B para 14(5) (as added: see note 3 *supra*).

11   *Ibid* Sch 3B para 15(1) (as added: see note 3 *supra*). The Commissioners may exercise this power in relation to qualifying supplies which: (1) are treated as made in the United Kingdom (Sch 3B para 15(2)(a) (as so added)); and (2) are made by the person while he is identified under any provision of the law of another member state which implements EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 26c (as added) (Value Added Tax Act 1994 Sch 3B para 15(2)(b) (as so added)). As to the Sixth Directive see PARA 1 note 1 *ante*. As to references to the law of another member state see PARA 17 note 2 *ante*.

## **UPDATE**

### **271 Maintenance and production of records**

NOTE 11--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## **272. Understatements and overstatements of value added tax liabilities.**

If the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> consider that a person who is or has been a participant in the special scheme<sup>2</sup> has submitted a special scheme return<sup>3</sup> which either understates or overstates his liability to United Kingdom value added tax<sup>4</sup>, they may give him a notice<sup>5</sup> identifying the return in which they consider that the incorrect statement was made<sup>6</sup> and specifying the amount by which they consider that the person's liability has been incorrectly stated<sup>7</sup>. If the liability is thought to be understated, the Commissioners' notice must request payment of the amount within the period of 30 days beginning with the date on which the notice is given<sup>8</sup>; and if the liability is thought to be overstated, the Commissioners are liable to pay that amount to the person concerned<sup>9</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'participant in the special scheme' see PARA 269 note 15 ante.

3 I.e. a special accounting return (see PARA 270 ante) or a value added tax return submitted to the tax authorities of another member state: Value Added Tax Act 1994 s 3A, Sch 3B para 16(6) (s 3A, Sch 3B added by the Finance Act 2003 s 23(1), Sch 2 paras 1, 2, 4). 'Value added tax return', in relation to another member state, means any VAT return required to be submitted under any provision of the law of that member state which implements EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 26c(B)(5) (as added): Value Added Tax Act 1994 Sch 3B para 16(6) (as so added). As to the Sixth Directive see PARA 1 note 1 ante.

4 I.e. VAT which a person is liable to pay (whether in the United Kingdom or another member state) in respect of qualifying supplies treated as made in the United Kingdom at a time when he is or was a participant in the special scheme: Value Added Tax Act 1994 Sch 3B para 16(6) (as added: see note 3 supra). For the meaning of 'qualifying supply' see PARA 270 ante. As to references to a qualifying supply being 'treated' as made in the United Kingdom see PARA 270 note 3 ante; and as to references to a qualifying supply being 'treated' as made in other member states see PARA 270 note 6 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

5 No such notice may be given more than three years after the end of the period for which the return in question was made: *ibid* Sch 3B para 16(4) (as added: see note 3 supra). An appeal lies to a VAT and duties tribunal against with respect to a decision of the Commissioners to give a notice under these provisions or the amount specified in any such notice: see Sch 3B para 20(1)(b), (c), (2) (as so added). As to appeals see generally para 343 et seq post.

6 *Ibid* Sch 3B para 16(1)(a), (2)(a) (as added: see note 3 supra).

7 *Ibid* Sch 3B para 16(1)(b), (2)(b) (as added: see note 3 supra).

8 *Ibid* Sch 3B para 16(1)(c) (as added: see note 3 supra).

9 *Ibid* Sch 3B para 16(3) (as added: see note 3 supra).

### **UPDATE**

## **272 Understatements and overstatements of value added tax liabilities**

NOTE 3--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

NOTE 5--Value Added Tax Act 1994 Sch 3B para 20(2) amended: SI 2009/56.



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### **273. Cancellation of registrations.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> must cancel a person's registration for the purposes of the special accounting scheme<sup>2</sup> if:

- 861 (1) he notifies them that he has ceased to make, or to have the intention of making, qualifying supplies<sup>3</sup>;
- 862 (2) they otherwise determine that he has ceased to make, or to have the intention of making, qualifying supplies<sup>4</sup>;
- 863 (3) he notifies them that he has ceased to satisfy the conditions for registration<sup>5</sup>;
- 864 (4) they otherwise determine that he has ceased to satisfy any of those conditions<sup>6</sup>; or
- 865 (5) they determine that he has persistently failed to comply with his obligations under the scheme<sup>7</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 le for the purposes of the scheme established under the Value Added Tax Act 1994 s 3A, Sch 3B (as added): see the text and notes 3-7 infra; and PARAS 269-272 ante. An appeal lies to a VAT and duties tribunal with respect to the cancellation of the registration of any person under these provisions: see ss 3A, 83(a), Sch 3B para 20(1)(a), (2) (s 3A, Sch 3B added by the Finance Act 2003 s 23(1), Sch 2 paras 1, 2, 4)). As to appeals see generally para 343 et seq post.

3 Value Added Tax Act 1994 Sch 3B para 8(1)(a) (as added: see note 2 supra). For the meaning of 'qualifying supply' see PARA 270 ante. Cancellation by reason of this provision or the provision set out under head (3) in the text takes effect either on the date on which notification is received (Sch 3B para 8(2)(a) (as so added)) or on such earlier or later date as may be agreed between the person concerned and the Commissioners (Sch 3B para 8(2)(b) (as so added)).

4 Ibid Sch 3B para 8(1)(b) (as added: see note 2 supra). Cancellation by reason of this provision or the provisions set out under head (4) or head (5) in the text takes effect either on the date on which the determination is made (Sch 3B para 8(3)(a) (as so added)) or on such earlier or later date as the Commissioners may in the particular case direct (Sch 3B para 8(3)(b) (as so added)).

5 Ibid Sch 3B para 8(1)(c) (as added: see note 2 supra). For the conditions for registration see Sch 3B para 2(3)-(6) (as added); and PARA 269 ante. As to when cancellation takes effect see note 3 supra.

6 Ibid Sch 3B para 8(1)(d) (as added: see note 2 supra). As to when cancellation takes effect see note 4 supra.

7 Ibid Sch 3B para 8(1)(e) (as added: see note 2 supra). For a person's obligations under the scheme see Sch 3B (as added); and PARAS 269-272 ante. As to when cancellation takes effect see note 4 supra.

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## **(vii) Claims for Input Tax**

### **274. In general.**

A person claiming deduction of input tax<sup>1</sup> must do so on the return<sup>2</sup> made by him for the prescribed accounting period<sup>3</sup> in which the value added tax became chargeable<sup>4</sup>. At the time of claiming the deduction, a person must hold the required document or invoice<sup>5</sup> or hold or provide such other evidence of the charge to VAT as the Commissioners for Her Majesty's Revenue and Customs may direct<sup>6</sup>.

Where the Commissioners are satisfied that a person is not able to claim the exact amount of input tax to be deducted by him in any period, he may estimate a part of his input tax for that period, provided that the estimated amount is adjusted and exactly accounted for as VAT deductible in the next prescribed accounting period or, if the exact amount is still not known and the Commissioners are satisfied that it could not with due diligence be ascertained, in the next but one prescribed accounting period<sup>7</sup>. If a trader fails to claim deduction of input tax in his return for the correct prescribed accounting period, he will have made an error in accounting for VAT and in his return; he must correct the error in such manner and within such time as the Commissioners may require<sup>8</sup>.

<sup>1</sup> le under the Value Added Tax Act 1994 s 25(2): see PARA 216 ante.

<sup>2</sup> For the meaning of 'return' see PARA 115 note 13 ante.

<sup>3</sup> For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante. A claim is made when it is entrusted to the Post Office for delivery to customs and excise: *Quintain Estates Development Ltd v Customs and Excise Comrs* (2004) VAT Decision 18877, [2005] STI 312 (voluntary disclosure of failure to claim input tax).

<sup>4</sup> Value Added Tax Regulations 1995, SI 1995/2518, reg 29(1) (reg 29(1) amended, and reg 29(1A) added, by SI 1997/1086). The Value Added Tax Regulations 1995, SI 1995/2518, reg 29(1) (as amended) applies save as the Commissioners for Her Majesty's Revenue and Customs otherwise allow or direct, either generally or specially (reg 29(1) (as so amended)), although the Commissioners may not allow or direct a person to make any claim for deduction of input tax in terms such that the deduction would fall to be claimed more than three years after the date by which the return for the prescribed accounting period in which the VAT became chargeable is required to be made (see reg 29(1A) (as so added)). This has been held to be not incompatible with EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 18(3) (which empowers member states to determine the conditions and procedures whereby a taxable person may be authorised to make a deduction): see *Local Authorities Mutual Investment Trust v Customs and Excise Comrs* [2003] EWHC 2766 (Ch), [2004] STC 246. As to the exercise of the Commissioners' discretion see further *Marks & Spencer plc v Customs and Excise Comrs*, *University of Sussex v Customs and Excise Comrs* [2003] EWCA Civ 1448, [2004] STC 1. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. As to the Sixth Directive see PARA 1 note 1 ante.

<sup>5</sup> Value Added Tax Regulations 1995, SI 1995/2518, reg 29(2). The required documents or invoices are as follows: (1) if the claim is in respect of a supply from another taxable person, the claimant must hold the document which is required to be provided under reg 13 (as amended) (see PARA 278 post) (reg 29(2)(a)); (2) if the claim is in respect of a supply under the Value Added Tax Act 1994 s 8(1) (see PARA 33 ante), the claimant must hold the relative invoice from the supplier (Value Added Tax Regulations 1995, SI 1995/2518, reg 29(2)(b)); (3) if the claim is in respect of an importation of goods, the claimant must hold a document authenticated or issued by the proper officer, showing the claimant as importer, consignee or owner and showing the amount of VAT charged on the goods (reg 29(2)(c)); (4) if the claim is in respect of goods which have been removed from a warehouse, the claimant must hold a document authenticated or issued by the proper officer showing the claimant's particulars and the amount of VAT charged on the goods (reg 29(2)(d)); (5) if the claim is in

respect of an acquisition by the claimant from another member state of any goods other than a new means of transport, the claimant must hold a document required by the authority in that other member state to be issued showing his registration number including the prefix 'GB', the registration number of the supplier including the alphabetical code of the member state in which the supplier is registered, the consideration for the supply exclusive of VAT, the date of issue of the document, and a description sufficient to identify the goods supplied (reg 29(2)(e)); or (6) if the claim is in respect an acquisition by the claimant from another member state of a new means of transport, he must hold a document required by the authority in that other member state to be issued showing his registration number including the prefix 'GB', the registration number of the supplier including the alphabetical code of the member state in which the supplier is registered, the consideration for the supply exclusive of VAT, the date of issue of the document, and a description sufficient to identify the acquisition as a new means of transport as specified in the Value Added Tax Act 1994 s 95 (as amended) (see PARA 19 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 29(2)(f)). For the meaning of 'supply' see PARA 27 ante; for the meaning of 'taxable person' see PARAS 18 note 4, 63 ante; for the meanings of 'document' and 'invoice' see PARA 17 note 9 ante; for the meaning of 'proper officer' see PARA 115 note 7 ante; for the meaning of 'new means of transport' see PARA 19 note 7 ante; and for the meanings of 'registration number' and 'alphabetical code' see PARA 22 note 14 ante.

Regulation 29(2) specifically requires the provision of an invoice because it is necessary to establish whether the recipient of the payment in relation to which the claim for deduction is made is VAT registered or not; thus other proof of the claimed transactions (such as an EC sales list) is of no assistance to the Commissioners in this regard: see *Maguire (t/a Skian Mhor) v Customs and Excise Comrs* [2004] V & DR 288.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 29(2) (amended by SI 2003/1114); and see *Kohanad v Customs and Excise Comrs* [1994] STC 967; *Vaughan v Customs and Excise Comrs* [1996] V & DR 95, [1996] STI 1022.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 29(3).

8 See *ibid* reg 35; and PARA 276 post. Where the total amount of the error does not exceed £2,000, the error may be corrected under reg 34 (as amended) (see PARA 276 post).

## UPDATE

### 274 In general

NOTE 3--*Quintain*, cited, reported at [2005] V & DR 123.

NOTE 4--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

SI 1995/2518 reg 29(1A) was held to be incompatible with the principle of effectiveness on the ground that it does not include transitional arrangements allowing an adequate period after its enactment for lodging claims for repayment of input tax: *Fleming (t/a Bodycraft) v Revenue and Customs Comrs*; *Condé Nast Publications Ltd v Revenue and Customs Comrs* [2008] UKHL 2, [2008] 1 All ER 1061. It is accordingly now provided that where the person does not, at the time the return in question is made, hold the document or invoice required by SI 1995/ 2518 reg 29(2), he must make his claim for input tax on the return for the first prescribed accounting period in which he holds that document or invoice: reg 29(1) (amended by SI 2009/586). The time limit is extended to four years: SI 1995/ 2518 reg 29(1A) (amended by SI 2009/586). However, HM Revenue and Customs must not allow or direct a person to make any claim for deduction of input tax where the return for the first prescribed accounting period in which he was entitled to claim that input tax in accordance with reg 29(1) was required to be made on or before 31 March 2006: reg 29(1B) (added by SI 2009/586). Further, nothing in SI 1995/ 2518 reg 29 entitles a taxable person to deduct more than once input tax incurred on goods imported or acquired by him or on goods or services supplied to him: reg 29(4) (added by SI 2009/586).

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## **(viii) Value Added Tax Accounts and Invoices**

### **275. Duty to keep accounts.**

Every taxable person<sup>1</sup> must keep and maintain an account to be known as the value added tax account<sup>2</sup>, divided into separate parts relating to the taxable person's prescribed accounting periods<sup>3</sup>. Each such part must be further divided into two portions to be known as 'the VAT payable portion' and 'the VAT allowable portion'<sup>4</sup>.

The VAT payable portion for each prescribed accounting period comprises:

- 866 (1) a total of the output tax<sup>5</sup> due from the taxable person for that period<sup>6</sup>;
- 867 (2) a total of the output tax due on acquisitions from other member states<sup>7</sup> by the taxable person for that period<sup>8</sup>;
- 868 (3) every required or allowed<sup>9</sup> correction or adjustment to the VAT payable portion<sup>10</sup>; and
- 869 (4) every adjustment to the amount of VAT payable by the taxable person for that period which is required or allowed by or under any relevant regulations<sup>11</sup>.

The VAT allowable portion for each prescribed accounting period comprises:

- 870 (a) a total of the input tax<sup>12</sup> allowable<sup>13</sup> to the taxable person for that period<sup>14</sup>;
- 871 (b) a total of the input tax allowable<sup>15</sup> in respect of acquisitions from other member states by the taxable person for that period<sup>16</sup>;
- 872 (c) every required or allowed<sup>17</sup> correction or adjustment to the VAT allowable portion<sup>18</sup>; and
- 873 (d) every adjustment to the amount of input tax allowable to the taxable person for that period which is required or allowed by or under any relevant regulations<sup>19</sup>.

A taxable person is also required to keep and maintain, together with the account he is required to keep and maintain under these provisions, a record of exempt supplies of investment gold<sup>20</sup> or supplies which subsequently result in the transfer of the possession of investment gold<sup>21</sup>, that he makes to another taxable person<sup>22</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 Value Added Tax Regulations 1995, SI 1995/2518, reg 32(1).

3 Ibid reg 32(2). For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante.

4 Ibid reg 32(2).

5 For the meaning of 'output tax' see PARAS 4, 215 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, reg 32(3)(a).

7 As to acquisitions from other member states see PARA 19 ante.

8 Value Added Tax Regulations 1995, SI 1995/2518, reg 32(3)(b).

9     Ie by ibid reg 34 (as amended) or reg 35 (see PARA 276 post) or reg 38 (as amended) (see PARA 277 post): reg 32(3)(c).

10    Ibid reg 32(3)(c).

11    Ibid reg 32(3)(d). The regulations referred to in the text are any regulations made under the Value Added Tax Act 1994.

12    For the meaning of 'input tax' see PARAS 4, 215 ante.

13    Ie by virtue of the Value Added Tax Act 1994 s 26 (see PARA 217 ante).

14    Value Added Tax Regulations 1995, SI 1995/2518, reg 32(4)(a).

15    See note 13 supra.

16    Value Added Tax Regulations 1995, SI 1995/2518, reg 32(4)(b).

17    See note 9 supra.

18    Value Added Tax Regulations 1995, SI 1995/2518, reg 32(4)(c).

19    Ibid reg 32(4)(d).

20    Ie supplies of a description falling within the Value Added Tax Act 1994 Sch 9 Group 15 item 1 (as added) (see PARA 164 post). These provisions do not apply to any person in respect of a supply by him of a description falling within Sch 9 Group 15 item 1 or 2 (as added) (see the text and note 3 supra) the value of which does not exceed £5,000, unless the total value of those supplies to any person over the last 12 months exceeds £10,000: Value Added Tax Regulations 1995, SI 1995/2518, reg 31A(6) (regs 31A-31C added by SI 1999/3114).

21    Ie supplies of a description falling within the Value Added Tax Act 1994 Sch 9 Group 15 item 2 (as added) (see PARA 164 post). See, however, note 20 supra.

22    Value Added Tax Regulations 1995, SI 1995/2518, reg 31A(3) (as added: see note 20 supra). Such records must be preserved for a minimum period of six years: reg 31A(5) (as so added). As to the maintenance of records of transactions involving investment gold see further PARA 244 ante. A person making supplies of a description falling within the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173, art 4 (as added) (supplies between taxable persons in relation to investment gold: see PARA 211 ante) is not required to keep in relation to those supplies the records specified in the Value Added Tax Regulations 1995, SI 1995/2518, reg 31A (as added) (see the text and notes 1-21 supra): reg 33A (added by SI 1999/3114).

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## 276. Correction of errors.

Where:

- 874 (1) a taxable person<sup>1</sup> has made a return<sup>2</sup>, or returns, which overstated or understated his liability to value added tax<sup>3</sup> or his entitlement to a payment in respect of a credit for input tax<sup>4</sup>; and
- 875 (2) in relation to all such overstatements or understatements discovered by that person during a prescribed accounting period the difference between under-declarations of liability<sup>5</sup> and over-declarations of liability<sup>6</sup> does not exceed £2,000<sup>7</sup>,

the taxable person may correct his VAT account in accordance with these provisions<sup>8</sup>. In the VAT payable portion<sup>9</sup>, where the amount of any overstatements of output tax is greater than the amount of any understatements, a negative entry<sup>10</sup> must be made for the amount of the excess<sup>11</sup>, or, where the amount of any such understatements is greater than the amount of any such overstatements, a positive entry<sup>12</sup> must be made for the amount of the excess<sup>13</sup>. In the VAT allowable portion<sup>14</sup>, where the amount of any overstatements of credit for input tax is greater than the amount of any understatements, a negative entry must be made for the amount of the excess<sup>15</sup>, or, where the amount of any such understatements is greater than the amount of any such overstatements, a positive entry must be made for the amount of the excess<sup>16</sup>. Every entry so required must be made in that part of the VAT account which relates to the prescribed accounting period in which the overstatements or understatements in any earlier returns were discovered<sup>17</sup>. The entry must make reference to the returns to which it applies<sup>18</sup> and to any documentation relating to the overstatements or understatements<sup>19</sup>.

Where a taxable person has made an error in accounting for VAT<sup>20</sup>, or in any return made by him<sup>21</sup>, then unless he corrects it in accordance with the procedure described above, he must correct it in such manner and within such time as the Commissioners for Her Majesty's Revenue and Customs<sup>22</sup> may require<sup>23</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'return' see PARA 115 note 13 ante.

3 An overstatement or understatement in a return is disregarded for these purposes where a period of three years has elapsed since the end of the prescribed accounting period for which the return was made (Value Added Tax Regulations 1995, SI 1995/2518, reg 34(1A)(a) (reg 34(1) amended, and reg 34(1A) added, by SI 1997/1086)) and the taxable person has not (in relation to that overstatement or understatement) corrected his VAT account in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 34 (as amended) (see the text and notes 4-19 infra) before the end of the prescribed accounting period during which that period of three years has elapsed (reg 34(1A)(b) (as so added)). For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante. As to the VAT account see PARA 275 ante (definition applied by reg 24 (amended by SI 2003/1485)).

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 34(1) (as amended: see note 3 supra). Payments in respect of credits for input tax are payments under the Value Added Tax Act 1994 s 25(3): see PARA 216 ante. For the meaning of 'input tax' see PARAS 4, 215 ante.

5 'Under-declarations of liability' means the aggregate of: (1) the amount (if any) by which credit for input tax was overstated in any return (Value Added Tax Regulations 1995, SI 1995/2518, reg 34(2)(a)(i)); and (2) the amount (if any) by which output tax was understated in any return (reg 34(2)(a)(ii)). For the meaning of 'output tax' see PARAS 4, 215 ante.

6 'Over-declarations of liability' means the aggregate of: (1) the amount (if any) by which credit for input tax was understated in any return (ibid reg 34(2)(b)(i)); and (2) the amount (if any) by which output tax was overstated in any return (reg 34(2)(a)(ii)).

7 Ibid reg 34(3)(a), (b).

8 Ibid reg 34(3). Where the conditions as to the amount of the difference do not apply, the VAT account may not be corrected by virtue of reg 34 (as amended): reg 34(7).

9 See PARA 275 ante.

10 'Negative entry' means an amount entered into the VAT account as a negative amount: Value Added Tax Regulations 1995, SI 1995/2518, reg 24.

11 Ibid reg 34(4)(a).

12 For the meaning of 'positive entry' see PARA 21 note 13 ante.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 34(4)(b).

14 See PARA 275 ante.

15 Value Added Tax Regulations 1995, SI 1995/2518, reg 34(5)(a).

16 Ibid reg 34(5)(b).

17 Ibid reg 34(6)(a).

18 Ibid reg 34(6)(b).

19 Ibid reg 34(6)(c).

20 Ibid reg 35(a).

21 Ibid reg 35(b).

22 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

23 Value Added Tax Regulations 1995, SI 1995/2518, reg 35. See also note 8 supra. The Commissioners have given guidance as to what they require in Customs and Excise Notice 700 *The VAT Guide* (April 2002) PARA 19.11 and in Customs and Excise Notice 700/45 *How to Correct VAT Errors and make Adjustments or Claims* (which provide that the trader must notify his local VAT office of the error, either by making a 'voluntary disclosure' by letter, or on Form VAT 652). A 'voluntary disclosure' must be made not only of under-declarations of liability but also for erroneous over-declarations of liability: *Customs and Excise Comrs v Fine Art Developments plc* [1989] STC 85 at 90, HL, per Lord Keith of Kinkel. As to recovery of overpaid VAT see PARA 311 post. As to the meaning of 'error' see *Trustees of the Victoria and Albert Museum v Customs and Excise Comrs* [1996] STC 1016.

## UPDATE

### 276 Correction of errors

TEXT AND NOTES 1-8--Head (2). Now £50,000: SI 1995/2518 reg 34(3) (amended by SI 2008/1482, SI 2009/586). However, if Box 6 of the taxable person's return for the prescribed accounting period must contain a total less than £5 m, the difference must not for these purposes exceed 1% of that total, unless the difference is £10,000 or less: SI 1995/2518 reg 34(3).

NOTE 3--The time limit is extended to four years: SI 1995/2518 reg 34(1A)(b) (amended by SI 2009/586). Any overstatement or understatement in a return must be disregarded for the purposes of SI 1995/2518 reg 34 where the prescribed accounting period for which the return was made or required to be made ended on or before 31 March 2006: reg 34(1C) (added by SI 2009/586).





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## **277. Adjustments in the course of business.**

Where there is an increase or a decrease in consideration<sup>1</sup> for a supply<sup>2</sup> which includes an amount of value added tax<sup>3</sup>, and the increase or decrease occurs after the end of the prescribed accounting period<sup>3</sup> in which the original supply took place<sup>4</sup>, the taxable person must adjust his VAT account<sup>5</sup> in accordance with the following provisions<sup>6</sup>. The maker of the supply must make a positive entry<sup>7</sup> for the relevant amount of VAT in the VAT payable portion<sup>8</sup> of his VAT account, in the case of an increase in consideration<sup>9</sup>, and a negative entry<sup>10</sup> in the case of a decrease in consideration<sup>11</sup>. The recipient of the supply, if he is a taxable person, must make a positive entry for the relevant amount of VAT in the VAT allowable portion<sup>12</sup> of his VAT account, in the case of an increase in consideration<sup>13</sup>, and a negative entry in the case of a decrease in consideration<sup>14</sup>. Every such entry must be made in that part of the VAT account which relates to the prescribed accounting period in which the increase or decrease is given effect in the business<sup>15</sup> accounts of the taxable person<sup>16</sup>.

None of the circumstances to which these provisions apply are to be regarded as giving rise to any application of the statutory provisions entitling a person to correct his VAT account or return<sup>17</sup>.

1 For these purposes, 'increase in consideration' means an increase in the consideration due on a supply made by a taxable person which is evidenced by a credit or debit note or any other document having the same effect; and 'decrease in consideration' is to be interpreted accordingly: Value Added Tax Regulations 1995, SI 1995/2518, reg 24. For the meaning of 'consideration' see PARA 95 ante; for the meaning of 'taxable person' see PARAS 18 note 4, 63 ante; and for the meaning of 'document' see PARA 17 note 9 ante.

The purposes of this definition are: (1) to ensure that the increases in the consideration are recorded by those parties to the supply who are taxable persons; (2) to guard against fictitious claims for adjustments; and (3) to enable the Commissioners for Her Majesty's Revenue and Customs to verify adjustment entries in a taxable person's VAT account by inspecting that person's books and records; it is not to be construed as setting a common standard that applies regardless of whether the recipient of the supply is entitled to input tax relief, and regardless of whether the agreement under which the supply was made contains a built-in mechanism for a reduction in the price: *Customs and Excise Comrs v General Motors Acceptance Corpn (UK) plc* [2004] EWHC 192 (Ch) at [38], [2004] STC 577 at [38] per Field J. There must be a document (which may be computer-generated) that comes into being at or after the time of the reduction in the consideration and which by some means records the acceptance by both parties that the event triggering the reduction has occurred, and moreover, that document taken on its own or with others must disclose the reduced price, although there is no requirement for the document or documents to be served on the hirer: *Customs and Excise Comrs v General Motors Acceptance Corpn (UK) plc* supra. See also Customs and Excise Information Sheet 5/04 [2004] STI 1159. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 These provisions do not apply to any increase or decrease in consideration which occurs more than three years after the end of the prescribed accounting period in which the original supply took place: Value Added Tax Regulations 1995, SI 1995/2518, reg 38(1A) (reg 38(1) amended, and reg 38(1A) added, by SI 1997/1086). For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante. Where a customer returns a car under a hire purchase agreement, either because the law allows the contract to be terminated or because the customer declines to make a 'balloon' payment at the end of the contract, that is a reduction in the consideration for the original supply and the VAT for which the seller has to account is adjusted accordingly; moreover, the three-year time limit imposed by the Value Added Tax Regulations 1995, SI 1995/2518, reg 38(1A) (as added) does not apply, the person being entitled to rely on his right to be taxed on the consideration actually received by him and no more: see *General Motors Acceptance Corpn (UK) plc v Customs and Excise Comrs* (2003) VAT Decision 17990, [2003] STI 983; affd [2004] EWHC 192 (Ch), [2004] STC 577; and see note 1 supra.

- 4 Value Added Tax Regulations 1995, SI 1995/2518, reg 38(1) (as amended: see note 3 supra).
- 5 As to the VAT account see PARA 275 ante (definition applied by *ibid* reg 24 (amended by SI 2003/1485)).
- 6 Value Added Tax Regulations 1995, SI 1995/2518, reg 38(2).
- 7 For the meaning of 'positive entry' see PARA 21 note 13 ante.
- 8 As to the VAT payable portion see PARA 275 ante (definition applied by the Value Added Tax Regulations 1995, SI 1995/2518, reg 24 (amended by SI 2003/1485)).
- 9 Value Added Tax Regulations 1995, SI 1995/2518, reg 38(3)(a).
- 10 For the meaning of 'negative entry' see PARA 269 note 10 ante.
- 11 Value Added Tax Regulations 1995, SI 1995/2518, reg 38(3)(b).
- 12 As to the VAT allowable portion see PARA 275 ante (definition applied by *ibid* reg 24 (amended by SI 2003/1485)).
- 13 Value Added Tax Regulations 1995, SI 1995/2518, reg 38(4)(a).
- 14 *Ibid* reg 38(4)(b).
- 15 For the meaning of 'business' see PARA 23 ante.
- 16 Value Added Tax Regulations 1995, SI 1995/2518, reg 38(5). Any such entry required to be made in the VAT account of an insolvent person must, however, be made in that part of the VAT account which relates to the prescribed accounting period in which the supply was made or received: reg 38(6). For these purposes, 'insolvent person' means either an individual who has been adjudged bankrupt or a company in relation to which: (1) a voluntary arrangement under the Insolvency Act 1986 Pt I (ss 1-7B) (as amended) (see *COMPANY AND PARTNERSHIP INSOLVENCY* vol 7(3) (2004 Reissue) PARA 71 et seq) has been approved; (2) an administrator has been appointed; (3) an administrative receiver has been appointed; (4) a resolution for voluntary winding up has been passed; or (5) an order for its winding up has been made by the court at a time when it had not already gone into liquidation by passing a resolution for voluntary winding up: Value Added Tax Regulations 1995, SI 1995/2518, reg 24 (amended by SI 2003/2096).
- 17 Value Added Tax Regulations 1995, SI 1995/2518, reg 38(7). The statutory provisions referred to in the text are reg 34 (as amended), and reg 35 (see PARA 276 ante).

## UPDATE

### 277 Adjustments in the course of business

TEXT AND NOTES 1-6--In such a case both the taxable person who makes the supply and a taxable person who receives the supply must adjust their respective VAT accounts in accordance with the provisions of SI 1995/2518 reg 38: reg 38(2) (amended by SI 2009/586).

NOTE 3--SI 1995/2518 reg 38(1A) revoked: SI 2009/586. Where an increase or decrease in consideration relates to a supply in respect of which it is for the recipient, on the supplier's behalf, to account for and pay the tax, the prescribed accounting period referred to in SI 1995/2518 reg 38(1) is that of the recipient, and not of the maker, of the supply: reg 38(1C) (added by SI 2007/1418). However, where SI 1995/2518 reg 38 applies and (1) as a result of an increase in consideration for a supply it becomes one to which the Value Added Tax Act 1994 s 55A(6) (see PARA 34A) applies; or (2) as a result of a decrease in consideration for a supply it ceases to be one to which that provision applies, both the maker and the recipient of the supply must make such entries in the VAT payable portion of the VAT accounts as are necessary to account for that fact: SI 1995/2518 reg 38A(1) (reg 38A added by SI 2007/1418). SI 1995/2518 reg 38(5), (6) applies to any entry required by reg 38A as it applies to any entry required by reg 38:

reg 38A(2). None of the circumstances to which reg 38A applies is to be regarded as giving rise to any application of regs 34 and 35 (see PARA 276): reg 38A(3).

TEXT AND NOTE 16--The reference is now to the relevant taxable person: SI 1995/2518 reg 38(5) (amended by SI 2009/586).

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## **278. Obligation to provide a value added tax invoice.**

Where a registered person<sup>1</sup>:

- 876 (1) makes a taxable supply<sup>2</sup> in the United Kingdom<sup>3</sup> to a taxable person<sup>4</sup>;
- 877 (2) makes a supply<sup>5</sup> of goods or services other than an exempt supply<sup>6</sup> to a person in another member state<sup>7</sup>; or
- 878 (3) receives a payment on account in respect of a supply he has made or intends to make from a person in another member state<sup>8</sup>,

he must provide such persons as are mentioned in heads (1) to (3) above with a VAT invoice<sup>9</sup>, unless, in the case of that supply, he is entitled to issue, and issues, a VAT invoice pursuant to the provisions<sup>10</sup> relating to certain supplies of services performed on goods while they are subject to a warehousing or fiscal warehousing regime<sup>11</sup>. The invoice must be provided within 30 days of the time when the supply is treated<sup>12</sup> as taking place, or within such longer period as the Commissioners for Her Majesty's Revenue and Customs may allow in general or special directions<sup>13</sup>.

Since a VAT invoice is nothing more than a document<sup>14</sup> which contains the prescribed particulars<sup>15</sup>, it is possible for a consignment or delivery note or similar document which is issued by the supplier before the time of supply and which contains the prescribed particulars to constitute a VAT invoice. The result is that a tax point<sup>16</sup> may inadvertently be created by the issue of such a document. However, in the case of goods sent or taken on approval or sale or return or similar terms<sup>17</sup> and in the case where, within a specified time, a person making a supply issues a VAT invoice and the supply is then treated as taking place at the time the invoice is issued<sup>18</sup>, any consignment or delivery note or similar document, or any copy of it, issued by the supplier before the time of supply is not to be treated as a VAT invoice provided it is indorsed: 'This is not a VAT invoice'<sup>19</sup>.

Where goods forming part of the assets of the business<sup>20</sup> of a taxable person are, under a power exercisable by another person, sold by the other in or towards satisfaction of a debt owed by the taxable person and are deemed to have been supplied by the taxable person in the course or furtherance of his business<sup>21</sup>, the particulars of the VAT chargeable on such a supply must be provided by the person selling them<sup>22</sup> on a document containing the prescribed particulars<sup>23</sup>. Where such a document is issued to the buyer it is treated<sup>24</sup> as a VAT invoice provided by the person by whom the goods are deemed<sup>25</sup> to be supplied<sup>26</sup>. Where there is a sale of investment gold<sup>27</sup> by a person who is not trading in investment gold to a person who is so trading, the purchaser must issue on behalf of the seller an invoice containing such particulars as may be set out in a notice published by the Commissioners for the purpose and the seller must sign such form of declaration as may be set out in a notice published by the Commissioners for the purpose<sup>28</sup>.

A registered person who is a retailer is not required to provide a VAT invoice except at the request of a customer who is a taxable person in respect of any supply to him<sup>29</sup>. In the event that the retailer is requested to provide a VAT invoice to such a customer, that invoice need contain only limited particulars<sup>30</sup> if (but only if) the consideration<sup>31</sup> for the supply does not exceed £250<sup>32</sup>.

Provision is also made in connection with self-billed invoices<sup>33</sup> and the provision of invoices by electronic means<sup>34</sup>. These provisions do not, however, apply to specified supplies<sup>35</sup> made in the United Kingdom<sup>36</sup>.

1 For the meaning of 'registered person' see PARA 115 note 5 ante.

2 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

3 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 13(1)(a). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

5 For the meaning of 'supply' see PARA 27 ante.

6 For the meaning of 'exempt supply' see PARA 155 ante.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 13(1)(b). For the meaning of 'another member state' see PARA 4 note 15 ante.

8 Ibid reg 13(1)(c).

9 For the meaning of 'VAT invoice' see PARA 35 note 9 ante. Where a VAT invoice or part thereof is in a language other than English, the Commissioners for Her Majesty's Revenue and Customs may, by notice in writing, require that an English translation of the invoice is provided to them by a person who has received such an invoice in the United Kingdom within 30 days of the date of the notice: *ibid* reg 13B (added by SI 2003/3220). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

10 *Ie* pursuant to the Value Added Tax Act 1994 s 18C(1)(e) (as added) (see PARA 154 ante) and the Value Added Tax Regulations 1995, SI 1995/2518, reg 145D(1) (as added) (see PARA 154 ante): reg 13(1) (amended by SI 1996/1250).

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 13(1) (as amended: see note 10 *supra*). For the meaning of 'subject to a warehousing regime' see PARA 144 note 6 ante; and for the meaning of 'subject to a fiscal warehousing regime' see PARA 149 note 3 ante.

12 *Ie* under the Value Added Tax Act 1994 s 6 (as amended): see PARA 35 *et seq* ante.

13 Value Added Tax Regulations 1995, SI 1995/2518, reg 13(5). See also Customs and Excise Public Notice 700 *The VAT Guide* (April 2002) PARA 16.2.3.

14 For the meaning of 'document' see PARA 17 note 9 ante.

15 For the prescribed particulars see PARA 281 *post*.

16 For the meaning of 'tax point' see PARA 35 note 4 ante.

17 *Ie* where a supply takes place as described in the Value Added Tax Act 1994 s 6(2)(c): see PARA 35 ante.

18 *Ie* where a supply takes place as described in *ibid* s 6(5): see PARA 35 ante.

19 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(3). Where a registered person provides an invoice containing the required particulars specified in reg 14(3) and specifies on it any goods or services which are the subject of an exempt or zero-rated supply, he must distinguish on the invoice between the goods or services which are the subject of an exempt, zero-rated or other supply and state separately the gross total amount payable in respect of each supply and rate: reg 14(4). For the meaning of 'exempt supply' see PARA 155 ante; and for the meaning of 'zero-rated supply' see PARA 174 ante.

20 For the meaning of 'business' see PARA 23 ante.

21 *Ie* where goods are supplied as described in the Value Added Tax Act 1994 s 5(1), Sch 4 para 7: see PARA 30 ante.

22 On a sale by auction, the particulars are to be provided by the auctioneer: Value Added Tax Regulations 1995, SI 1995/2518, reg 13(2).

23 Ibid reg 13(2). The invoice must be provided within 30 days of the time when the supply is treated as taking place, or within such longer period as the Commissioners may allow in general or special directions: see reg 13(5); and the text and notes 12-13 supra. The prescribed particulars are those required in the case of a VAT invoice by reg 14(1) (as amended): see PARA 281 post. In addition, the auctioneer (in the case of a sale by auction) or, where the sale is otherwise than by auction, the person selling the goods, must, whether or not registered under the Value Added Tax Act 1994, within 21 days of the sale furnish a statement showing: (1) his name and address and, if registered, his registration number (Value Added Tax Regulations 1995, SI 1995/2518, reg 27(a)(i)); (2) the name, address and registration number of the person whose goods were sold (reg 27(a)(ii)); (3) the date of the sale (reg 27(a)(iii)); (4) the description and quantity of goods sold at each rate of VAT (reg 27(a)(iv)); and (5) the amount for which they were sold and the amount of VAT charged at each rate (reg 27(a)(v)). The auctioneer or seller must also pay the amount of VAT due (reg 27(b)) and send to the person whose goods were sold a copy of the statement referred to above (reg 27(c)). Correspondingly, both the auctioneer (or other person selling the goods) and the person whose goods were sold must exclude the VAT chargeable on the supply of those goods from any return made under the Value Added Tax Regulations 1995, SI 1995/2518 (as amended): reg 27(c). For the meaning of 'registration number' see PARA 22 note 14 ante; and for the meaning of 'return' see PARA 115 note 13 ante.

24 Ie for the purposes of ibid reg 13(1)(a): see head (1) in the text.

25 Ie in accordance with the Value Added Tax Act 1994 Sch 4 para 7: see PARA 30 ante.

26 Value Added Tax Regulations 1995, SI 1995/2518, reg 13(2).

27 Ie a sale which would, if the person were supplying investment gold in the course or furtherance of any business, fall within the Value Added Tax Act 1994 Sch 9 Group 15 item 1 or 2 (as added) (see PARA 164 post): Value Added Tax Regulations 1995, SI 1995/2518, reg 31A(4) (reg 31A added by SI 1999/3114). 'Investment gold' has the same meaning for these purposes as it has for the purposes of the Value Added Tax Act 1994 Sch 9 Group 15 (as added) (see PARA 164 note 1 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 24 (amended by SI 1999/3114). These provisions do not apply to any person in respect of a supply by him of a description falling within the Value Added Tax Act 1994 Sch 9 Group 15 item 1 or 2 (as added) the value of which does not exceed £5,000, unless the total value of those supplies to any person over the last 12 months exceeds £10,000: Value Added Tax Regulations 1995, SI 1995/2518, reg 31A(6) (as so added).

28 Ibid reg 31A(4) (as added: see note 27 supra). The records required to be kept and the documents required to be retained under this provision must be preserved for a minimum period of six years: reg 31A(5) (as so added).

29 Ibid reg 16(1). The exception does not apply if the customer is in another member state: reg 16(1).

30 A retailer's invoice need only contain: (1) the name, address and registration number of the retailer (ibid reg 16(1)(a)); (2) the time of the supply (reg 16(1)(b)); (3) a description sufficient to identify the goods or services supplied (reg 16(1)(c)); (4) the total amount payable including VAT (reg 16(1)(d)); and (5) for each rate of VAT chargeable, the gross amount payable including VAT, and the VAT rate applicable (reg 16(1)(e)). Such an invoice must not contain any reference to any exempt supply: reg 16(2). As to the rate of VAT see PARAS 5-6 ante. As to exempt supplies see PARA 155 et seq ante.

31 For the meaning of 'consideration' generally see PARA 95 ante.

32 Value Added Tax Regulations 1995, SI 1995/2518, reg 16(1) (amended by SI 2003/3220).

33 See PARA 279 post.

34 See PARA 280 post.

35 Ie: (1) any zero-rated supply other than a supply for the purposes of an acquisition in another member state (Value Added Tax Regulations 1995, SI 1995/2518, reg 20(a)); (2) any supply to which an order under the Value Added Tax Act 1994 s 25(7) (see PARA 218 ante) applies (Value Added Tax Regulations 1995, SI 1995/2518, reg 20(b)); (3) any supply on which VAT is charged although it is not made for consideration (see PARA 30 ante) (reg 20(c)); and (4) any supply to which an order made under s 32 (repealed) applies (reg 20(d)). The Commissioners consider the effect of head (1) supra is that the time of a zero-rated supply cannot be advanced by the issue of a VAT invoice but only by the making of a payment: but see PARA 35 note 9 ante. It is submitted that head (4) supra should now be taken to refer to the Value Added Tax Act 1994 s 50A (as added) (margin schemes: see PARA 202 ante). For the meaning of 'zero-rated' see PARA 174 ante.

36 Value Added Tax Regulations 1995, SI 1995/2518, reg 20.

## UPDATE

## **278 Obligation to provide a value added tax invoice**

TEXT AND NOTES 6, 7--An exempt supply is now excluded only if it is made to a person in a member state which does not require an invoice to be issued for the supply: SI 1995/2518 reg 13(1) (amended by SI 2007/2085).

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## **279. Provision of self-billed invoices.**

Where a registered person<sup>1</sup> provides a document to himself which purports to be a value added tax invoice<sup>3</sup> in respect of a supply<sup>4</sup> of goods or services to him by another registered person<sup>5</sup>, or a customer in another member state<sup>6</sup> provides a document to himself in respect of a supply of goods or services to him by a registered person<sup>7</sup>, that document is to be treated as the VAT invoice required<sup>8</sup> to be provided by the supplier<sup>9</sup> if:

- 879 (1) it has been provided pursuant to a prior agreement (a 'self-billing agreement') entered into between the supplier of the goods or services to which it relates and the recipient of the goods or services ('the customer') and which satisfies specified requirements<sup>10</sup>;
- 880 (2) it contains the required particulars<sup>11</sup>; and
- 881 (3) it relates to a supply or supplies made by a supplier who is a taxable person<sup>12</sup>.

Where a registered person provides a document to himself, that document may also be required to comply with any further conditions that may be contained in a notice published by the Commissioners for Her Majesty's Revenue and Customs<sup>13</sup> or imposed in a particular case<sup>14</sup>, and the conditions that must be complied with may be set out in a notice published by the Commissioners<sup>15</sup>.

Similarly, where a person who makes a supply to which certain provisions relating to the construction industry<sup>16</sup> apply gives an authenticated receipt<sup>17</sup> containing the prescribed particulars<sup>18</sup>, that document is treated as the VAT invoice required to be provided<sup>19</sup> on condition that no VAT invoice<sup>20</sup> is issued<sup>21</sup>. Where, however, a taxable person ('the recipient') provides a document to himself which purports to be an invoice in respect of a taxable supply of goods or services to him by another taxable person<sup>22</sup>, and that document understates the VAT chargeable on the supply<sup>23</sup>, the Commissioners may, by notice served on the recipient and on the supplier, elect that the amount of VAT understated by the document is to be regarded for all purposes as VAT due from the recipient and not from the supplier<sup>24</sup>.

These provisions do not apply to specified supplies made in the United Kingdom<sup>25</sup>. Provision is also made in connection with the provision of invoices by electronic means<sup>26</sup>.

1 For the meaning of 'registered person' see PARA 115 note 5 ante.

2 For the meaning of 'document' see PARA 17 note 9 ante.

3 For the meaning of 'value added tax invoice' see PARA 35 note 9 ante. As to the obligation to provide VAT invoices see PARA 278 ante.

4 For the meaning of 'supply' see PARA 27 ante.

5 Value Added Tax Regulations 1995, SI 1995/2518, reg 13(3) (reg 13(3) substituted, and regs 13(3A)-(3F) added, by SI 2003/3220).

6 For the meaning of 'another member state' see PARA 4 note 15 ante.

7 Value Added Tax Regulations 1995, SI 1995/2518, reg 13(3E) (as added: see note 5 supra).



8 le under *ibid* reg 13(1)(a) (where a registered person provides a document to himself) or reg 13(1)(b) or (c) (where a customer in another member state provides a document to himself) (see PARA 278 ante).

9 The invoice must be provided within 30 days of the time when the supply is treated as taking place (ie under the Value Added Tax Act 1994 s 6 (as amended): see PARA 35 et seq ante), or within such longer period as the Commissioners for Her Majesty's Revenue and Customs may allow in general or special directions: Value Added Tax Regulations 1995, SI 1995/2518, reg 13(5). See also Customs and Excise Public Notice 700 *The VAT Guide* (April 2002) PARA 16.2.3. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. A self-billed invoice is not treated as issued by the supplier (however the supplier may be described in the provision concerned) for the purposes of the Value Added Tax Regulations 1995, SI 1995/2518, reg 84(2)(b) (ii) (see PARA 41 ante); reg 85(1)(b), (2) (see PARA 38 ante); reg 86(1), (2)(b), (3) (see PARAS 36, 38, 40 ante); reg 88(1)(b) (see PARA 37 ante); reg 89(b)(ii) (see PARA 40 ante); reg 90(1)(b), (2) (see PARA 38 ante); reg 91 (see PARA 43 ante); reg 92(b) (see PARA 42 ante); reg 93(1)(b) (as substituted) (see PARA 39 ante); reg 94B(6)(a) (as added) (see PARA 38 ante): see reg 13(3F) (as added: see note 5 supra).

10 *Ibid* reg 13(3A)(a), (3E) (as added: see note 5 supra). The requirements so specified are: (1) that the agreement authorises the customer to produce self-billed invoices in respect of supplies made by the supplier for a specified period ending not later than either the expiry of a period of 12 months (reg 13(3B)(a)(i) (as so added)) or the expiry of the period of any contract between the customer and the supplier for the supply of the particular goods or services to which the self-billing agreement relates (reg 13(3B)(a)(ii) (as so added)) (without prejudice to any term of a self-billing agreement, it is treated as having expired either when the business of the supplier is transferred as a going concern (reg 13(3C)(a) (as so added)), the business of the customer is transferred as a going concern (reg 13(3C)(b) (as so added)), or the supplier ceases to be registered for VAT (reg 13(3C)(c) (as so added))); and (2) that the agreement specifies that the supplier will not issue VAT invoices in respect of supplies covered by the agreement (reg 13(3B)(b) (as so added)), will accept each self-billed invoice created by the customer in respect of supplies made to him by the supplier (reg 13(3B)(c) (as so added)), and will notify the customer if he ceases to be a taxable person or if he changes his registration number (reg 13(3B)(d) (as so added)).

11 *Ibid* reg 13(3A)(b) (as added: see note 5 supra). The required particulars are those required under reg 14(1), (2) (as amended): see PARA 281 post.

12 *Ibid* reg 13(3A)(c) (as added: see note 5 supra). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

13 *Ibid* reg 13(3A) (as added: see note 5 supra).

14 *Ibid* reg 13(3A), (3D)(b) (as added: see note 5 supra).

15 *Ibid* reg 13(3D)(a) (as added: see note 5 supra).

16 le *ibid* reg 93 (as substituted): see PARA 39 ante.

17 Such a receipt may be used to found the recipient's claim for input tax: see *ibid* reg 29(2)(a); and PARA 274 ante.

18 The prescribed particulars are those required under *ibid* reg 14(1) (as amended): see PARA 281 post.

19 le under *ibid* reg 13(1)(a) (see PARA 278 ante). The invoice must be provided within 30 days of the time when the supply is treated as taking place or within such longer period as the Commissioners may allow in general or special directions: see reg 13(5); and the text and note 9 supra.

20 Or similar document which was intended to be or could be construed as being a VAT invoice for the supply to which the receipt relates: *ibid* reg 13(4).

21 *Ibid* reg 13(4).

22 Value Added Tax Act 1994 s 29(a).

23 *Ibid* s 29(b).

24 *Ibid* s 29.

25 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 20; and PARA 278 notes 35-36 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

26 See PARA 280 post.



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## **280. Electronic invoicing.**

A document<sup>1</sup> provided by a registered person<sup>2</sup> by electronic transmission<sup>3</sup> that purports to be a value added tax invoice<sup>4</sup> in respect of a supply<sup>5</sup> of goods or services may be treated as the VAT invoice required<sup>6</sup> to be provided by the supplier provided that both the supplier and the customer are able to guarantee<sup>7</sup> the authenticity of the origin and integrity of the contents<sup>8</sup> and the supplier<sup>9</sup> has complied with any conditions imposed by the Commissioners for Her Majesty's Revenue and Customs<sup>10</sup>. Where an invoice that meets these conditions has been provided or received, both the supplier and the customer must preserve the means adopted for guaranteeing the authenticity of the origin and integrity of the contents<sup>11</sup> for such time as the invoice is preserved<sup>12</sup>.

1 For the meaning of 'document' see PARA 17 note 9 ante.

2 For the meaning of 'registered person' see PARA 115 note 5 ante.

3 'Electronic transmission' in relation to invoices means transmission or making available to the recipient using electronic equipment employing wires, radio transmission, optical technologies or other electromagnetic means: Value Added Tax Regulations 1995, SI 1995/2518, reg A13(f) (regs A13, 13A added by SI 2003/3220). These provisions are made under the Value Added Tax Act 1994 s 58, Sch 11 para 3(1), (2)(a) (substituted by the Finance Act 2002 s 24(3)), which provides for regulations to prescribe, or provide for the Commissioners to impose in a particular case, conditions that must be complied with in relation to the provision of VAT invoices by electronic means and the preservation by electronic means of such invoices or of information contained therein. Such regulations may make different provision for different circumstances: Value Added Tax Act 1994 Sch 11 para 3(3) (as so substituted).

4 For the meaning of 'value added tax invoice' see PARA 35 note 9 ante. As to the obligation to provide VAT invoices see PARA 278 ante.

5 For the meaning of 'supply' see PARA 27 ante.

6 Ie under the Value Added Tax Regulations 1995, SI 1995/2518, reg 13(1) (see PARA 278 ante).

7 The supplier and customer may guarantee the authenticity of the origin and integrity of the contents of an electronic transmission for these purposes either by an advanced electronic signature (ibid reg 13A(2)(a)(i) (as added: see note 3 supra)), by an electronic data interchange (reg 13A(2)(a)(ii) (as so added)) or, where the document relates to supplies of goods or services made in the United Kingdom, by such other electronic means as may be approved by the Commissioners for Her Majesty's Revenue and Customs in any particular case (reg 13A(2)(a)(iii) (as so added)). 'Advanced electronic signature' means an electronic signature which is uniquely linked to the signatory, is capable of identifying the signatory, is created using means that the signatory can maintain under his sole control and is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable: reg A13(a) (as so added). 'Electronic signature' means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication: reg A13(d) (as so added). 'Signatory' means a person who holds a signature-creation device and acts either on his own behalf or on behalf of the natural or legal person or entity he represents: reg A13(g) (as so added). 'Electronic data interchange', or 'EDI', means the electronic transfer, from computer to computer, of commercial and administrative data using an agreed standard to structure an EDI message: reg A13(b) (as so added). 'EDI message' means a set of segments, structured using an agreed standard, prepared in a computer readable format and capable of being automatically and unambiguously processed: reg A13(c) (as so added). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

8 Ibid reg 13A(1), (2)(a) (as added: see note 3 supra).

- 9 Or, when the document is a self-billed invoice that purports to be a VAT invoice (see PARA 279 ante), the customer: *ibid* reg 13A(3) (as added: see note 3 *supra*).
- 10 *Ibid* reg 13A(2)(b) (as added: see note 3 *supra*).
- 11 *Ie* under *ibid* reg 13A(2)(a) (as added) (see the text and note 7 *supra*).
- 12 *Ibid* reg 13A(4) (as added: see note 3 *supra*).

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## **281. Contents of value added tax invoice.**

Save as the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may otherwise allow, a registered person<sup>2</sup> providing a VAT invoice<sup>3</sup> must<sup>4</sup> state on it:

- 882 (1) an identifying number<sup>5</sup>;
- 883 (2) the time of the supply<sup>6</sup>;
- 884 (3) the date of the issue of the document<sup>7</sup>;
- 885 (4) the name, address and registration number<sup>8</sup> of the supplier<sup>9</sup>;
- 886 (5) the name and address of the person to whom the goods or services are supplied<sup>10</sup>;
- 887 (6) a description sufficient to identify the goods or services supplied<sup>11</sup>;
- 888 (7) for each description, the quantity of the goods or the extent of the services, and the rate of VAT<sup>12</sup> and the amount payable, excluding VAT, expressed in any currency<sup>13</sup>;
- 889 (8) the gross total amount payable, excluding VAT, expressed in any currency<sup>14</sup>;
- 890 (9) the rate of any cash discount offered<sup>15</sup>;
- 891 (10) the total amount of VAT chargeable, expressed in sterling<sup>16</sup>; and
- 892 (11) the unit price<sup>17</sup>.

Where a registered person provides a VAT invoice (or any document that refers to a VAT invoice and is intended to amend it) to a person in another member state<sup>18</sup>, the invoice must, except as the Commissioners may otherwise allow, contain all the particulars mentioned in heads (1) to (6) and (9) and (11) above<sup>19</sup>, and:

- 893 (a) the letters 'GB' as a prefix to his registration number<sup>20</sup>;
- 894 (b) the registration number, if any, of the recipient of the supply of goods or services<sup>21</sup>;
- 895 (c) the gross amount payable, excluding VAT<sup>22</sup>;
- 896 (d) where the supply is of a new means of transport<sup>23</sup> a description sufficient to identify it as such<sup>24</sup>;
- 897 (e) for each description, the quantity of the goods or the extent of the services, and (where a positive rate of VAT is chargeable) the rate of VAT and the amount payable, excluding VAT, expressed in sterling<sup>25</sup>; and
- 898 (f) where the supply of goods is a taxable supply, the total amount of VAT chargeable, expressed in sterling<sup>26</sup>.

Where a registered person provides a VAT invoice relating in whole or in part to a supply the VAT upon which is required to be accounted for and paid by the person supplied, on the supplier's behalf, the supplier must state that fact, and the amount of VAT so to be accounted for and paid, on the VAT invoice<sup>27</sup>. Where a registered person provides a VAT invoice relating in whole or in part to a supply of the letting on hire of a motor car other than for self-drive hire, he must state on the invoice whether that motor car is a qualifying<sup>28</sup> vehicle<sup>29</sup>.

These provisions do not apply to specified supplies made in the United Kingdom<sup>30</sup>.

- 1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.
- 2 For the meaning of 'registered person' see PARA 115 note 5 ante.
- 3 For the meaning of 'VAT invoice' see PARA 35 note 9 ante; and as to the obligation to supply such an invoice see PARA 278 ante.
- 4 These requirements are subject to the Value Added Tax Regulations 1995, SI 1995/2518, reg 14(2) (as amended) (see the text and notes 18-26 infra) and reg 16 (as amended) (see PARA 278 ante): reg 14(1) (amended by SI 1996/1250). Additionally, where a registered person provides documents in batches to the same recipient by electronic transmission (see PARA 280 ante) that purport to be VAT invoices in respect of supplies of goods or services made to, or received by, him, details common to each such document need, as an exception to these requirements, be stated only once for each batch file: reg 14(7) (added by SI 2003/3220).
- 5 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(1)(a).
- 6 Ibid reg 14(1)(b). For the meaning of 'supply' see PARA 27 ante; and as to the time of supply see PARA 35 et seq ante.
- 7 Ibid reg 14(1)(c). For the meaning of 'document' see PARA 17 note 9 ante. As to the issuing of VAT invoices by the use of a computer see PARA 280 ante.
- 8 For the meaning of 'registration number' see PARA 22 note 14 ante.
- 9 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(1)(d).
- 10 Ibid reg 14(1)(e).
- 11 Ibid reg 14(1)(g).
- 12 As to rates of VAT see PARAS 5-6 ante.
- 13 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(1)(h) (amended by SI 2003/3220). Where a registered person provides an invoice containing the required particulars specified in the Value Added Tax Regulations 1995, SI 1995/2518, reg 14(1) (as amended) and specifies on it any goods or services which are the subject of an exempt or zero-rated supply, he must distinguish on the invoice between the goods or services which are the subject of an exempt, zero-rated or other supply and state separately the gross total amount payable in respect of each supply and rate: reg 14(4). For the meaning of 'exempt supply' see PARA 155 ante; and for the meaning of 'zero-rated supply' see PARA 174 ante.
- 14 Ibid reg 14(1)(i) (amended by SI 2003/3220).
- 15 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(1)(j). As to the correct amount to include in a VAT invoice where a discount was offered to a part-exchange customer but the supply of the new car was made, without reference to the discount, to a finance company see *First County Garages Ltd v Customs and Excise Comrs* (1996) VAT Decision 14417, [1996] STI 1721.
- 16 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(1)(l).
- 17 Ibid reg 14(1)(m) (added by SI 2003/3220).
- 18 For the meaning of 'another member state' see PARA 4 note 15 ante.
- 19 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(2)(a) (amended by SI 2003/3220).
- 20 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(2)(b).
- 21 Ibid reg 14(2)(c). This number must also contain the alphabetical code of the member state in which the recipient is registered: reg 14(2)(c).
- 22 Ibid reg 14(2)(d).
- 23 For the meaning of 'new means of transport' see PARA 19 note 7 ante (definition applied by ibid reg 14(2)(e)).
- 24 Ibid reg 14(2)(e).

25 Ibid reg 14(2)(f).

26 Ibid reg 14(2)(g) (amended by SI 2003/3220).

27 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(5). This would appear to apply, for example, to a supply consisting in part of gold falling within the Value Added Tax Act 1995 s 55 (as amended): see PARA 32 ante.

28 le under the Value Added Tax (Input Tax) Order 1992, SI 1992/3222, art 7(2A) (as added): see PARA 223 ante.

29 Value Added Tax Regulations 1995, SI 1995/2518, reg 14(6) (added by SI 1995/3147).

30 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 20; and PARA 278 notes 35-36 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

## UPDATE

### 281 Contents of value added tax invoice

TEXT AND NOTES 1-17--The invoice must also give (12) the relevant reference or other indication of any margin scheme (see PARA 202 et seq) which has been applied; and (13) where the invoice relates in whole or part to a supply where the recipient is liable to pay the tax, a relevant reference or any indication that that is the case: SI 1995/2518 reg 14(1)(n), (o) (added by SI 2007/2085). A 'relevant reference' is a reference to the appropriate provision of EC Council Directive 2006/112, or a reference to the corresponding provision of the Value Added Tax Act 1994: SI 1995/2518 reg 14(7) (added by SI 2007/2085).

TEXT AND NOTE 5--The number is now required to be a sequential number based on one or more series which uniquely identifies the document: SI 1995/2518 reg 14(1)(a) (amended by SI 2007/2085).

TEXT AND NOTES 18-26--The invoice must also contain (g) where the supply is an exempt or zero-rated supply, a relevant reference or any indication that such is the case: SI 1995/2518 reg 14(2)(g) (added by SI 2007/2085).

TEXT AND NOTE 19--Now refers to heads (1) to (6), (9) and (11) to (13): SI 1995/2518 reg 14(2)(a) (amended by SI 2007/2085).

TEXT AND NOTE 27--SI 1995/2518 reg 14(5) revoked: SI 2007/2085.

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## **282. Credit notes on a change in the rate of value added tax.**

Where there is a change in the rate of value added tax in force<sup>1</sup>, or in the descriptions of exempt<sup>2</sup>, zero-rated<sup>3</sup> or reduced-rate supplies<sup>4</sup>, and a VAT invoice<sup>5</sup> which relates to a supply<sup>6</sup> in respect of which an election as to the time of supply<sup>7</sup> has been made was issued before the election was made, the person making the supply must, within 14 days after any such change, provide the person to whom the supply was made with a credit note bearing the prescribed heading<sup>8</sup> and containing:

- 899 (1) the identifying number and date of issue of the credit note<sup>9</sup>;
- 900 (2) the name, address and registration number<sup>10</sup> of the supplier<sup>11</sup>;
- 901 (3) the name and address of the person to whom the supply is made<sup>12</sup>;
- 902 (4) the identifying number and date of issue of the VAT invoice<sup>13</sup>;
- 903 (5) a description sufficient to identify the goods or services supplied<sup>14</sup>; and
- 904 (6) the amount being credited in respect of VAT<sup>15</sup>.

These provisions do not apply to specified supplies made in the United Kingdom<sup>16</sup>.

1    Ie under the Value Added Tax Act 1994 s 2 (as amended) or s 29A (as added) (see PARAS 5-6 ante).

2    As to exempt supplies see PARA 155 et seq ante.

3    As to zero-rated supplies see PARA 174 et seq ante.

4    As to reduced-rate supplies see PARA 36 ante.

5    For the meaning of 'VAT invoice' see PARA 35 note 9 ante; as to the obligation to supply such invoices see PARA 278 ante; and as to their contents see PARA 281 ante.

6    For the meaning of 'supply' see PARA 27 ante.

7    Ie an election under the Value Added Tax Act 1994 s 88 (as amended): see PARA 36 ante.

8    Value Added Tax Regulations 1995, SI 1995/2518, reg 15 (amended by SI 2003/1485). The prescribed heading is 'Credit note - change of VAT rate': Value Added Tax Regulations 1995, SI 1995/2518, reg 15 (as so amended).

9    Value Added Tax Regulations 1995, SI 1995/2518, reg 15(a).

10   For the meaning of 'registration number' see PARA 22 note 14 ante.

11   Value Added Tax Regulations 1995, SI 1995/2518, reg 15(b).

12   Ibid reg 15(c).

13   Ibid reg 15(d).

14   Ibid reg 15(e).

15   Ibid reg 15(f).

16   See ibid reg 20; and PARA 278 notes 35-36 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.



**UPDATE**

**282 Credit notes on a change in the rate of value added tax**

TEXT AND NOTE 8--The time limit is increased from 14 days to 45 days, or such longer period as the Commissioners may allow in general or special directions: SI 1995/2518 reg 15 (amended by SI 2008/3021).

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### **283. Accounting for the purposes of triangulation.**

An intermediate supplier may elect that the supply of goods which he makes to a customer registered in the United Kingdom<sup>1</sup> be treated instead as a taxable acquisition<sup>2</sup> by his customer, on which the customer alone is obliged to account for value added tax<sup>3</sup>. Where the intermediate supplier intends to use the simplified procedure<sup>4</sup>, he is obliged to notify both the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup> and the customer in writing of his intention to do so<sup>6</sup>. On each occasion that an intermediate supplier makes or intends to make a supply<sup>7</sup> to which he wishes the simplified procedure to apply, he must provide the customer with an invoice in the prescribed form<sup>8</sup>.

If the intermediate supplier is registered in the United Kingdom for the purposes of VAT, he may elect that the transaction be treated simply as a removal of goods from one member state to another, with a taxable acquisition by the customer in the member state of destination; and he is then treated as making neither a taxable acquisition of the goods nor a taxable supply<sup>9</sup> of them<sup>10</sup>. Where a registered person<sup>11</sup> makes a supply to which this provision applies, he must nevertheless provide the person supplied with an invoice in respect of that supply<sup>12</sup>.

Similar provisions apply where a person who belongs in another member state<sup>13</sup> wishes to operate the simplified procedure for goods installed or assembled in the United Kingdom<sup>14</sup>. That person must notify both the Commissioners and the customer in writing of his intention to rely on the procedure<sup>15</sup>, and on each occasion that he makes or intends to make a supply to which he wishes that procedure to apply he must provide the registered person to whom the supply is made with an invoice in the prescribed form<sup>16</sup>.

The requirements obliging suppliers to provide invoices in prescribed forms to their customers do not apply to specified supplies made in the United Kingdom<sup>17</sup>.

1 For the meaning of 'registered' see PARA 64 note 2 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

2 For the meaning of 'taxable acquisition' see PARA 19 ante.

3 See PARA 22 ante.

4 I.e. the procedure permitted under the Value Added Tax Act 1994 s 14(1): see PARA 22 ante.

5 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 11; and PARA 22 ante.

7 For the meaning of 'supply' see PARA 27 ante.

8 Value Added Tax Regulations 1995, SI 1995/2518, reg 18(1). An invoice so provided must: (1) comply with the provisions of the law corresponding, in relation to the member state which provided the intermediate supplier with the identification number for VAT purposes used, or to be used, by him for the purpose of the supply to him by the original supplier of the goods which were subsequently removed to the United Kingdom, to reg 17 (see the text and notes 11-12 infra) (reg 18(2)(a)); (2) be provided no later than 15 days after the time at which the supply would have been treated as taking place by or under the Value Added Tax Act 1994 s 6 (as amended) (see PARA 35 et seq ante) but for s 14(1) (see PARA 22 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 18(2)(b)); (3) cover no less than the extent of the supply which would have been so treated as taking place but for the Value Added Tax Act 1994 s 14(1) (see PARA 22 ante) at the time that such an invoice is provided (Value Added Tax Regulations 1995, SI 1995/2518, reg 18(2)(c)); and (4) bear the legend: 'VAT: EC

ARTICLE 28 SIMPLIFICATION INVOICE' (reg 18(2)(d)). Where, however, an intermediate supplier makes a supply such as is mentioned in reg 18(1) and he has already provided the customer with an invoice that complies with the requirements of heads (1), (3), (4) supra, he is not required to provide the customer with a further invoice in relation to that supply: reg 18(3). Where he makes such a supply and he provides the customer with an invoice such as is described in reg 18(2), (3), that invoice is treated as if it were an invoice for the purpose of reg 83 (see PARA 44 ante): reg 18(4). Where he makes such a supply and provides the customer with an invoice that complies only with the requirements of head (1) supra, that invoice is treated, for the purposes of reg 18 only, as a VAT invoice: reg 18(5). As to the meaning of 'invoice' see PARA 17 note 9 ante; for the meaning of 'VAT invoice' see PARA 35 note 9 ante; and as to the obligation to provide, and the contents of, VAT invoices see PARAS 278-281 ante. As to references to the law of another member state see PARA 17 note 2 ante.

9 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

10 See the Value Added Tax Act 1994 s 14(6); and PARA 22 ante.

11 For the meaning of 'registered person' see PARA 115 note 5 ante.

12 Value Added Tax Regulations 1995, SI 1995/2518, reg 17(1). The invoice must comply with the requirements of regs 13, 14 (as amended) (see PARAS 278, 281 ante) (reg 17(2)(a)) and must bear the legend: 'VAT: EC ARTICLE 28 SIMPLIFICATION INVOICE' (reg 17(2)(b)).

13 For the meaning of 'another member state' see PARA 4 note 15 ante.

14 As to this procedure see the Value Added Tax Act 1994 s 14(2); and PARA 47 ante.

15 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 12(1); and PARA 47 ante.

16 Ibid reg 19(1). An invoice so provided by a person belonging in another member state must: (1) comply with the provisions of the law of the member state in which he belongs corresponding in relation to that member state to the provisions of reg 14 (see PARA 281 ante) (reg 19(2)(a)); (2) be provided no later than 15 days after the time that the supply of the goods would have been treated as having taken place by or under the Value Added Tax Act 1994 s 6 (as amended) but for s 14(2) (see PARA 47 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 19(2)(b)); (3) cover no less than the extent of the supply which would, but for the Value Added Tax Act 1994 s 14(2) (see PARA 47 ante), have been treated as having taken place by or under s 6 (as amended) (see PARA 35 ante) at the time that such an invoice is provided (Value Added Tax Regulations 1995, SI 1995/2518, reg 19(2)(c)); and (4) bear the legend 'SECTION 14(2) VATA INVOICE' (reg 19(2)(d)). Where, however, a person belonging in another member state makes a supply such as is mentioned in reg 19(1) and he has already provided the registered person with an invoice that complies with the requirements of heads (1), (3)-(4) supra, he is not required to provide the registered person with a further invoice in relation to that supply: reg 19(3). Where a person belonging in a member state makes such a supply and he provides the registered person with an invoice such as is described in reg 19(2), (3), that invoice is treated as if it were an invoice for the purpose of reg 83 (see PARA 44 ante): reg 19(4). Where a person belonging in a member state makes such a supply and he provides the registered person with an invoice that complies only with the requirements of head (1) supra, that invoice is treated, for the purposes of reg 19 only, as if it were a VAT invoice: reg 19(5).

17 See ibid reg 20; and PARA 278 notes 35-36 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

## UPDATE

### 283 Accounting for the purposes of triangulation

NOTE 8--Head (4) omitted: SI 2007/2085.

NOTE 12--Words 'must bear ... INVOICE' omitted: SI 1995/2518 reg 17(2) (substituted by SI 2007/2085).

NOTE 16--Head (4) omitted: SI 2007/2085.

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## **284. EC sales statements.**

Every taxable person<sup>1</sup> who in any period of a quarter has made a supply<sup>2</sup> of, or has dispatched, transported or transferred, goods<sup>3</sup> to a person who is or was registered in another member state<sup>4</sup> must submit a statement in relation to that period to the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup>. The statement must be in the prescribed form<sup>6</sup>, containing full information<sup>7</sup> as well as a declaration signed by him that it is true and complete and must be submitted no later than 42 days after the end of the quarter<sup>8</sup>. The Commissioners may, however, allow a taxable person to submit such statements in respect of periods of one month<sup>9</sup>. In addition, where a taxable person satisfies the Commissioners either that, at the end of any month, the value of his taxable supplies<sup>10</sup> in the period of one year then ending is less than the relevant figure<sup>11</sup> or that, at any time, there are reasonable grounds for believing that the value of his taxable supplies in the period of one year beginning at that or any later time will not exceed the relevant figure<sup>12</sup>, and the prescribed condition<sup>13</sup> is satisfied, the Commissioners may allow that person to submit a statement which relates to the period of that year<sup>14</sup>.

Where the Commissioners have allowed a taxable person to make returns<sup>15</sup> in respect of periods longer than three months<sup>16</sup> and they are satisfied that the prescribed conditions<sup>17</sup> are fulfilled, they may allow that person to submit statements in respect of periods identical to those that have been allowed for the making of his returns<sup>18</sup>.

Every taxable person who has made a supply of a new means of transport<sup>19</sup> in any period of a quarter to a person for the purpose of acquisition by him in another member state must submit a statement to the Commissioners in relation to that period, no later than 42 days after its end<sup>20</sup>.

Any taxable person who ceases to be registered<sup>21</sup> must submit a final statement to the Commissioners<sup>22</sup> no later than 42 days after the date with effect from which his registration has been cancelled, unless another person has been registered<sup>23</sup> with his registration number and in substitution for him<sup>24</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 There is no corresponding provision relating to services.

4 'Registered in another member state' means registered in accordance with the measures adopted by the competent authority in another member state for the purposes of the common system of value added tax; and 'registered' is to be construed accordingly for these purposes: Value Added Tax Regulations 1995, SI 1995/2518, reg 21.

5 Ibid reg 22(1). 'Statement' means the statement which a taxable person is required to submit in accordance with Pt IV (regs 21-23) (as amended): reg 21. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante. Where the Commissioners consider it necessary in a particular case, they may allow or direct a taxable person to submit statements to a specified address: reg 22(1) proviso (d).

6 For the prescribed form see ibid reg 22(1), Sch 1, Form 12.

7 I.e. the information specified in ibid reg 22(3) (as amended) or reg 22(5): reg 22(1) (amended by SI 1996/210). Save as the Commissioners may otherwise allow or direct, a taxable person must in any such statement specify: (1) his name, address and registration number, which number must include the prefix 'GB'

(Value Added Tax Regulations 1995, SI 1995/2518, reg 22(3)(a), (5)(a)); (2) the date of the submission of the statement (reg 22(3)(b)); (3) the date of the last day of the period to which the statement refers (reg 22(3)(c)); (4) the registration number of each person acquiring or deemed to have acquired goods in the period, including the alphabetical code of the member state in which each such person is registered (reg 22(3)(d)); and (5) the total value of the goods supplied in the period to each person mentioned in head (4) supra (reg 22(3)(e) (amended by SI 1996/210)). Where a taxable person makes a supply such as is mentioned in the Value Added Tax Regulations 1995, SI 1995/2518, reg 18(1) (as amended) (see PARA 283 ante), he must additionally specify the figure '2' in the box marked 'indicator' on Sch 1, Form 12 (reg 22(5)(b)) and the total value of the goods supplied to him (reg 22(5)(c)). 'Total value' means the consideration for the supply including the costs of any freight transport services and services ancillary to the transport of goods charged by the supplier of the goods to the customer: reg 21. For the meanings of 'registration number' and 'alphabetical code' see PARA 22 note 14 ante.

8 Ibid reg 22(1) (as amended: see note 7 supra).

9 Ibid reg 22(1) proviso (a). The statement must be submitted no later than 42 days after the end of the quarter in which the month occurs: reg 22(2)(a).

10 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 22(1) proviso (b)(i). The 'relevant figure' means the sum of the amount mentioned in the Value Added Tax Act 1994 Sch 1 para 1(1)(a) (as amended) (ie the VAT registration limit: see PARA 38 ante) and £25,500: Value Added Tax Regulations 1995, SI 1995/2518, reg 21.

12 Ibid reg 22(1) proviso (b)(ii).

13 Ie that: (1) at the end of any month, the value of his supplies to persons registered in other member states in the period of one year then ending is less than £11,000 (ibid reg 22(1) proviso (b)(iii)); or (2) at any time, there are reasonable grounds for believing that the value of his supplies to such persons will not exceed that figure in the period of one year beginning at that or at any later time (reg 22(1) proviso (b)(iv)).

14 Ibid reg 22(1) proviso (b). The statement must contain full information as specified in reg 22(3)(a)-(d) (see note 7 supra) and a declaration signed by him that it is true and complete: reg 22(1) proviso (b). It must be submitted no later than 42 days after the end of the period of the year to which the statement relates: reg 22(2)(b).

15 For the meaning of 'return' see PARA 115 note 13 ante.

16 Ie under the Value Added Tax Regulations 1995, SI 1995/2518, reg 25 (as amended): see PARA 247 ante.

17 Ie that:

107 (1) at the end of any month, the value of the taxable person's taxable supplies in the period of one year then ending is less than £145,000 (ibid reg 22(1) proviso (c)(i)); or

108 (2) at any time, there are reasonable grounds for believing that the value of those supplies in the period of one year beginning at that or any later time will not exceed that amount (reg 22(1) proviso (c)(ii));

and that:

109 (a) at the end of any month, the value of his supplies to persons registered in other member states in the period of one year then ending is less than £11,000 (reg 22(1) proviso (c)(iii)); or

110 (b) at any time, there are reasonable grounds for believing that the value of such supplies in the period of one year beginning at that or any later time will not exceed £11,000 (reg 22(1) proviso (c)(iv)).

18 Ibid reg 22(1) proviso (c). Each statement must contain full information as specified in reg 22(3) or (5) (see note 7 supra), as the case may require, and a declaration signed by him that the statement is true and complete: reg 22(1) proviso (c) (amended by SI 1996/210). The statement must be submitted no later than 42 days after the end of the period in respect of which the Commissioners have allowed a return to be furnished: Value Added Tax Regulations 1995, SI 1995/2518, reg 22(2)(c).

19 For the meaning of 'new means of transport' see PARA 19 note 7 ante.

20 Value Added Tax Regulations 1995, SI 1995/2518, reg 22(6). The statement must contain the particulars, including the declaration made by the taxable person, set out in Sch 1, Form 13: reg 22(6). Where the

Commissioners consider it necessary in a particular case, they may allow or direct a taxable person to submit the statement to a specified address: reg 22(6) proviso.

21     Ie under the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended): see PARA 64 et seq ante.

22     The final statement must be in the form set out in the Value Added Tax Regulations 1995, SI 1995/2518, Sch 1, Form 12 or Form 13, as the case may require, and must contain, unless the Commissioners in any case otherwise allow or direct: (1) the information specified in reg 22(3) and (5) (see note 7 supra), or the full information required by Sch 1, Form 13, or both, as the case may require (reg 23(a) (amended by SI 1996/210)); and (2) a declaration signed by the taxable person that the statement is true and complete (reg 23(b)).

23     Ie under ibid reg 6(3): see PARA 83 ante.

24     Ibid reg 23.

## **UPDATE**

### **284 EC sales statements**

TEXT AND NOTES--As to notification to the Commissioners of the first occasion on which a person makes a supply to which the Value Added Tax Act 1994 s 55A(6) (see PARA 34A) applies and for the submission of statements to the Commissioners containing prescribed particulars about such supplies see PARA 284A.

As to the provision of information in relation to arrivals and dispatches of goods between member states for the purposes of Intrastat see PARA 284B.

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## **284A. Reverse charge sales statements.**

On the first occasion on which a person makes a relevant supply<sup>1</sup>, he must, within 30 days of the day on which the supply is made, notify the Commissioners for Her Majesty's Revenue and Customs of that fact on line, using a portal provided by the Commissioners<sup>2</sup>.

Every taxable person<sup>3</sup> who, in any prescribed accounting period<sup>4</sup> has made a relevant supply must, in relation to that period, submit to the Commissioners, no later than the day by which he is required to make a return for that period and in such a form and manner as may be determined by the Commissioners in a notice published by them (or otherwise), a statement containing:

- 905 (1) the person's registration number,
- 906 (2) the registration number of each person to whom he has made a relevant supply, and
- 907 (3) for each month falling within the prescribed accounting period, the total value of the relevant supplies made to each person mentioned in head (2) above<sup>5</sup>.

If, in any prescribed accounting period, no relevant supply is made, a statement to that effect must be submitted to the Commissioners in such form and manner as may be determined by them in a notice published by them (or otherwise)<sup>6</sup>.

Where a person ceases to make relevant supplies without intending subsequently to make such supplies, or has so ceased but nonetheless resumes making taxable supplies, he must, within 30 days of so ceasing (or, as the case may be, of so recommencing), notify the Commissioners of that fact in such form and manner as may be determined in a notice published by them (or otherwise)<sup>7</sup>.

1   le a supply of goods to which the Value Added Tax Act 1994 s 55A(6) (see PARA 34A) applies: Value Added Tax Regulations 1995, SI 1995/2518, reg 23A (regs 23A-23C added by SI 2007/1418).

2   SI 1995/2518 reg 23B(1), (2). If the portal is unavailable for any reason, the Commissioners may allow the notification to be made by e-mail: reg 23B(3).

3   For the meaning of 'taxable person' see PARA 63.

4   For the meaning of 'prescribed accounting period' see PARA 216 NOTE 6.

5   SI 1995/2518 regs 23A, 23C(1). The statement must contain a declaration by the taxable person that it is true and complete: reg 23C(4).

6   Ibid reg 23C(2). This does not apply where a taxable person has notified the Commissioners that he has ceased to make relevant supplies without intending subsequently to make such supplies: reg 23C(3).

7   Ibid reg 23D (added by SI 2007/1599).

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**284B. Information relating to arrivals and dispatches.**

The following information must be provided to the Commissioners for Her Majesty's Revenue and Customs in relation to arrivals and dispatches<sup>1</sup> by a responsible party<sup>2</sup>:

- 908 (1) the registration number of the responsible party,
- 909 (2) the reference period<sup>3</sup>,
- 910 (3) whether the information relates to arrival or despatch,
- 911 (4) the commodity<sup>4</sup>,
- 912 (5) the partner member state,
- 913 (6) the value of the goods,
- 914 (7) the quantity of the goods,
- 915 (8) the nature of the transaction<sup>5</sup>.

The information must be provided in a supplementary declaration in which, and for the same reference period as, information is provided relating to the arrivals and dispatches for Intrastat purposes<sup>6</sup>.

1 'Arrivals and dispatches' means those arrivals and dispatches for which a responsible party is required to provide information under European Parliament and EC Council Regulation 638/2004 (the 'establishing Regulation') (amended by European Parliament and EC Council Regulation 222/2009 (OJ L87, 31.3.2009, p 160)), EC Commission Regulation 1982/2004 (the 'implementing Regulation') and the Statistics of Trade (Customs and Excise) Regulations 1992, SI 1992/2790 (the 'statistics Regulations') (see CUSTOMS AND EXCISE vol 12(3) (2005 Reissue) PARA 1176): Value Added Tax Regulations 1995, SI 1995/2518, reg 23E(1), (2) (regs 23E, 23F added by SI 2008/556).

2 'Responsible party' means a taxable person (see PARA 18 NOTE 4) who is required by the establishing Regulation art 7 and the statistics Regulations reg 3 to provide information in relation to arrivals and dispatches: SI 1995/2518 reg 23E(2). A responsible party to whom the statistics Regulations reg 4(2) applies must also provide to the Commissioners the delivery terms relating to arrivals and dispatches: SI 1995/2518 reg 23F(3).

3 I.e. the period applicable under the establishing Regulation art 6(1) or such other period directed by the Commissioners pursuant to the statistics Regulations reg 4(3): SI 1995/2518 reg 23E(2).

4 The commodity must be identified by the 8-digit code of the Combined Nomenclature as defined in EEC Council Regulation 2658/87.

5 SI 1995/2518 reg 23F(1), (2). 'Delivery terms', 'nature of the transaction', 'partner member state', 'quantity of the goods' and 'value of the goods' have the same meaning as in the establishing Regulation and implementing Regulation: reg 23E(2).

6 Ibid reg 23F(4). 'Supplementary declaration' means the relevant form set out in the Schedule to the statistics Regulations, and 'for Intrastat purposes' means for any purpose under the establishing Regulation, the implementing Regulation or the statistics Regulations: SI 1995/2518 reg 23E.



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## **285. Persons acting in a representative capacity.**

Where any person who is subject to any prescribed requirements relating to accounting, payment and record-keeping<sup>1</sup> dies or becomes incapacitated<sup>2</sup> and control of his assets passes to another person who is a personal representative, trustee in bankruptcy, receiver, liquidator or person otherwise acting in a representative capacity, that other person must, if the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> require it, and so long as he has control of those assets, comply with the relevant requirements<sup>4</sup>. Any requirement to pay value added tax, however, applies to that other person only to the extent of the assets of the deceased or incapacitated person over which he has control<sup>5</sup>.

1 The requirements under the Value Added Tax Regulations 1995, SI 1995/2518, Pt V (regs 24-43) (as amended): see PARAS 145, 247 et seq ante, 311 post.

2 'Incapacitated', in this context, means 'incapable of carrying on one's business' and contemplates a general incapacity which, like death or bankruptcy, would make it impossible for any business to be carried on by the taxable person: *Sargent v Customs and Excise Comrs* [1995] 1 WLR 821 at 826, [1995] STC 398 at 401, CA, per Nourse LJ (decided in the context of the Value Added Tax Regulations 1995, SI 1995/2518, reg 9 (see PARA 79 ante)).

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 Value Added Tax Regulations 1995, SI 1995/2518, reg 30. Part V (as amended) applies to the representative person in the same way as it would have applied to the deceased or incapacitated person, had that person not been deceased or incapacitated, except in relation to the payment of VAT (see the text to note 5 infra): reg 30. Where the Commissioners have so required of any person, the period in respect of which taxable supplies were being made by the person who died or became incapacitated ends on the day previous to the date when death or incapacity took place: reg 25(3)(a). Subject to reg 25(1)(c) (see PARA 247 ante), a return made on behalf of that person must be made in respect of that period no later than the last day of the month next following the end of that period (reg 25(3)(b)), and the next period starts on the day following that period and ends, and all subsequent periods begin and end, on the date previously determined under reg 25(1) (see PARA 247 ante) (reg 25(3)(c)).

5 Ibid reg 30 proviso.

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## **286. Power to require security.**

Where the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> think it necessary for the protection of the revenue, they may require a taxable person<sup>2</sup>, as a condition of his supplying or being supplied with goods or services under a taxable supply<sup>3</sup>, to give security<sup>4</sup>, or further security, of such amount and in such manner as they may determine<sup>5</sup>, for the payment of any value added tax which is or may become due from either the taxable person<sup>6</sup> or any person by or to whom relevant goods or services<sup>7</sup> are supplied<sup>8</sup>. If, in contravention of such a requirement for security, any person supplies or is supplied with goods or services, he is liable to a penalty<sup>9</sup>.

An appeal lies to a VAT and duties tribunal against the requirement of security for this purpose<sup>10</sup>.

The matter of the compatibility of these provisions with the Sixth Directive<sup>11</sup> has been referred to the European Court of Justice<sup>12</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

3 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

4 Security cannot be required where there is no risk that VAT collected by the trader will not be paid; it is not generally an appropriate means of enforcing the obligation to make returns: *Cameron v Customs and Excise Comrs* (1998) VAT Decision 15779, [1999] STI 133.

5 Value Added Tax Act 1994 s 58, Sch 11 para 4(4) (Sch 11 para 4(2) substituted, and Sch 11 para 4(3)-(5) added, by the Finance Act 2003 s 17(1), (4)).

6 Value Added Tax Act 1994 Sch 11 para 4(2)(a) (as substituted: see note 5 supra).

7 The goods or services supplied by or to the taxable person: *ibid* Sch 11 para 4(3) (as added: see note 5 supra).

8 *Ibid* Sch 11 para 4(2)(b) (as substituted: see note 5 supra). These powers are without prejudice to the power of the Commissioners under s 48(7) (see PARA 18 ante): Sch 11 para 4(5) (as added: see note 5 supra). As to the security for the making of VAT credits see PARA 216 ante.

9 *Ibid* s 72(11) (amended by the Finance Act 2003 s 17(1), (5)). On summary conviction there is a penalty of level 5 on the standard scale: see the Value Added Tax Act 1994 s 72(11) (as so amended). As to the standard scale see PARA 143 note 5 ante.

10 *Ibid* s 83(l) (amended by the Finance Act 2003 s 17(1), (6)). The nature of the appeal has been the subject of some judicial debate: see *Customs and Excise Comrs v Peachtree Enterprises Ltd* [1994] STC 747 (jurisdiction of the VAT and duties tribunal supervisory only and, in accordance with the principle in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, [1947] 2 All ER 680, CA, the tribunal should not substitute its decision for that of the Commissioners); cf *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941, CA (tribunal's jurisdiction more strictly appellate in nature; nevertheless, in applying the statutory condition of whether it was requisite for the protection of the revenue that a person be required to give security for VAT, the tribunal should apply the test laid down in *Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd* [1981] AC 22, [1980] 2 All ER 72, HL, in considering whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted, or had taken some irrelevant matter into account or had disregarded something to which they should have given weight, or had erred in point of law; once this was decided, the tribunal had (if necessary) to remit the issue to the Commissioners for further consideration and could not exercise the discretion itself; but where the tribunal concluded that the decision of the Commissioners

would inevitably have been the same, even if they had carried out their task properly, it was unnecessary to remit the matter to the Commissioners, and their decision could stand). It is difficult to see how the latter approach differs from a supervisory jurisdiction. As to appeals generally see PARA 343 et seq post. The Commissioners were held to have acted unreasonably in *Wold Construction Co Ltd v Customs and Excise Comrs* (1994) VAT Decision 11704, [1994] STI 452, when they sought security for VAT from an established repayment trader. For a case where costs on the indemnity basis were awarded against the Commissioners for imposing a requirement of security for VAT for an improper purpose see *VSP Marketing Ltd v Customs and Excise Comrs (No 3)* (1995) VAT Decision 13587, [1995] STI 1756 (Commissioners had sought to impose the requirement in order to persuade the trader to discharge its predecessor's VAT liability).

11     le EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') arts 21, 22. As to the Sixth Directive see PARA 1 note 1 ante.

12     See *R (on the application of the Federation of Technological Industries) v Customs and Excise Comrs* [2004] EWCA Civ 1020, [2004] STC 1424.

## UPDATE

### 286 Power to require security

TEXT AND NOTES--As to the compatibility of these provisions with European law see Case C-384/04 *Customs and Excise Comrs v Federation of Technological Industries* [2006] STC 1483, ECJ.

NOTE 10--The lodging of a late appeal against a requirement to give security for VAT does not provide a defence to a charge of continuing to trade even if it has been accepted by the tribunal: *Chaudhry v Revenue and Customs Prosecution Office* [2007] EWHC 1805 (Admin), [2008] STC 2357, DC.

NOTE 11--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

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## **287. Liability for another's unpaid VAT.**

Where a taxable supply<sup>1</sup> of specified telecommunications or computer equipment<sup>2</sup> has been made to a taxable person<sup>3</sup>, and at the time of the supply<sup>4</sup> the person knew or had reasonable grounds to suspect<sup>5</sup> that some or all of the value added tax payable in respect of that supply, or on any previous or subsequent supply of those goods or services<sup>6</sup>, would go unpaid<sup>7</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>8</sup> may serve on that person a notice specifying the amount of the VAT so payable that is unpaid<sup>9</sup> and stating the effect of the notice<sup>10</sup>. The effect of such a notice is that the person served with it<sup>11</sup> and the person who would otherwise<sup>12</sup> be liable for the amount specified in it<sup>13</sup> are jointly and severally liable to the Commissioners for the amount therein stated<sup>14</sup>.

An appeal lies to a VAT and duties tribunal against any liability arising by virtue of these provisions<sup>15</sup>, and applications may be made to the Commissioners for a review of their decision<sup>16</sup>.

The matter of the compatibility of these provisions with the Sixth Directive<sup>17</sup> has been referred to the European Court of Justice<sup>18</sup>.

1 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

2 These provisions apply to telephones and any other equipment, including parts and accessories, made or adapted for use in connection with telephones or telecommunication (Value Added Tax Act 1994 s 77A(1)(a) (s 77A added by the Finance Act 2003 s 18(1)) and to computers and any other equipment, including parts, accessories and software, made or adapted for use in connection with computers or computer systems (Value Added Tax Act 1994 s 77A(1)(b) (as so added)). The Treasury may by order amend s 77A(1) (as added), and any such order may make such incidental, supplemental, consequential or transitional provision as the Treasury thinks fit: s 77A(9) (as so added). As to the making of orders generally see PARA 14 ante. At the date at which this volume states the law no such orders had been made.

3 Ibid s 77A(2)(a) (as added: see note 2 supra). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

4 As to the time of the supply see PARA 29 et seq ante.

5 A person has reasonable grounds so to suspect if the price payable by him for the goods in question was either less than the lowest price that might reasonably be expected to be payable for them on the open market (Value Added Tax Act 1994 s 77A(6)(a) (as added: see note 2 supra)) or was less than the price payable on any previous supply of those goods (s 77A(6)(b) (as so added)). This presumption is rebuttable on proof that the low price payable for the goods was due to circumstances unconnected with failure to pay VAT (s 77A(7) (as so added)), but is without prejudice to any other way of establishing reasonable grounds for suspicion (s 77A(8) (as so added)).

6 For these purposes, 'goods' includes services: ibid s 77A(10)(a) (as added: see note 2 supra).

7 Ibid s 77A(2)(b) (as added: see note 2 supra).

8 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

9 For this purpose, the amount of VAT that is payable in respect of a supply is the lesser of: (1) the amount chargeable on the supply (Value Added Tax Act 1994 s 77A(4)(a) (as added: see note 2 supra)); and (2) the amount shown as due on the supplier's return for the prescribed accounting period in question (if he has made one) together with any amount assessed as due from him for that period (subject to any appeal by him) (s 77A(6)(b) (as so added)). For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante. The reference to assessing an amount as due from a person includes a reference to the case where, because it is

impracticable to do so, the amount is not notified to him: s 77A(5) (as so added). An amount of VAT counts as unpaid only to the extent that it exceeds the amount of any refund due: s 77A(10)(b) (as so added).

10 Ibid s 77A(2) (as added: see note 2 supra).

11 Ibid s 77A(3)(a) (as added: see note 2 supra).

12 Ie apart from ibid s 77A (as added).

13 Ibid s 77A(3)(b) (as added: see note 2 supra).

14 Ibid s 77A(3) (as added: see note 2 supra)

15 Ibid s 83(ra) (added by the Finance Act 2003 s 18(2)). As to appeals see PARA 343 et seq post.

16 See Customs and Excise Public Notice 726 *Joint and Several Liability in the Supply of Specified Goods* (August 2003) PARA 6.2.

17 Ie EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') arts 21, 22. As to the Sixth Directive see PARA 1 note 1 ante.

18 See *R (on the application of the Federation of Technological Industries) v Customs and Excise Comrs* [2004] EWCA Civ 1020, [2004] STC 1424.

## UPDATE

### 287 Liability for another's unpaid VAT

TEXT AND NOTES--As to the compatibility of these provisions with Community law see Case C-384/04 *Customs and Excise Comrs v Federation of Technological Industries* [2006] STC 1483, ECJ.

NOTE 2--These provisions now apply to (1) any equipment made or adapted for use as a telephone and any other equipment made or adapted for use in connection with telephones or telecommunication; (2) any equipment made or adapted for use as a computer and any other equipment made or adapted for use in connection with computers or computer systems (including, in particular, positional determination devices for use with satellite navigation systems); and (3) any other electronic equipment made or adapted for use by individuals for the purposes of leisure, amusement or entertainment and any other equipment made or adapted for use in connection with any such electronic equipment: 1994 Act s 77A(1) (amended by SI 2007/939). 'Other equipment' includes parts, accessories and software: 1994 Act s 77A(1) (as so amended).

Section 77A(9) replaced by s 77A(9)-(9B) (substituted by the Finance Act 2007 s 98(1)). The Treasury may by order amend the 1994 Act s 77A(1) and may amend s 77A generally in order to extend or otherwise alter the circumstances in which a person is presumed to have reasonable grounds for suspecting matters to be as mentioned in s 77A(2)(b): s 77A(9), (9A) (as so substituted). Any such order may make such incidental, supplemental, consequential or transitional provision as the Treasury thinks fit: s 77A(9B) (as so substituted).

NOTE 17--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(3) ACCOUNTING FOR VALUE ADDED TAX/(ix) Disclosure of Avoidance Schemes/288. Obtaining a tax advantage.

## **(ix) Disclosure of Avoidance Schemes**

### **288. Obtaining a tax advantage.**

A taxable person<sup>1</sup> obtains a tax advantage if:

- 916 (1) in any prescribed accounting period<sup>2</sup> the amount by which the output tax accounted for by him exceeds the input tax deducted by him is less than it would otherwise be<sup>3</sup>;
- 917 (2) he obtains a value added tax credit when he would not otherwise do so, or obtains a larger VAT credit or obtains a VAT credit earlier than would otherwise be the case<sup>4</sup>;
- 918 (3) in a case where he recovers input tax as a recipient of a supply<sup>5</sup> before the supplier accounts for the output tax, the period between the time when the input tax is recovered and the time when the output tax is accounted for is greater than would otherwise be the case<sup>6</sup>; or
- 919 (4) in any prescribed accounting period, the amount of his non-deductible tax<sup>7</sup> is less than it would otherwise be<sup>8</sup>,

and a person who is not a taxable person obtains a tax advantage if his non-refundable tax<sup>9</sup> is less than it would otherwise be<sup>10</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

3 Value Added Tax Act 1994 s 58A, Sch 11A paras 1, 2(1)(a) (s 58A, Sch 11A added by the Finance Act 2004 s 19(1), Sch 2 paras 1, 2; and the Value Added Tax Act 1994 Sch 11A para 1 amended, Sch 11 para 2 substituted, and Sch 11 para 2A added, by the Finance (No 2) Act 2005 s 6(1), Sch 1 paras 1-4)). For the meanings of 'output tax' and 'input tax' see PARAS 4 ante, 215 post.

4 Value Added Tax Act 1994 Sch 11A para 2(1)(b) (as added and substituted: see note 3 supra).

5 For the meaning of 'supply' see PARA 27 ante.

6 Value Added Tax Act 1994 Sch 11A para 2(1)(c) (as added and substituted: see note 3 supra).

7 'Non-deductible tax', in relation to a taxable person, means input tax for which he is not entitled to credit under *ibid* s 25 (see PARA 216 ante) (Sch 11A paras 1, 2A(1)(a) (as added: see note 3 supra)) and any VAT incurred by him which is not input tax and in respect of which he is not entitled to a refund from the Commissioners for Her Majesty's Revenue and Customs by virtue of any provision of the Value Added Tax Act 1994 (Sch 11A para 2A(1)(b) (as so added)). For these purposes, the VAT 'incurred' by a taxable person is VAT on the supply to him of any goods or services (Sch 11A para 2A(2)(a) (as so added)), VAT on the acquisition by him from another member state of any goods (Sch 11A para 2A(2)(b) (as so added)), and VAT paid or payable by him on the importation of any goods from a place outside the member states (Sch 11A para 2A(2)(c) (as so added)). For the meaning of 'another member state' see PARA 4 note 15 ante; and as to goods acquired in another member state see PARA 19 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 *Ibid* Sch 11A para 2(1)(d) (as added and substituted: see note 3 supra). Any tax advantage falling within Sch 11A para 2(1)(d) (as added and substituted) or Sch 11A para 2(2) (as added and substituted) is disregarded for the purposes of Sch 11A para 5(3) (as added) (meaning of notifiable scheme: see PARA 289 post) in relation

to any prescribed accounting period beginning before 1 August 2005 where a taxable person has treated, or intends to treat, a tax advantage as having been obtained for the purposes of any VAT return made in respect of that period (Finance (No 2) Act 2005, section 6, (Appointed Day and Savings Provisions) Order 2005, SI 2005/2010, arts 2, 4(1)(a), (2), (3)) or any claim for repayment of output tax or increase in credit for input tax in respect of that period (art 4(1)(b)).

9 'Non-refundable tax', in relation to a person who is not a taxable person, means VAT on the supply to him of any goods or services (Value Added Tax Act 1994 Sch 11A para 2(3)(a) (as added and substituted: see note 3 supra)), VAT on the acquisition by him from another member state of any goods (Sch 11A para 2(3)(b) (as so added and substituted)), and VAT paid or payable by him on the importation of any goods from a place outside the member states (Sch 11A para 2(3)(c) (as so added and substituted)), but excluding (in each case) any VAT in respect of which he is entitled to a refund from the Commissioners by virtue of any provision of the Value Added Tax Act 1994 (Sch 11A para 2(3) (as so added and substituted)).

10 Ibid Sch 11A para 2(2) (as added and substituted: see note 3 supra). For a saving see note 8 supra.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(3) ACCOUNTING FOR VALUE ADDED TAX/(ix) Disclosure of Avoidance Schemes/289. Designated schemes and notifiable schemes.

## **289. Designated schemes and notifiable schemes.**

The Treasury has by order<sup>1</sup> designated a number of schemes<sup>2</sup> of particular descriptions pursuant to its powers to make such designations where it appears to it that a scheme has been, or might be, entered into for the purpose of enabling any person to obtain a tax advantage<sup>3</sup>, and that it is unlikely that persons would enter into a scheme of that description unless the main purpose, or one of the main purposes, of doing so was the obtaining by any person of a tax advantage<sup>4</sup>. Schemes so designated are referred to as 'designated schemes'<sup>5</sup>, and are 'notifiable'<sup>6</sup>. The Treasury's power of designation extends also to provisions<sup>7</sup> of a particular description which appear to it to be, or to be likely to be, included in or associated with schemes that are entered into for the purpose of enabling any person to obtain a tax advantage<sup>8</sup>; schemes which include, or are associated with, a provision of a description so designated<sup>9</sup> and which have as their main purpose, or one of their main purposes, the obtaining of a tax advantage by any person<sup>10</sup>, are also notifiable, notwithstanding that they are not designated<sup>11</sup>, and may be voluntarily notified<sup>12</sup>.

1 See the Value Added Tax (Disclosure of Avoidance Schemes) (Designations) Order 2004, SI 2004/1933 (amended by SI 2005/1724). The Treasury has also allocated reference numbers to the schemes so designated, as required by the Value Added Tax Act 1994 s 58A, Sch 11A para 3(3) (s 58A, Sch 11A added by the Finance Act 2004 s 19(1), Sch 2 paras 1, 2). As to the making of orders generally see PARA 14 ante.

2 'Scheme' includes any arrangements, transaction or series of transactions: Value Added Tax Act 1994 Sch 11A para 1 (as added: see note 1 supra).

3 Ibid Sch 11A para 3(1)(a) (as added: see note 1 supra). A scheme may be designated for these purposes even though the Treasury is of the opinion that no scheme of that description could as a matter of law result in the obtaining by any person of a tax advantage: Sch 11A para 3(2) (as so added). As to obtaining a tax advantage see PARA 288 ante.

4 Ibid Sch 11A para 3(1)(b) (as added: see note 1 supra).

5 Ibid Sch 11A para 3(4) (as added: see note 1 supra). For the schemes so designated see the Value Added Tax (Disclosure of Avoidance Schemes) (Designations) Order 2004, SI 2004/1933, art 3(1), Sch 1 (amended by SI 2005/1724).

6 Value Added Tax Act 1994 Sch 11A paras 1, 5(1)(a) (as added: see note 1 supra). As to notification see PARA 290 post.

7 For these purposes, 'provision' includes any agreement, transaction, act or course of conduct: ibid Sch 11A para 4(3) (as added: see note 1 supra).

8 Ibid Sch 11A para 4(1) (as added: see note 1 supra). For the provisions so designated see the Value Added Tax (Disclosure of Avoidance Schemes) (Designations) Order 2004, SI 2004/1933, art 3(2), Sch 2 (amended by SI 2005/1724). A provision may be designated under this power even though it also appears to the Treasury that the provision is, or is likely to be, included in or associated with schemes that are not entered into for the purpose of obtaining a tax advantage: Value Added Tax Act 1994 Sch 11A para 4(2) (as so added).

9 Ibid Sch 11A para 5(2) (as added: see note 1 supra).

10 Ibid Sch 11A para 5(3) (as added: see note 1 supra). Any tax advantage falling within Sch 11A para 2(1) (d) (as added and substituted) or Sch 11A para 2(2) (as added and substituted) (see PARA 288 ante) is disregarded for these purposes in relation to any prescribed accounting period beginning before 1 August 2005 where a taxable person has treated, or intends to treat, a tax advantage as having been obtained for the purposes of any VAT return made in respect of that period (Finance (No 2) Act 2005, section 6, (Appointed Day



and Savings Provisions) Order 2005, SI 2005/2010, arts 2, 4(1)(a), (2), (3)) or any claim for repayment of output tax or increase in credit for input tax in respect of that period (art 4(1)(b)).

11 Value Added Tax Act 1994 Sch 11A para 5(1)(b) (as added: see note 1 supra).

12 See *ibid* Sch 11A para 9 (as added); and PARA 290 post.

## **UPDATE**

### **289 Designated schemes and notifiable schemes**

NOTE 1--SI 2004/1933 further amended: SI 2008/954.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(3) ACCOUNTING FOR VALUE ADDED TAX/(ix) Disclosure of Avoidance Schemes/290. Notification of schemes.

## **290. Notification of schemes.**

A taxable person<sup>1</sup> is in general<sup>2</sup> required to notify or otherwise inform the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> if:

- 920 (1) the amount of value added tax shown in a return<sup>4</sup> in respect of a prescribed accounting period<sup>5</sup> as payable by or to him is less than or greater than it would be but for any notifiable scheme<sup>6</sup> to which he is party<sup>7</sup>;
- 921 (2) he makes a claim for the repayment of output tax or an increase in credit for input tax<sup>8</sup> in respect of any prescribed accounting period in respect of which he has previously delivered a return and the amount claimed is greater than it would be but for such a scheme<sup>9</sup>; or
- 922 (3) the amount of his non-deductible tax<sup>10</sup> in respect of any prescribed accounting period is less than it would be but for such a scheme<sup>11</sup>.

Where the scheme in question is a designated scheme<sup>12</sup>, the taxable person must, unless he has given a previous notification concerning the scheme<sup>13</sup>, notify the Commissioners of the reference number allocated to the scheme<sup>14</sup>; and, where the scheme is not designated, the taxable person must, where there is no previous notification<sup>15</sup>, provide the Commissioners with prescribed information relating to the scheme<sup>16</sup>. In either case, the requisite notification or information must be given within the prescribed time<sup>17</sup> and in such form and manner as may be required by or under regulations<sup>18</sup>.

A person may also at any time provide the Commissioners with prescribed information<sup>19</sup> relating to a scheme or proposed scheme of a particular description which is (or, if implemented, would be)<sup>20</sup> a notifiable scheme<sup>21</sup>.

There are exceptions to the notification requirements<sup>22</sup>, but in general a person who fails to comply with them is subject to a penalty<sup>23</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 Exceptions to the notification requirements apply: see the Value Added Tax Act 1994 s 58A, Sch 11A para 6(6) (s 58A, Sch 11A added by the Finance Act 2004 s 19(1), Sch 2 paras 1, 2; and the Value Added Tax Act 1994 Sch 11A para 6(1)(a) amended, Sch 11A para 6(1)(c), (2A) added, and Sch 11A para 6(5) substituted, by the Finance (No 2) Act 2005 ss 6(1), 70(1), Sch 1 paras 1, 5, Sch 11 Pt 1)). See also PARA 291 post.

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 For the meaning of 'return' see PARA 115 note 13 ante.

5 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

6 As to the meaning of 'scheme' see PARA 289 note 2 ante. As to schemes which are notifiable see PARA 289 ante.

7 Value Added Tax Act 1994 Sch 11A para 6(1)(a) (as added and amended: see note 2 supra). Subject to specified exceptions (see the Value Added Tax (Disclosure of Avoidance Schemes) Regulations 2004, SI 2004/1929, reg 2(5), Schedule (reg 2(3), (4) substituted, and reg 2(5), (6), Schedule added, by SI 2005/2009)), where the Value Added Tax Act 1994 Sch 11A para 6(1)(a) (as added and amended) applies, the time prescribed for the purposes of Sch 11A para 6(2), (3) (as added) (see the text and notes 12-18 infra) is the

thirtieth day from the end of the last day specified by or under the Value Added Tax Regulations 1995, SI 1995/2518, reg 25 (as amended) (see PARA 247 ante) for making the return: Value Added Tax (Disclosure of Avoidance Schemes) Regulations 2004, SI 2004/1929, reg 2(1).

Regulations under the Value Added Tax Act 1994 Sch 11A (as added and amended) may make different provision for different circumstances (Sch 11A para 13(a) (as so added)) and may include transitional provisions or savings (Sch 11A para 13(b) (as so added)).

8 For the meanings of 'output tax' and 'input tax' see PARAS 4 ante, 215 post.

9 Value Added Tax Act 1994 Sch 11A para 6(1)(b) (as added: see note 2 supra). Subject to specified exceptions (see the Value Added Tax (Disclosure of Avoidance Schemes) Regulations 2004, SI 2004/1929, reg 2(6), Schedule (as added: see note 7 supra)), where this provision applies the time prescribed for the purposes of the Value Added Tax Act 1994 Sch 11A para 6(2), (3) (as added) (see the text and notes 12-18 infra) is the thirtieth day from the end of the date the claim is made: Value Added Tax (Disclosure of Avoidance Schemes) Regulations 2004, SI 2004/1929, reg 2(2).

10 For the meaning of 'non-deductible tax' see PARA 288 note 7 ante.

11 Value Added Tax Act 1994 Sch 11A para 6(1)(c) (as added: see note 2 supra). This provision does not apply in relation to any prescribed accounting period beginning before 1 August 2005: Finance (No 2) Act 2005, section 6, (Appointed Day and Savings Provisions) Order 2005, SI 2005/2010, arts 2, 3. Where this provision does apply, the time prescribed for the purposes of the Value Added Tax Act 1994 Sch 11A para 6(2), (3) (as added) (see the text and notes 12-18 infra) is the thirtieth day from the end of the last day specified by or under the Value Added Tax Regulations 1995, SI 1995/2518, reg 25 (as amended) (see PARA 247 ante) for making a return in respect of the relevant prescribed accounting period (ie the period in which the taxable person's non-deductible tax is less than it would be but for any notifiable scheme to which he is party): Value Added Tax (Disclosure of Avoidance Schemes) Regulations 2004, SI 2004/1929, reg 2(3), (4) (as substituted: see note 7 supra).

12 For the meaning of 'designated scheme' see PARA 289 ante.

13 Ie unless the taxable person has on a previous occasion either notified the Commissioners under the Value Added Tax Act 1994 Sch 11A para 6(2) (as added) in relation to the scheme (Sch 11A para 6(2A)(a) (as added: see note 2 supra)) or provided the Commissioners with prescribed information under Sch 11A para 6(3) (as added) (see the text and notes 15-18 infra) (as it applied before the scheme became a designated scheme) in relation to the scheme (Sch 11A para 6(2A)(b) (as so added)).

14 Ibid Sch 11A para 6(2) (as added: see note 2 supra). As to the allocation of reference numbers see Sch 11A para 3(3) (as added); the Value Added Tax (Disclosure of Avoidance Schemes) (Designations) Order 2004, SI 2004/1933, Sch 1 (as amended); and PARA 289 ante.

15 Ie notification under these provisions is not required where the scheme is one in respect of which any person has previously voluntarily provided the Commissioners with prescribed information under the Value Added Tax Act 1994 Sch 11A para 9 (as added) (see the text and notes 19-21 infra) (Sch 11A para 6(3), (4)(a) (as added: see note 2 supra)) and provided the taxable person with a reference number notified to him by the Commissioners under Sch 11A para 9(2)(b) (as added) (Sch 11A para 6(4)(b) (as so added)), not where the scheme is one in respect of which the taxable person has on a previous occasion provided the Commissioners with prescribed information under Sch 11A para 6(3) (as added) (Sch 11A para 6(5) (as so added and substituted)).

16 Ibid Sch 11A para 6(3) (as added: see note 2 supra). The prescribed information is: (1) any provision designated in accordance with Sch 11A para 4 (as added) (see PARA 289 ante) which is included in or associated with the scheme (Value Added Tax (Disclosure of Avoidance Schemes) Regulations 2004, SI 2004/1929, reg 4(1)(a)); (2) how the scheme gives rise to a tax advantage, including, in so far as material to the tax advantage, a description of each arrangement, transaction or series of transactions (reg 4(1)(b)(i)), their sequence (reg 4(1)(b)(ii)), their timing, or the intervals between them (reg 4(1)(b)(iii)), and the goods or services involved (reg 4(1)(b)(iv)); (3) how the involvement of any party to the scheme contributes to the obtaining of the tax advantage (reg 4(1)(c)); and (4) any provision having the force of law in the United Kingdom or elsewhere relied upon as giving rise to the tax advantage (reg 4(1)(d)). For the meaning of 'tax advantage' see PARA 288 ante. For these purposes, a tax advantage is considered to have been obtained or to be obtained, and any arrangement, transaction or series of transactions is considered to have taken place or to take place, provided a taxable person has treated or intends to treat it as having been obtained or taken place for the purposes of a return required under the Value Added Tax Act 1994 (Value Added Tax (Disclosure of Avoidance Schemes) Regulations 2004, SI 2004/1929, reg 4(2)(a)), a claim for repayment of output tax or an increase in credit for input tax (reg 4(2)(b)), or reducing the amount of his non-deductible tax (reg 4(2)(c) (added by SI 2005/2009)). See also Customs and Excise Public Notice VAT 700/8 *Disclosure of VAT Avoidance Schemes* (August 2004). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

17 For the prescribed time, which is dependant upon the reason why a taxable person is making a notification to the Commissioners, see notes 7, 9, 11 supra.

18 Notification of a scheme pursuant to the Value Added Tax Act 1994 Sch 11A para 6(2) (as added) or Sch 11A para 6(3) (as added) must be made in such form and manner as may be specified in a notice published by the Commissioners and not withdrawn by a further notice: Value Added Tax (Disclosure of Avoidance Schemes) Regulations 2004, SI 2004/1929, reg 3.

19 As to the prescribed information see note 16 supra.

20 Ie by virtue of the Value Added Tax Act 1994 Sch 11A para 5(1)(b) (as added) (see PARA 289 ante).

21 Ibid Sch 11A para 9(1) (as added: see note 2 supra). On receiving the prescribed information, the Commissioners may: (1) allocate a reference number to the scheme (if they have not previously done so under this provision) (Sch 11A para 9(2)(a) (as so added)); and (2) notify the person who provided the information of the number allocated (Sch 11A para 9(2)(b) (as so added)).

22 See PARA 291 post.

23 See PARA 292 post.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(3) ACCOUNTING FOR VALUE ADDED TAX/(ix) Disclosure of Avoidance Schemes/291. Exceptions to notification requirements.

## **291. Exceptions to notification requirements.**

A taxable person<sup>1</sup> is not required to notify or give information about a tax avoidance scheme<sup>2</sup> to the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> if:

- 923 (1) the total value<sup>4</sup> of his taxable supplies<sup>5</sup> and exempt supplies in the period of 12 months ending immediately before the beginning of the relevant period<sup>6</sup> ('the minimum turnover') is less than either £600,000 (in relation to a designated scheme)<sup>7</sup> or £10,000,000 (in relation to any other notifiable scheme)<sup>8</sup>; and
- 924 (2) the total value of his taxable supplies and exempt supplies in the prescribed accounting period<sup>9</sup> immediately preceding the relevant period is less than the proportion which the length of the prescribed accounting period bears to 12 months ('the appropriate proportion')<sup>10</sup> of the minimum turnover<sup>11</sup>.

These conditions, as they have effect in relation to the scheme, must be met in relation either to the taxable person himself (where he is not a group undertaking in relation to any other undertaking)<sup>12</sup> or in relation to the taxable person and every other group undertaking (where he is a group undertaking in relation to any other undertaking)<sup>13</sup>.

In order to prevent the maintenance or creation of any artificial separation of business activities carried on by two or more persons<sup>14</sup> from resulting in an avoidance of the notification requirements<sup>15</sup>, the Commissioners may direct that named persons be treated<sup>16</sup> as a single taxable person carrying on the activities of a business described in the direction<sup>17</sup>, the effect of which is that if the statutory exemptions from the duty to notify<sup>18</sup> would not exclude the application of the notification requirements, in respect of any notifiable scheme, to that single taxable person, they also do not exclude the application those requirements, in respect of that scheme, to the persons named in the direction<sup>19</sup>. An appeal to a VAT and duties tribunal lies against any direction under these provisions<sup>20</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 As to the requirements to notify or give information about a tax avoidance scheme see PARA 290 ante.

3 I.e. the Value Added Tax Act 1994 Sch 11A para 6 (as added and amended) (see PARA 290 ante) does not apply: s 58A, Sch 11A para 7(1) (s 58A, Sch 11A added by the Finance Act 2004 s 19(1), Sch 2 paras 1, 2). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 The value of a supply of goods or services is determined for these purposes on the basis that no VAT is chargeable on the supply: Value Added Tax Act 1994 Sch 11A para 7(6) (as added: see note 3 supra).

5 For the meaning of 'taxable supplies' see PARA 18 note 3 ante.

6 I.e. the prescribed accounting period referred to in the Value Added Tax Act 1994 Sch 11A para 6(1)(a), (b) or (c) (as added) (see PARA 290 ante): Sch 11A para 7(9) (as added (see note 3 supra); and amended by the Finance (No 2) Act 2005 s 6(1), Sch 1 paras 1, 6).

7 Value Added Tax Act 1994 Sch 11A para 7(2), (4)(a) (as added: see note 3 supra). As to designated schemes see PARA 289 ante. The Treasury may by order substitute for the sum of £600,000 specified in Sch 11A para 7(4)(a) (as added) such other sum as it thinks fit: Sch 11A para 7(7) (as so added). At the date at which this volume states the law no such order had been made. As to the making of orders generally see PARA 14 ante.

8 Ibid Sch 11A para 7(4)(b) (as added: see note 3 supra). As to the meaning of 'scheme' see PARA 289 note 2 ante. As to schemes which are notifiable see PARA 289 ante. The Treasury may by order substitute for the sum of £10,000,000 specified in Sch 11A para 7(4)(b) (as added) such other sum as it thinks fit: Sch 11A para 7(7) (as so added). At the date at which this volume states the law no such order had been made.

9 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

10 Value Added Tax Act 1994 Sch 11A para 7(5) (as added: see note 3 supra).

11 Ibid Sch 11A para 7(3) (as added: see note 3 supra).

12 Ibid Sch 11A para 7(1)(a) (as added: see note 3 supra). 'Undertaking' and 'group undertaking' have the same meanings as in the Companies Act 1985 s 259 (as substituted) (see COMPANIES vol 14 (2009) PARAS 26, 27): Value Added Tax Act 1994 Sch 11A para 7(9) (as so added).

13 Ibid Sch 11A para 7(1)(b) (as added: see note 3 supra).

14 In determining for these purposes whether any separation of business activities is artificial, regard is to be had to the extent to which the different persons carrying on those activities are closely bound to one another by financial, economic and organisational links: ibid Sch 11A para 8(2) (as added: see note 3 supra).

15 Ibid Sch 11A para 8(1) (as added: see note 3 supra). The 'notification requirements' are the obligations imposed by Sch 11A para 6 (as added and amended) (see PARA 290 ante).

16 Ie for the purposes of ibid Sch 11A para 7 (as added and amended) (see the text and notes 1-13 supra). Such a direction must be served on each of the persons named in it: Sch 11A para 8(5) (as added: see note 3 supra). The Commissioners may not make such a direction naming any person unless they are satisfied: (1) that he is making or has made taxable or exempt supplies (Sch 11A para 8(4)(a) (as so added)); (2) that the activities in the course of which he makes those supplies form only part of certain activities, the other activities being carried on concurrently or previously (or both) by one or more other persons (Sch 11A para 8(4)(b) (as so added)); and (3) that, if all the taxable and exempt supplies of the business described in the direction were taken into account, the conditions set out in Sch 11A para 7(2), (3) (as added) (see the text and notes 5-11 supra), as those conditions have effect in relation to designated schemes, would not be met in relation to that business (Sch 11A para 8(4)(c) (as so added)). For the meaning of 'business' see PARA 23 ante.

17 Ibid Sch 11A para 8(3)(a) (as added: see note 3 supra). Such a direction will have effect from the date of the direction or, if it so provides, from such later date as may be specified in it (Sch 11A para 8(3)(a) (as so added)), and remains in force until it is revoked or replaced by a further direction (Sch 11A para 8(6) (as so added)).

18 Ie ibid Sch 11A para 7 (as added and amended) (see the text and notes 1-13 supra).

19 Ibid Sch 11A para 8(3)(b) (as added: see note 3 supra).

20 See ibid 83(za) (added by the Finance Act 2004 Sch 2 para 4). As to VAT and duties tribunals see PARA 343 et seq post.

## UPDATE

### 291 Exceptions to notification requirements

NOTE 12--Definitions now refer to Companies Act 2006 s 1161: Value Added Tax Act 1994 Sch 11A para 7(9) (amended by SI 2008/954).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(3) ACCOUNTING FOR VALUE ADDED TAX/(ix) Disclosure of Avoidance Schemes/292. Penalty for failure to notify use of notifiable scheme.

## **292. Penalty for failure to notify use of notifiable scheme.**

Unless he satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> or, on appeal, a tribunal<sup>2</sup>, that he has a reasonable excuse<sup>3</sup>, or he has been convicted of an offence<sup>4</sup> or assessed to a penalty<sup>5</sup> in respect of the conduct in question, a person who fails to comply with the notification requirements<sup>6</sup> is liable to a penalty of £5,000 (where the failure relates to a notifiable scheme<sup>7</sup> that is not a designated scheme)<sup>8</sup> or 15 per cent of the VAT saving<sup>9</sup> (where the failure relates to a designated scheme)<sup>10</sup>. The Commissioners may assess the amount due by way of penalty<sup>11</sup> and notify it to the person accordingly<sup>12</sup>; and this power is unaffected by the fact that any conduct giving rise to the penalty may have ceased before the assessment is made<sup>13</sup>, although no assessment to a penalty under these provisions may be made more than two years from the time when facts sufficient, in the opinion of the Commissioners, to indicate that there has been a failure to comply with the notification requirements in relation to a notifiable scheme came to the Commissioners' knowledge<sup>14</sup>. An amount assessed and notified to any person under these provisions is, unless or except to the extent that the assessment is withdrawn or reduced, recoverable as if it were VAT due from that person<sup>15</sup>; and assessments made under these provisions may also be combined<sup>16</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 An appeal to a VAT and duties tribunal lies against any direction under the Value Added Tax Act 1994 Sch 11A para 8 (as added) (see PARA 291 ante), any liability to a penalty under Sch 11A para 10(1) (as added), and any assessment under Sch 11A para 12(1) (as added) (see the text and note 12 infra) or the amount thereof: see s 83(za), (zb) (added by the Finance Act 2004 s 19(1), Sch 2 para 4). As to VAT and duties tribunals see PARA 343 et seq post.

3 Value Added Tax Act 1994 s 58A, Sch 11A para 10(2) (s 58A, Sch 11A added by the Finance Act 2004 Sch 2 paras 1, 2).

4 Value Added Tax Act 1994 Sch 11A para 10(3)(a) (as added: see note 3 supra). The conviction may be under Value Added Tax Act 1994 or otherwise: Sch 11A para 10(3)(a) (as so added).

5 Ibid Sch 11A para 10(3)(b) (as added: see note 3 supra). As to penalties see s 60; and PARA 321 post.

6 The 'notification requirements' are the obligations imposed by ibid Sch 11A para 6 (as added and amended) (see PARA 290 ante).

7 As to the meaning of 'scheme' see PARA 289 note 2 ante. As to schemes which are notifiable see PARA 289 ante.

8 Value Added Tax Act 1994 Sch 11A paras 10(1), 11(1) (as added: see note 3 supra). As to designated schemes see PARA 289 ante. There is a right of appeal: see note 2 supra.

9 As to the VAT saving see PARA 293 post.

10 Value Added Tax Act 1994 Sch 11A para 11(2) (as added: see note 3 supra).

11 This power is subject to ibid Sch 11A para 12(3), (3A) (as added and substituted) (see PARA 293 post).

12 Ibid Sch 11A para 12(1) (as added: see note 3 supra). There is a right of appeal: see note 2 supra. Notification to a personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting in a representative capacity in relation to another is treated for these purposes as notification to the person in relation to whom he so acts: s 76(10) (amended by the Finance Act 1997 s 45(6)); Value Added Tax Act 1994 Sch 11A para 12(8) (as so added)). Where the Commissioners notify a

person of a penalty in accordance with this provision, the notice of assessment must specify the amount of the penalty (Sch 11A para 12(5)(a) (as so added)), the reasons for the imposition of the penalty (Sch 11A para 12(5)(b) (as so added)), how the penalty has been calculated (Sch 11A para 12(5)(c) (as so added)), and any reduction of the penalty in accordance with s 70 (see PARA 247 ante) (Sch 11A para 12(5)(d) (as so added)).

13 Ibid Sch 11A para 12(2) (as added: see note 3 supra).

14 Ibid Sch 11A para 12(4) (as added: see note 3 supra).

15 Ibid Sch 11A para 12(7) (as added: see note 3 supra).

16 Ie where a person is assessed under ibid Sch 11A para 12 (as added and amended) to an amount due by way of penalty and is also assessed under s 73(1), (2), (7), (7A) or (7B) (as added) (see PARA 294 post) for any of the prescribed accounting periods to which the assessment under Sch 11A para 12 (as added) relates, the assessments may be combined and notified to him as one assessment (although the amount of the penalty must be separately identified in the notice): Sch 11A para 12(6) (as added: see note 3 supra).

## **UPDATE**

### **292 Penalty for failure to notify use of notifiable scheme**

NOTE 5--Value Added Tax Act 1994 Sch 11A para 10(3)(b) amended: SI 2009/571. As to penalties, see also the Finance Act 2007 Sch 24; and INCOME TAXATION vol 23(2) (Reissue) PARA 1712A.



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### **293. Calculating the VAT saving.**

For the purposes of the statutory provisions imposing a penalty on persons who fail to notify the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> of their involvement in value added tax avoidance schemes<sup>2</sup>, the 'VAT saving' is calculated as follows:

- 925 (1) to the extent that the person's duty to notify the Commissioners has arisen because the amount of VAT shown in a return<sup>3</sup> in respect of a prescribed accounting period<sup>4</sup> as payable by or to him was less than or greater than it would have been but for any notifiable scheme to which he is party<sup>5</sup>, the VAT saving is the aggregate of: (a) the amount by which the amount of VAT that would, but for the scheme, have been shown in returns in respect of the relevant periods<sup>6</sup> as payable by the taxable person exceeds the amount of VAT that was shown in those returns as payable by him<sup>7</sup>; and (b) the amount by which the amount of VAT that was shown in such returns as payable to the taxable person exceeds the amount of VAT that would, but for the scheme, have been shown in those returns as payable to him<sup>8</sup>;
- 926 (2) to the extent that a person's duty to notify the Commissioners has arisen because he has made a claim for the repayment of output tax or an increase in credit for input tax<sup>9</sup> in respect of any prescribed accounting period in respect of which he had previously delivered a return and the amount claimed was greater than it would have been but for such a scheme<sup>10</sup>, the VAT saving is the amount by which the amount claimed exceeds the amount which the taxable person would, but for the scheme, have claimed<sup>11</sup>; and
- 927 (3) to the extent that a person's duty to notify the Commissioners has arisen because the amount of his non-deductible tax<sup>12</sup> in respect of any prescribed accounting period was less than it would have been but for such a scheme<sup>13</sup>, and the excess of the notional non-deductible tax<sup>14</sup> of the taxable person for the relevant periods<sup>15</sup> over his non-deductible tax for those periods is not represented by a corresponding amount which by virtue of head (1) or head (2) above is part of the VAT saving<sup>16</sup>, the VAT saving is the amount of the excess.

In a case where the penalty falls to be calculated by reference to the VAT saving<sup>17</sup> and the notional tax (that is, either the VAT that would, but for the scheme, have been shown in returns as payable by or to the taxable person<sup>18</sup> or any amount that would, but for the scheme, have been the amount of the non-deductible tax of the taxable person<sup>19</sup>) cannot readily be attributed to any one or more prescribed accounting periods<sup>20</sup>, the notional tax is treated for these purposes as attributable to such period or periods as the Commissioners may determine to the best of their judgment and notify to the person liable for the penalty<sup>21</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Ie for the purposes of the Value Added Tax Act 1994 Sch 11A para 11(3) (as added) (see PARA 292 ante). As to the duty to notify the Commissioners about tax avoidance schemes generally see PARA 288 et seq ante.

3 For the meaning of 'return' see PARA 115 note 13 ante.

- 4 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.
- 5 Ie the case falls within the Value Added Tax Act 1994 Sch 11A para 6(1)(a) (as added) (see PARA 289 ante).
- 6 For the purposes of ibid Sch 11A para 11(3)(a), (c) (as added and amended), 'the relevant periods' means the prescribed accounting periods beginning with that in respect of which the duty to comply with Sch 11A para 6 (as added and amended) (see PARA 289 ante) first arose and ending with the earlier of the prescribed accounting period in which the taxable person complied with Sch 11A para 6 (as added and amended) and the prescribed accounting period immediately preceding the notification by the Commissioners of the penalty assessment: s 58A, Sch 11A para 11(4)(a), (b) (s 58A, Sch 11A added by the Finance Act 2004 s 19(1), Sch 2 paras 1, 2; and the Value Added Tax Act 1994 Sch 11A paras 11(3), (4) amended, Sch 11A paras 11(5), 12(3A) added, and Sch 11A para 12(3) substituted, by the Finance (No 2) Act 2005 ss 6(1), 70(1), Sch 1 paras 1, 7, 8, Sch 11 Pt 1). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.
- 7 Value Added Tax Act 1994 Sch 11A para 11(3)(a)(i) (as added: see note 6 supra).
- 8 Ibid Sch 11A para 11(3)(a)(ii) (as added and amended: see note 6 supra).
- 9 For the meanings of 'output tax' and 'input tax' see PARAS 4 ante, 215 post.
- 10 Ie the case falls within the Value Added Tax Act 1994 Sch 11A para 6(1)(b) (as added) (see PARA 289 ante).
- 11 Ibid Sch 11A para 11(3)(b) (as added and amended: see note 6 supra).
- 12 For the meaning of 'non-deductible tax' see PARA 288 note 7 ante.
- 13 Ie the case falls within the Value Added Tax Act 1994 Sch 11A para 6(1)(c) (as added) (see PARA 289 ante): Sch 11A para 11(3)(c)(i) (as added: see note 6 supra).
- 14 'Notional non-deductible tax', in relation to a taxable person, means the amount that would, but for the scheme, have been the amount of his non-deductible tax: ibid Sch 11A para 11(5) (as added: see note 6 supra).
- 15 See note 6 supra.
- 16 Value Added Tax Act 1994 Sch 11A para 11(3)(c)(ii) (as added: see note 6 supra).
- 17 Ibid Sch 11A para 12(3)(a) (as added and substituted: see note 6 supra).
- 18 Ibid Sch 11A para 12(3A)(a) (as added: see note 6 supra).
- 19 Ibid Sch 11A para 12(3A)(b) (as added: see note 6 supra).
- 20 Ibid Sch 11A para 12(3)(b) (as added and substituted: see note 6 supra).
- 21 Ibid Sch 11A para 12(3) (as added and substituted: see note 6 supra).

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## **(4) ASSESSMENTS**

### **294. Assessments for failure to make returns etc.**

Where a person has failed to make any returns required in relation to value added tax<sup>1</sup> or to keep any documents<sup>2</sup> and afford the facilities necessary to verify those returns, or where it appears to the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> that those returns are incomplete or incorrect, they may assess the amount of VAT due from him<sup>4</sup> to the best of their judgment<sup>5</sup> and notify it to him<sup>6</sup>. In any case where, for any prescribed accounting period<sup>7</sup>, there has been paid or credited to any person as being a repayment or refund of VAT<sup>8</sup>, or as being due to him as a VAT credit<sup>9</sup>, an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly<sup>10</sup>. An appeal lies to a VAT and duties tribunal against any such assessment or the amount thereof<sup>11</sup>. An amount which has been paid to any person as being due to him as a VAT credit<sup>12</sup>, and which ought not to have been so paid by reason of the cancellation of his registration<sup>13</sup>, may be so assessed notwithstanding that cancellation<sup>14</sup>.

Where a taxable person, in the course or furtherance of a business<sup>15</sup> carried on by him, has been supplied with any goods, acquired any goods from another member state<sup>16</sup> or otherwise obtained possession or control of any goods<sup>17</sup> or imported any goods from a place outside the member states<sup>18</sup>, the Commissioners may require him from time to time to account for the goods<sup>19</sup>. If he fails to prove that the goods have been or are available to be supplied by him, or have been exported or otherwise removed from the United Kingdom<sup>20</sup> (without being exported or removed by way of supply<sup>21</sup>), or have been lost or destroyed, the Commissioners may assess to the best of their judgment and notify to him the amount of VAT that would have been chargeable in respect of the supply of the goods if they had been supplied by him<sup>22</sup>. In addition, where a fiscal warehousekeeper<sup>23</sup> has failed to pay VAT required by the Commissioners<sup>24</sup>, they may assess to the best of their judgment the amount of that VAT due from him and notify it to him<sup>25</sup>. Similarly, where it appears to the Commissioners that goods have been removed from a warehouse<sup>26</sup> or fiscal warehouse<sup>27</sup> without payment of the VAT payable on that removal<sup>28</sup>, they may assess to the best of their judgment the amount of VAT due from the person removing the goods or other person liable and notify it to him<sup>29</sup>. An appeal lies to a VAT and duties tribunal against any such assessment or the amount thereof<sup>30</sup>.

A special rule exists for cases where the Commissioners make an assessment<sup>31</sup> as a result of a person's failure to make a return for a prescribed accounting period<sup>32</sup> and the VAT assessed has been paid but no proper return has been made for the period to which the assessment related<sup>33</sup>. In any such case where the Commissioners find it necessary to make another assessment<sup>34</sup> as a result of a failure by that person, or a person acting in a representative capacity in relation to him, to make a return for a later prescribed accounting period<sup>35</sup>, they may, if they think fit having regard to the earlier failure, specify in the later assessment an amount of VAT greater than that which they would otherwise have considered to be appropriate<sup>36</sup>.

Where an amount has been assessed and notified to any person under any of the provisions described above, it is<sup>37</sup> deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn<sup>38</sup> or reduced<sup>39</sup>.

1 le any returns required under the Value Added Tax Act 1994 or under any provision repealed by that Act: s 73(1). As to the requirement to make returns see PARA 247 ante. For the meaning of 'return' see PARA 115 note 13 ante.

2 For the meaning of 'document' see PARA 17 note 9 ante.

3 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 Where the person who failed to make a return, or who makes a return which appears to the Commissioners to be incomplete or incorrect, was required to make the return as a personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting in a representative capacity in relation to another person, the Value Added Tax Act 1994 s 73(1) applies as if the reference to VAT due from him included a reference to VAT due from that other person: s 73(5). The cost of potential litigation arising from the making of an assessment, and the Commissioners' knowledge of impending legislation which might reduce the incentive to bring a claim for assessed VAT, may legitimately be taken into account in deciding whether or not to make an assessment: see *R (on the application of Freeserve.com plc) v Customs and Excise Comrs* [2003] EWHC 2736 (Admin), [2004] STC 187.

5 The Value Added Tax Act 1994 s 73(1) accordingly involves two issues: the first being to determine whether the person concerned has failed to make any of the required returns, and the second being to consider whether the Commissioners have made the assessment to the best of their judgment: *Hindle (t/a DJ Baker Bar) v Customs and Excise Comrs* [2003] EWHC 1665 (Ch), [2004] STC 412. Further, these provisions do not expressly draw a distinction between a decision to assess and the assessment itself, nor do they require such a distinction to be drawn: *Courts plc v Customs and Excise Comrs* [2004] EWCA Civ 1527, [2005] STC 27. The tribunal's primary task on an appeal against an assessment to VAT is to find the correct amount of tax, and it should not automatically treat a best-of-their-judgment challenge as an appeal against the assessment as such, rather than against the amount: see *Customs and Excise Comrs v Pegasus Birds Ltd* [2004] EWCA Civ 1015, [2004] STC 1509.

In order to make an assessment to the best of their judgment, the Commissioners must exercise their powers in such a way that they make a value judgment on the material which is before them. They must exercise their function honestly and bona fide and it would be a misuse of their power if the Commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, leaving it to the taxpayer to seek to reduce it on appeal (but for an exception to this see the Value Added Tax Act 1994 s 73(8); and the text to notes 32-36 infra). There must be some material before the Commissioners; if they have none at all, their judgment cannot be exercised. However, the primary obligation is on the taxpayer himself to make his return; and the Commissioners cannot be required to do the work of the taxpayer. Therefore, the Commissioners are not obliged to carry out exhaustive investigations; only fairly to consider all material placed before them and, on that material, to come to a decision which is one which is reasonable and not arbitrary as to the amount of the tax which is due: *Van Boeckel v Customs and Excise Comrs* [1981] 2 All ER 505 at 508, [1981] STC 290 at 292 per Woolf J. See also *Schlumberger Inland Services Inc v Customs and Excise Comrs* [1987] STC 228; *Holder v Customs and Excise Comrs* [1989] STC 327; *Spillane v Customs and Excise Comrs* [1990] STC 212; *Barber v Customs and Excise Comrs* [1992] VATTR 144; *Farnocchia v Customs and Excise Comrs* [1994] STC 881; *Dwyer Property Ltd v Customs and Excise Comrs* [1995] STC 1035; *Georgiou (t/a Marios Chippery) v Customs and Excise Comrs* [1996] STC 463, CA; *Akbar (t/a Mumtaz Paan House) v Customs and Excise Comrs* [2000] STC 237; *Henderson (t/a Tony's Fish and Chip Shop) v Customs and Excise Comrs* [2001] STC 47; *University Court of the University of Glasgow v Customs and Excise Comrs* [2003] STC 495 (Commissioners may legitimately make two or more differing assessments); *Hossain v Customs and Excise Comrs* [2004] EWHC 1898 (Ch), [2004] STC 1572 (making of site visits as part of considering evidence as a whole).

Whether the Commissioners have assessed the amount of tax due to the best of their judgment is a question of fact for the tribunal (*Seto v Customs and Excise Comrs* [1981] STC 698, Ct of Sess) to be determined by way of review (*Hindle (t/a DJ Baker Bar) v Customs and Excise Comrs* supra). If it is decided that an assessment has not been made to the best of the Commissioners' judgment, the assessment is a nullity and cannot be saved by the excision of the incorrect elements (*Barber v Customs and Excise Comrs* supra) and the tribunal may either discharge the Commissioners' assessment or substitute another amount (*Rahman (t/a Khayam Restaurant) v Customs and Excise Comrs (No 2)* [2002] EWCA Civ 1881, [2003] STC 150); however, where a tribunal considers that the assessment was to the best of the Commissioners' judgment it must still consider whether the amount of the assessment is correct (*Murat v Customs and Excise Comrs* [1998] STC 923; *Rahman (t/a Khayam Restaurant) v Customs and Excise Comrs (No 2)* supra). The phrase 'best of judgment' connotes a deliberate choice between possible alternatives and a mere want of care does not make an assessment invalid: *Gauntlett v Customs and Excise Comrs* (1996) VAT Decision 13921, [1996] V & DR 138.

6 Value Added Tax Act 1994 s 73(1). For these purposes, notification to a personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise so acting is treated as

notification to the person in relation to whom he so acts: s 73(10). As to service of the notification see s 98; and PARA 340 post. See also *Din v Customs and Excise Comrs* [1984] VATTR 228 at 232 (nothing in the VAT legislation requires 'such a thing as an assessment which must itself be served upon a taxpayer, or, indeed, taken physically into his hand'); *House (t/a P & J Autos) v Customs and Excise Comrs* [1996] STC 154, CA. In the case of a partnership it is sufficient to serve the notice of assessment on the partnership rather than on each partner: *Bengal Brasserie v Customs and Excise Comrs* [1991] VATTR 210. For a statement as to the Commissioners' practice for making and notifying assessments see Customs and Excise Public Notice 915 *Assessments and Time Limits: Statement of Practice* (March 2002).

7 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante. As to the correct accounting period for these purposes see *Customs and Excise Comrs v Laura Ashley Ltd* [2003] EWHC 2832 (Ch), [2004] STC 635; *Customs and Excise Comrs v DFS Furniture Co plc* [2004] EWCA Civ 243, [2004] STC 559; and PARA 299 post. Although the Value Added Tax Act 1994 s 73 (as amended) is framed in terms of prescribed accounting periods, each assessment may be for more than one period. Difficulty has arisen where a single entry in a notice of assessment (the document which is sent to the trader) relates to more than one period, and in particular when the entry relates in part to a time falling outside the limitation period for making such an assessment. As to the limitation periods applicable to assessments and such 'global assessments' see PARA 299 post.

8 Ibid s 73(2)(a).

9 Ibid s 73(2)(b). For the meaning of 'VAT credit' see s 25(3); and PARA 216 ante.

10 Ibid s 73(2).

11 See ibid s 83(p)(i); and PARA 346 post. The assessments against which an appeal lies under this provision are those under s 73(1) and s 73(2) (see the text and notes 1-10 supra): s 83(p)(i).

12 Ibid s 73(3)(a).

13 Ibid s 73(3)(b). The reference in the text to the cancellation of a person's registration is a reference to cancellation under s 3(2), Sch 1 para 13(2)-(6) (see PARA 82 ante), Sch 2 para 6(2) (see PARA 85 ante), Sch 3 para 6(2) or (3) (see PARA 87 ante), or Sch 3A para 6(1) or (2) (as added) (see PARA 82 ante): s 73(3)(b) (amended by the Finance Act 2000 s 136(4)).

14 Ibid s 73(3) (as amended: see note 13 supra). Where a person is assessed under s 73(1) and (2) in respect of the same prescribed accounting period, the assessments may be combined and notified to him as one assessment: s 73(4). It is not, however, possible for the Commissioners to treat an assessment for overclaimed input tax as an assessment for under-declared output tax: *Ridgeons Bulk Ltd v Customs and Excise Comrs* [1994] STC 427 (distinguishing *Football Association Ltd v Customs and Excise Comrs* [1985] VATTR 106 and *Customs and Excise Comrs v Sooner Foods Ltd* [1983] STC 376; following, inter alia, *Silvermere Golf and Equestrian Centre Ltd v Customs and Excise Comrs* [1981] VATTR 106 and *Jeudwine v Customs and Excise Comrs* [1977] VATTR 115). See also *BUPA Purchasing Ltd v Revenue and Customs Comrs* [2005] EWHC 2117 (Ch).

15 For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

16 As to acquisitions from other member states see PARA 19 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

17 Value Added Tax Act 1994 s 73(7)(a).

18 Ibid s 73(7)(b). For the meaning of 'imported from a place outside the member states' see PARA 113 note 2 ante.

19 Ibid s 73(7).

20 As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

21 For the meaning of 'supply' see PARA 27 ante.

22 Value Added Tax Act 1994 s 73(7).

23 For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante.

24 Ie required under the Value Added Tax Act 1994 s 18E(2) (as added): see PARA 152 ante.

25 Ibid s 73(7A) (s 73(7A), (7B) added by the Finance Act 1996 s 26(1), Sch 3 para 10).

26 For the meaning of 'warehouse' see PARA 144 note 6 ante.

27 For the meaning of 'fiscal warehouse' see PARA 147 ante.

28 Ie payable under the Value Added Tax Act 1994 s 18(4) (see PARA 144 ante) or s 18D (as added) (see PARA 149 ante): s 73(7B) (as added: see note 25 supra).

29 Ibid s 73(7B) (as added: see note 25 supra).

30 See ibid s 83(p)(ii) (amended by the Finance Act 1996 Sch 3 para 12); and PARA 346 post. The assessments against which an appeal lies under this provision are those under the Value Added Tax Act 1994 s 73(7), and s 73(7A), (7B) (as added): s 83(p)(ii) (as so amended).

31 Ie under ibid s 73(1): see the text and notes 1-6 supra.

32 Ibid s 73(8)(a).

33 Ibid s 73(8)(b).

34 See note 31 supra.

35 Value Added Tax Act 1994 s 73(8)(c).

36 Ibid s 73(8).

37 Ie subject to the provisions of the Value Added Tax Act 1994 as to appeals: see PARA 343 et seq post.

38 Whether an assessment has been withdrawn must turn on the nature of the act, objectively viewed, relied upon as constituting the withdrawal together with, where the purpose of the act relied upon is unclear or ambiguous, whatever admissible evidence there may be which throws light on that purpose; the fact alone that a later assessment is made which repeats the figures in an earlier assessment is not a withdrawal of the earlier assessment, but merely means that the Commissioners cannot enforce both: *Courts plc v Customs and Excise Comrs* [2003] EWHC 2541 (Ch), [2004] STC 690; affd [2004] EWCA Civ 1527, [2005] STC 27.

39 Value Added Tax Act 1994 s 73(9) (amended by the Finance Act 1996 Sch 3 para 11). If, however, the assessment is a nullity, because the time limit for making it has expired, it seems that it is void ab initio and the person assessed may defend proceedings brought to recover the tax assessed, rather than by making an appeal to the VAT and duties tribunal: *Lord Advocate v Shanks (t/a Shanks & Co)* [1992] STC 928, Ct of Sess. Quaere whether the principle is applicable in England; cf *IRC v Pearlberg* [1953] 1 All ER 388, 34 TC 57, CA; *IRC v Soul* (1976) 51 TC 86, CA; *IRC v Aken* [1990] 1 WLR 1374, [1990] STC 497, CA; and INCOME TAXATION vol 23(2) (Reissue) PARA 1739.

## UPDATE

### 294 Assessments for failure to make returns etc

NOTE 5--*Georgiou*, cited, applied in *Arif (t/a Trinity Fisheries) v Revenue and Customs Comrs* [2006] EWHC 1262 (Ch), [2006] STC 1989 (whether evidence of dishonesty strong enough to satisfy burden of proof a question of fact and degree for tribunal). *University Court of the University of Glasgow*, cited, applied in *Westone Wholesale Ltd v Revenue and Customs Comrs* [2007] EWHC 2676 (Ch), [2008] STC 828.

NOTE 14--*BUPA Purchasing*, cited, reported at [2006] STC 388, reversed: [2007] EWCA Civ 542, [2008] STC 101, overruling *Ridgeons Bulk*, cited.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(4) ASSESSMENTS/295. Assessments in cases of certain acquisitions by non-taxable persons.

## **295. Assessments in cases of certain acquisitions by non-taxable persons.**

Where a taxable acquisition<sup>1</sup> of goods subject to excise duty or of a new means of transport<sup>2</sup> takes place in the United Kingdom<sup>3</sup>, the acquisition is not in pursuance of a taxable supply<sup>4</sup>, and the person acquiring the goods is not a taxable person<sup>5</sup> at the time of the acquisition<sup>6</sup>, the person acquiring the goods must notify the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup> of the acquisition<sup>8</sup>. He must pay the value added tax due upon the acquisition at the time of notification<sup>9</sup> or, if he has acquired a new means of transport, within 30 days of the Commissioners issuing a written demand to him detailing the VAT due and requesting payment<sup>10</sup>.

Where, at a time when a person was not a taxable person, he acquires in the United Kingdom from another member state<sup>11</sup> any goods subject to excise duty or consisting in a new means of transport and:

- 928 (1) notification of that acquisition has not been given<sup>12</sup> to the Commissioners<sup>13</sup>;
- 929 (2) the Commissioners are not satisfied that the particulars relating to the acquisition in any notification given to them are accurate and complete<sup>14</sup>; or
- 930 (3) there has been a failure to supply the Commissioners with the information necessary to verify the particulars contained in any such notification<sup>15</sup>,

the Commissioners may assess the amount of VAT due on the acquisition to the best of their judgment<sup>16</sup> and notify<sup>17</sup> their assessment to that person<sup>18</sup>. Where an amount has been so assessed and notified to any person, it is deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced<sup>19</sup>. An appeal lies to a VAT and duties tribunal against any such assessment or the amount thereof<sup>20</sup>.

1 For the meaning of 'taxable acquisition' see PARA 19 ante.

2 For the meaning of 'new means of transport' see PARA 19 note 7 ante.

3 Value Added Tax Regulations 1995, SI 1995/2518, regs 36(1)(a), 148(1)(a). As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

4 Ibid regs 36(1)(b), 148(1)(b). For the meaning of 'taxable supply' see PARA 18 note 3 ante.

5 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

6 Value Added Tax Regulations 1995, SI 1995/2518, regs 36(1)(c), 148(1)(c).

7 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 Value Added Tax Regulations 1995, SI 1995/2518, regs 36(1), 148(1).

In the case of goods subject to excise duty, the notification must: (1) be made at the time of the acquisition or the arrival of the goods in the United Kingdom, whichever is the later (reg 36(1)); (2) be in writing in the English language and contain the name and current address of the person acquiring the goods (reg 36(2)(a)), the time of acquisition (reg 36(2)(b)), the date when the goods arrived in the United Kingdom (reg 36(2)(c)), the value of the goods including any excise duty payable (reg 36(2)(d)), and the VAT due upon the acquisition (reg 36(2)(e)); and (3) include a declaration, signed by the person who is required to make the notification, that all the

information entered in it is true and complete (reg 36(3)). Where a person required to make such notification dies or becomes incapacitated and control of his assets passes to another person, being a personal representative, trustee in bankruptcy, receiver, liquidator or person otherwise acting in a representative capacity, that other person is required to make the notification so long as he has such control: reg 36(5).

In the case of a new means of transport, the notification must: (a) be made within seven days of the time of the acquisition or the arrival of the goods in the United Kingdom, whichever is the later (reg 148(1)); (b) be in writing in the English language and contain the name and current address of the person acquiring the new means of transport (reg 148(2)(a)), the time of the acquisition (reg 148(2)(b)), the date when the new means of transport arrived in the United Kingdom (reg 148(2)(c)), a full description of the new means of transport, including any registration mark allocated to it by any competent authority in another member state prior to its arrival in the United Kingdom and any chassis, hull or airframe identification number and engine number (reg 148(2)(d)), the consideration for the transaction in pursuance of which the new means of transport was acquired (reg 148(2)(e)), the name and address of the supplier in the member state from which the transport was acquired (reg 148(2)(f)), the place where the new means of transport can be inspected (reg 148(2)(g)), and the date of notification (reg 148(2)(h)); (c) include a declaration, signed by the person who is required to make the notification or a person authorised in that behalf in writing, that all the information entered in it is true and complete (reg 148(3)); and (d) be made at, or sent to, any office designated by the Commissioners for the receipt of such notifications (reg 148(4)).

9 Ibid regs 36(4), 148(5). In the case of goods subject to excise duty, the payment must be made in any event no later than the last day on which the person is required to make the notification: reg 36(4). This requirement to pay VAT applies to a person acting in a representative capacity (see note 8 *supra*) only to the extent of the assets of the deceased or incapacitated person over which he has control; but reg 36 otherwise applies to a person so acting in the same way as it would have applied to the deceased or incapacitated person had that person not been deceased or incapacitated: reg 36(5).

10 Ibid reg 148(5).

11 For the meaning of 'another member state' see PARA 4 note 15 *ante*.

12 Ie by the person who is required to give notification by regulations made under the Value Added Tax Act 1994 Sch 11 para 2(4): see PARA 245 *ante*. For the regulations so made see the text and notes 1-10 *supra*.

13 Ibid s 75(1)(a).

14 Ibid s 75(1)(b).

15 Ibid s 75(1)(c).

16 As to assessments to the best of the Commissioners' judgment see PARA 294 note 5 *ante*.

17 For the purposes of assessment, notification to a personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting in a representative capacity in relation to the person who made the acquisition in question is treated as notification to the person in relation to whom he so acts: Value Added Tax Act 1994 s 75(4). See also note 8 *supra*. As to the method of notification see s 98; and PARA 340 *post*.

18 Ibid s 75(1).

19 Ibid s 75(3).

20 See *ibid* s 83(p)(iii); and PARA 346 *post*.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(4) ASSESSMENTS/296. Interest on value added tax recovered or recoverable by assessment.

## **296. Interest on value added tax recovered or recoverable by assessment.**

Where an assessment is made because of a failure to make returns<sup>1</sup>, and:

- 931 (1) the assessment relates to a prescribed accounting period<sup>2</sup> in respect of which either a return has previously been made<sup>3</sup>, or an earlier assessment has already been notified to the person concerned<sup>4</sup>;
- 932 (2) the assessment relates to a prescribed accounting period which exceeds three months and begins on the date with effect from which the person concerned was, or was required to be, registered<sup>5</sup>; or
- 933 (3) the assessment relates to a prescribed accounting period at the beginning of which the person concerned was, but should no longer have been, exempted<sup>6</sup> from registration<sup>7</sup>,

the whole of the amount assessed carries interest at the applicable rate<sup>8</sup> from the reckonable date<sup>9</sup> until payment<sup>10</sup>. In the case of other assessments<sup>11</sup>, the whole of the amount assessed carries such interest without the need to fulfil the conditions set out in heads (1) to (3) above<sup>12</sup>. Where the circumstances are such that an assessment carrying interest could have been made<sup>13</sup>, but before the assessment is made the value added tax due or other amount concerned was paid, so that no such assessment was necessary<sup>14</sup>, the whole of the amount paid carries interest at the applicable rate from the reckonable date until the date on which it was paid<sup>15</sup>.

Where, however, the period<sup>16</sup> for which any amount would otherwise carry interest under these provisions would exceed three years, the part of that period for which that amount carries interest is confined to the last three years of that period<sup>17</sup>.

If an unauthorised person<sup>18</sup> issues an invoice showing an amount as being VAT or as including an amount attributable to VAT, interest is charged on the amount which is so shown or is to be taken as representing VAT at the applicable rate from the date of the invoice until payment<sup>19</sup>.

Interest under these provisions must be paid without any deduction of income tax<sup>20</sup>.

1    I.e. an assessment under the Value Added Tax Act 1994 s 73(1): see PARA 294 ante. For the meaning of 'return' see PARA 115 note 13 ante.

2    For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

3    Value Added Tax Act 1994 s 74(1)(a)(i).

4    Ibid s 74(1)(a)(ii).

5    Ibid s 74(1)(b). For the meaning of 'registered' see PARA 64 note 2 ante.

6    I.e. under ibid s 3(2), Sch 1 para 14(1) (see PARA 66 ante), Sch 3 para 8 (see PARA 72 ante) or Sch 3A para 7 (as added) (see PARA 66 ante): s 74(1)(c) (amended by the Finance Act 2000 s 136(5)).

7    Value Added Tax Act 1994 s 74(1)(c) (as amended: see note 6 supra).

8    For the applicable rate see the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998, SI 1998/1461 (amended by SI 2000/631; SI 2001/3337; SI 2003/230). These regulations are made under the Finance Act 1996 s 197(1), (2)(c) and the Value Added Tax Act 1994 s 74(1) (s 74(1), (2), (4) amended by

the Finance Act 1996 s 197(2)(c), (6)(d)(i)), which also provide for the specified rate to have effect for periods beginning on or after such day as the Treasury may by order made by statutory instrument appoint and have effect in relation to interest running from before that day as well as in relation to interest running from, or from after, that day (see the Finance Act 1996 s 197(7)). Regulations so made may: (1) make different provision for different enactments or for different purposes of the same enactment (s 197(3)(a)); (2) either themselves specify a rate of interest for the purposes of an enactment or make provision for any such rate to be determined, and to change from time to time, by reference to such rate or the average of such rates as may be referred to in the regulations (s 197(3)(b)); (3) provide for rates to be reduced below, or increased above, what they otherwise would be by specified amounts or by reference to specified formulae (s 197(3)(c)); (4) provide for rates arrived at by reference to averages or formulae to be rounded up or down (s 197(3)(d)); (5) provide for circumstances in which changes of rates of interest are or are not to take place (s 197(3)(e)); and (6) provide that changes of rates are to have effect for periods beginning on or after a day determined in accordance with the regulations in relation to interest running from before that day, as well as in relation to interest running from, or from after, that day (s 197(3)(f)). The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons: s 197(4). Where regulations so made provide, without specifying the rate determined in accordance with the regulations, for a new method of determining the rate applicable for the purposes of any enactment (s 197(5)(a)) or the rate which, in accordance with regulations so made, is the rate applicable for the purposes of any enactment, changes otherwise than by virtue of the making of regulations specifying a new rate (s 197(5)(b)), the Commissioners for Her Majesty's Revenue and Customs must make an order specifying the new rate and the day from which, in accordance with the regulations, it has effect (s 197(5)). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

9 For these purposes, the reckonable date is the latest date on which, in accordance with regulations made under the Value Added Tax Act 1994, a return is required to be made for the prescribed accounting period to which the amount assessed or paid relates (see s 74(5)(b)), except in the context of the application of s 74 (as amended) to assessments of overpaid interest under s 78A(1) (as added) (see PARA 314 post), where references to the 'reckonable date' should be read as references to the date on which the assessment was notified (s 78A(6) (s 78A added by the Finance Act 1997 s 45(1), (4))).

10 Value Added Tax Act 1994 s 74(1). This is subject to s 76(8) (see PARA 298 post): s 74(1). Interest runs from the reckonable date even if that date is a non-business day (ie within the meaning of the Bills of Exchange Act 1882 s 92 (as amended): see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1437): Value Added Tax Act 1994 s 74(5). The assessment for interest is made under s 76(1)(c) (see PARA 298 post) and is discretionary; but the only remedy if the Commissioners fail to exercise their discretion not to charge interest is by way of an application for judicial review: see *Dollar Land (Feltham) Ltd, Dollar Land (Cumbernauld) Ltd, Dollar Land (Calthorpe House) Ltd v Customs and Excise Comrs* [1995] STC 414. See also *Customs and Excise Comrs v Musashi Autoparts Europe Ltd (formerly TAP Manufacturing Ltd)* [2003] EWCA Civ 1738, [2004] STC 220 (taxpayer who remedied failure to make returns entitled to a credit for assessment to VAT, but not for assessment to interest).

11 Ie an assessment under any provision of the Value Added Tax Act 1994 s 73 (as amended) (see PARA 294 ante), except s 73(1): s 74(1).

12 Ibid s 74(1). Where the amount assessed or paid is such an amount as is referred to in s 73(2)(a) or (b) (see PARA 294 ante), the reckonable date is the seventh day after the day on which a written instruction was issued by the Commissioners directing the making of the payment of the amount which ought not to have been repaid or paid to the person concerned: s 74(5)(a). In all other cases, s 74(5)(b) (see note 9 supra) applies, but in the case of an amount assessed under s 73(7) (see PARA 294 ante), the sum assessed is taken for those purposes to relate to the period for which the assessment was made: s 74(5)(b), (c).

13 Ibid s 74(2)(a). Such an assessment is an assessment falling within s 74(1) (as amended): see the text and notes 1-12 supra.

14 Ibid s 74(2)(b).

15 Ibid s 74(2) (as amended: see note 8 supra).

16 Ie either the period before the assessment in question for which any amount would carry interest under ibid s 74(1) (as amended) (see the text and notes 1-12 supra) (s 74(3)(a)) or the period for which any amount would carry interest under s 74(2) (as amended) (see the text and notes 13-15 supra) (s 74(3)(b)).

17 Ibid s 74(3).

18 Ie as defined in ibid s 67(2): see PARA 328 post.

19 Ibid s 74(4) (as amended: see note 8 supra).

20 Ibid s 74(7).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(4) ASSESSMENTS/297. Assessment in consequence of group anti-avoidance direction.

## **297. Assessment in consequence of group anti-avoidance direction.**

Where a direction is given under the anti-avoidance provisions relating to groups<sup>1</sup> and there is an amount of value added tax ('the unpaid tax') for which a relevant person<sup>2</sup> would have been liable before the giving of the direction if the facts had accorded with the assumptions specified in the direction<sup>3</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> may, to the best of their judgment, assess the amount of unpaid tax as tax due from the person to whom the direction was given or another relevant person and notify their assessment to that person<sup>5</sup>. Where any assessment falls to be made under these provisions in a case in which the Commissioners for Her Majesty's Revenue and Customs are satisfied that the actual revenue loss<sup>6</sup> is less than the unpaid tax, the total amount to be assessed must not exceed what appears to them, to the best of their judgment, to be the amount of that loss<sup>7</sup>.

An assessment may not be made under these provisions more than one year after the day on which the direction to which it relates was given<sup>8</sup> or in the case of any direction that has been withdrawn<sup>9</sup>.

Where an amount has been assessed on any person under these provisions and notified to him, then, unless or to the extent that the assessment in question has been withdrawn or reduced<sup>10</sup>:

- 934 (1) that amount is deemed<sup>11</sup> to be an amount of VAT due from him<sup>12</sup>;
- 935 (2) that amount may be recovered accordingly, either from that person or, in the case of a body corporate that is for the time being treated as a member of a group, from the representative member of that group<sup>13</sup>; and
- 936 (3) to the extent that more than one person is liable by virtue of any such assessment in respect of the same amount of unpaid tax, those persons are treated as jointly and severally liable for that amount<sup>14</sup>.

The statutory provisions relating to interest<sup>15</sup> and supplementary assessments<sup>16</sup> apply in relation to such assessments with certain modifications<sup>17</sup>.

An appeal lies to a VAT and duties tribunal against such an assessment<sup>18</sup>.

1 Value Added Tax Act 1994 s 43(9), Sch 9A para 6(11)(a) (Sch 9A added by the Finance Act 1996 s 31, Sch 4)). The reference in the text to the giving of a direction under the anti-avoidance provisions relating to groups is a reference to the giving of a direction under the Value Added Tax Act 1994 Sch 9A (as added and amended); see PARA 207 ante. See also Customs and Excise Public Notice 700/2 *Group and Divisional Registration* (December 2004) PARA 8.

2 'A relevant person', in relation to a direction, means: (1) the person to whom the direction is given (Value Added Tax Act 1994 Sch 9A para 6(11)(a) (as added: see note 1 supra)); (2) the body corporate which was the representative member of any group of which that person was treated as being, or in pursuance of the direction is to be treated as having been, a member at a time to which the assumption specified in the direction relates (Sch 9A para 6(11)(b) (as so added)); and (3) any body corporate which, in pursuance of the direction, is to be treated as having been the representative member of such a group (Sch 9A para 6(11)(c) (as so added)). As to the construction for these purposes of references to being treated as a member of a group see PARA 207 note 2 ante; and for the meaning of 'representative member' see PARA 75 ante.

3 Ibid Sch 9A para 6(1)(b) (as added: see note 1 supra). This reference to an amount of VAT for which a person would, on particular assumptions, have been liable before the giving of a direction under Sch 9A (as added and amended) is a reference to the aggregate of: (1) any amount of output tax which, on those assumptions but not otherwise, would have been due from a relevant person at the end of a prescribed

accounting period ending before the giving of the direction (Sch 9A para 6(2)(a) (as so added)); (2) the amount of any credit for input tax to which a relevant person is treated as having been entitled at the end of such an accounting period but to which he would not have been entitled on those assumptions (Sch 9A para 6(2)(b) (as so added)); and (3) the amount of any repayment of tax made to a relevant person in accordance with regulations under s 39 (see PARAS 308-309 post) but to which he would not have been entitled on those assumptions (Sch 9A para 6(2)(a) (as so added)). For the meanings of 'output tax' and 'input tax' see PARAS 4, 215 ante; and for the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 Value Added Tax Act 1994 Sch 9A para 6(1) (as added: see note 1 supra). Such an assessment relating to a direction may be notified to the person to whom that direction is given by being incorporated in the same notice as the direction: Sch 9A para 6(5) (as so added). As to notification to receivers, liquidators or persons otherwise acting in a representative capacity see PARA 207 note 1 ante.

6 For the purposes of making an assessment under these provisions in relation to any direction, the actual revenue loss must be taken to be equal to the amount of the unpaid tax less the amount given by aggregating the amounts of every entitlement to credit for input tax (ibid Sch 9A para 6(4)(a) (as added: see note 1 supra)) or to a repayment in accordance with regulations made under s 39 (see PARAS 308-309 post) (Sch 9A para 6(4) (b) (as so added)), which, whether as an entitlement of the person in relation to whom the assessment is made or as an entitlement of any other person, would have arisen on the assumptions contained in the direction, but not otherwise (Sch 9A para 6(4) (as so added)).

7 Ibid Sch 9A para 6(3) (as added: see note 1 supra).

8 Ibid Sch 9A para 6(6)(a) (as added: see note 1 supra).

9 Ibid Sch 9A para 6(6)(b) (as added: see note 1 supra).

10 Ibid Sch 9A para 6(8) (as added: see note 1 supra).

11 Ie subject to the provisions of the Value Added Tax Act 1994 as to appeals: see PARA 343 et seq post.

12 Ibid Sch 9A para 6(7)(a) (as added: see note 1 supra).

13 Ibid Sch 9A para 6(7)(b) (as added: see note 1 supra).

14 Ibid Sch 9A para 6(7)(c) (as added: see note 1 supra).

15 Ie ibid s 74 (as amended): see PARA 296 ante.

16 Ie ibid s 77(6): see PARA 299 post.

17 Ibid Sch 9A para 6(9) (as added: see note 1 supra). Section 74 (as amended) (see PARA 296 ante) so applies as if the reference in s 74(1) to the reckonable date were a reference to the date on which the assessment is notified: Sch 9A para 6(9) (as so added). Where any person is so liable to interest under s 74 (as amended), then s 76 (as amended) (see PARA 298 post) has effect in relation to that liability with the omission of s 76(2)-(6) (as amended) (Sch 9A para 6(10)(a) (as so added)) and s 77 (as amended) (see PARA 299 post), except s 77(6), does not apply to an assessment of the amount due by way of interest (Sch 9A para 6(10)(b) (as so added)); and (without prejudice to the power to make assessments for interest for later periods) the interest to which any assessment made under s 76 (as amended) by virtue of these provisions may relate is confined to interest for a period of no more than two years ending with the time when the assessment to interest is made (Sch 9A para 6(10) (as so added)).

18 See ibid s 83(wa) (added by the Finance Act 1996 s 31(3)); and PARA 346 post.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(4) ASSESSMENTS/298. Assessment of amounts due by way of penalty, interest or surcharge.

## **298. Assessment of amounts due by way of penalty, interest or surcharge.**

Where any person is liable to a default surcharge<sup>1</sup>, to a penalty<sup>2</sup>, or for interest on value added tax recovered or recoverable by assessment<sup>3</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> may<sup>5</sup> assess the amount due by way of penalty, interest or surcharge and notify it to him accordingly<sup>6</sup>. The fact that any conduct giving rise to a penalty may have ceased before an assessment is made does not affect the Commissioners' power to make an assessment<sup>7</sup>.

As a general rule, the Commissioners are to make assessments of an amount due by way of penalties, interest and surcharge in respect of a prescribed accounting period<sup>8</sup>; but in any case where the amount of any penalty, interest or surcharge falls to be calculated by reference to VAT which was not paid when it should have been and that VAT, or the supply<sup>9</sup> which gives rise to it, cannot be readily attributed to any one or more prescribed accounting periods, it is treated as VAT due for such period or periods as the Commissioners determine to the best of their judgment and which they notify to the person liable<sup>10</sup>.

Where a person is assessed under this provision to an amount due by way of any penalty, interest or surcharge<sup>11</sup> and is also assessed to VAT<sup>12</sup> for the relevant prescribed accounting period, the assessments may be combined and notified to him as one assessment, but the amount of the penalty, interest or surcharge must be separately identified in the notice<sup>13</sup>. Similarly, where a person is assessed to a penalty for failing to give notification to the Commissioners of the acquisition of specified goods from another member state<sup>14</sup>, that assessment may be combined with an assessment for the amount of VAT due on the relevant acquisition<sup>15</sup> and the two assessments notified together, provided that the amount of the penalty is separately identified in the notice<sup>16</sup>.

In the case of an amount due by way of penalty for a failure to submit an EC sales statement<sup>17</sup>, or for breach of a regulatory requirement<sup>18</sup>, or for interest<sup>19</sup>, the notice of assessment must specify a date, not later than the date of the notice, to which the aggregate amount of the penalty which is assessed or, as the case may be, the amount of interest is calculated<sup>20</sup>. If the penalty or interest continues to accrue after that date, a further assessment or assessments may be made in respect of amounts which so accrue<sup>21</sup>.

If an amount is assessed and notified to any person under these provisions, then unless, or except to the extent that, the assessment is withdrawn or reduced, that amount is recoverable as if it were VAT due from him<sup>22</sup>.

A person may appeal against any penalty, or surcharge, or the amount of any penalty, interest or surcharge specified in an assessment, to a VAT and duties tribunal<sup>23</sup>.

1 Value Added Tax Act 1994 s 76(1)(a) (amended by the Finance Act 1996 s 35(1), (7)). As to default surcharges see the Value Added Tax Act 1994 s 59 (as amended), s 59A (as added); and PARAS 332-333 post.

2 Ibid s 76(1)(b) (amended by the Finance Act 2000 s 137(1), (4)). As to penalties see the Value Added Tax Act 1994 ss 60-69A (as amended); and PARA 321 et seq post.

3 Ibid s 76(1)(c). As to interest see s 74 (as amended); and PARA 296 ante.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 The Commissioners have a discretion whether or not to impose a surcharge or a penalty, or to charge interest, which they exercise by deciding whether or not to assess: see *Dollar Land (Feltham) Ltd, Dollar Land (Cumbernauld) Ltd, Dollar Land (Calthorpe House) Ltd v Customs and Excise Comrs* [1995] STC 414 (neither the right given to a taxpayer to appeal against the liability to default surcharge, nor the right of appeal against the amount of the surcharge, includes an express reference to a right of appeal against the decision of the Commissioners to assess to surcharge, nor does the VAT and duties tribunal have an implied power to review the Commissioners' decision to impose a surcharge; the only remedy against an improper exercise of the Commissioners' discretion is by way of an application to the High Court for judicial review). Cf *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941, CA (a decision relating to the Commissioners' discretion to require security for VAT under the Value Added Tax Act 1994 Sch 11 para 4(2) (see PARA 286 ante)).

6 Value Added Tax Act 1994 s 76(1). Notification to a personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting in a representative capacity in relation to another is treated as notification to the person in relation to whom he so acts: s 76(10) (amended by the Finance Act 1997 s 45(6)). Under the Value Added Tax Act 1994 s 81(3), where an amount is due from the Commissioners to any person, in accordance with the Value Added Tax Act 1994, and that person is liable to pay a sum by way of VAT, penalty, interest or surcharge, the amount due from the Commissioners is set against the sum which the person is liable to pay to the Commissioners and, to the extent of the set-off, the obligations of the Commissioners and the person concerned are discharged: see PARA 301 post. The effect of this would appear to be to enable the Commissioners to effect a set-off even where there has been no assessment to the VAT or penalty, etc under the appropriate provision.

7 Ibid s 76(1) (as amended: see note 2 supra). However, where a person is liable for a penalty under s 69 (as amended) (breach of regulatory provisions: see PARA 331 post) for a failure to comply with a requirement of a kind described in s 69(1)(c)-(f), no assessment may be made of the amount due in respect of the penalty unless within the period of two years preceding the assessment the Commissioners have issued him with a written warning of the consequences of a continuing failure to comply with the relevant requirement: s 76(2).

8 Ibid s 76(3). The prescribed accounting period is referred to as 'the relevant period': s 76(3). In the case of a surcharge under s 59 (as amended) or s 59A (as added) (see PARAS 332-333 post), the relevant period is the prescribed accounting period in respect of which the taxable person is in default and in respect of which the surcharge arises: s 76(3)(a) (amended by the Finance Act 1996 s 35(1), (7), (8)). In the case of a penalty under the Value Added Tax Act 1994 s 60 (see PARA 321 post) relating to the evasion of VAT, the relevant period is the prescribed accounting period for which the VAT evaded was due: s 76(3)(b). In the case of a penalty under s 60 relating to the obtaining of the payment of a VAT credit, the relevant period is the prescribed accounting period in respect of which the payment was obtained: s 76(3)(c). In the case of a penalty under s 63 (as amended) (see PARA 324 post), the relevant period is the prescribed accounting period for which liability to VAT was understated or in respect of which entitlement to a VAT credit was overstated: s 76(3)(d). In the case of interest under s 74 (as amended) (see PARA 296 ante), the relevant period is the prescribed accounting period in respect of which the VAT (or the amount assessed as VAT) was due: s 76(3)(e). As to the ability to make a global assessment in all cases see PARA 299 post; and *Georgiou (t/a Mario's Chippery) v Customs and Excise Comrs* [1996] STC 463, CA.

9 For the meaning of 'supply' see PARA 27 ante.

10 Value Added Tax Act 1994 s 76(4).

11 Ie any penalty, interest or surcharge falling within ibid s 76(3) (as amended): see the text and note 8 supra.

12 Ie under ibid s 73(1), (2), (7), (7A) or (7B) (s 73(7A), (7B) as added): see PARA 294 ante.

13 Ibid s 76(5) (amended by the Finance Act 1996 Sch 3 para 11).

14 Ie under the Value Added Tax Act 1994 s 67(1)(b): see PARA 328 post. For the meaning of 'another member state' see PARA 4 note 15 ante. As to the required notification see the Value Added Tax Regulations 1995, SI 1995/2518, regs 36, 148; and PARA 295 ante.

15 Ie under the Value Added Tax Act 1994 s 75: see PARA 295 ante.

16 Ibid s 76(6).

17 Ie under ibid s 66: see PARA 327 post.

18 Ie under ibid s 69 (as amended): see PARA 331 post.

19 Ie under ibid s 74 (as amended): see PARA 296 ante.

20 Ibid s 76(7)(a). If, within such period as may be notified by the Commissioners to the person liable to a penalty under s 66 or s 69 (as amended) or for interest under s 74 (as amended), a failure or default falling within s 66(1) or s 69(1) is remedied, or the VAT or other amount referred to in s 74(1) is paid, it is treated for the purposes of the provision in question as paid or remedied on the date specified as mentioned in s 76(7)(a): s 76(8).

21 Ibid s 76(7)(b).

22 Ibid s 76(9). As to the recovery of VAT see PARA 300 et seq post.

23 See ibid s 83(n), (q) (s 83(n) amended by the Finance Act 2000 s 137(1), (5)); and PARA 346 post.

## **UPDATE**

### **298 Assessment of amounts due by way of penalty, interest or surcharge**

NOTE 2--As to penalties see also Value Added Tax Act 1994 s 69B: s 76(1) (amended by the Finance Act 2006 s 21(3)). Also included is a penalty under regulations made under the Finance Act 2002 s 135 (see INCOME TAXATION) in connection with VAT, and this may apply notwithstanding that the regulations may have ceased to have effect before an assessment is made: 1994 Act s 76(1) (amended by the Finance Act 2007 s 93(4)-(6)).

NOTE 8--In the case of a penalty under regulations made under the Finance Act 2002 s 135, the relevant period is the prescribed accounting period in respect of which the contravention of, or failure to comply with, the regulations occurred: 1994 Act s 76(3) (amended by the 2007 Act s 93(4), (7), Sch 27 Pt 5(4)).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(4) ASSESSMENTS/299. Time limits for making assessments.

## **299. Time limits for making assessments.**

Subject to specific exceptions, an assessment<sup>1</sup> may not be made more than three years after the end of the prescribed accounting period<sup>2</sup> or importation or acquisition concerned<sup>3</sup>. If, however, value added tax has been lost as a result of conduct involving dishonesty<sup>4</sup> or for which a person has been convicted of fraud<sup>5</sup>, or in circumstances giving rise to a penalty<sup>6</sup>, an assessment may be made within 20 years of the prescribed accounting period or importation or acquisition concerned<sup>7</sup>. An appeal lies to a VAT and duties tribunal against the making of any such assessment on this basis<sup>8</sup>. Where a person has died and, after his death, the Commissioners for Her Majesty's Revenue and Customs propose to assess a sum as due by reason of some conduct, however described, of the deceased (including a sum due by way of penalty, interest or surcharge<sup>9</sup>), the assessment may not be made more than three years after the death<sup>10</sup>. If the circumstances are such that, had the deceased still been living, the 20-year limitation period would have applied<sup>11</sup>, that period is inapplicable; but the Commissioners may make any assessment that could have been made immediately after the death at any time within three years after it<sup>12</sup>.

Where the Commissioners wish to make an assessment, on one of the grounds relating to failure to make returns<sup>13</sup>, of an amount of VAT due for any prescribed accounting period<sup>14</sup>, the assessment must be made within the time limits prescribed by the general rules set out above but in any event may not be made after the later of two years after the end of the prescribed accounting period<sup>15</sup> or one year after evidence of facts, sufficient in the opinion of the Commissioners<sup>16</sup> to justify the making of the assessment, comes to their knowledge<sup>17</sup>.

Where the Commissioners wish to make an assessment on someone who is not a taxable person in respect of an acquisition of certain goods from another member state<sup>18</sup>, the assessment must be made within the time limits prescribed by the general rules set out above but, in any event may not be made after the later of two years after the time when a notification of the acquisition of the goods in question is given to the Commissioners by the person who is required<sup>19</sup> to do so<sup>20</sup> and one year after evidence of the facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge<sup>21</sup>. An appeal lies to a VAT and duties tribunal against any such assessment or the amount thereof<sup>22</sup>.

The Commissioners may make a single, or 'global', assessment covering more than one prescribed accounting period<sup>23</sup>. In practice this is done when it is impossible or impracticable for them to identify the specific accounting period or periods for which the tax claimed is due; but the power to make such an assessment is not confined to such cases<sup>24</sup>. Where such an assessment is made, each individual assessment that comprises the global assessment is made only when the requirements for making it are fulfilled in relation to it<sup>25</sup>, and the time limit for the assessment begins to run from the end of the first prescribed accounting period included in the assessment<sup>26</sup>. It is a question of fact whether, in any case, there has been a global assessment or a number of separate assessments notified to the taxpayer on the same form<sup>27</sup>. This question of fact is not resolved by the form of the notice of assessment sent to the taxpayer, but by the form of the assessment actually made by the Commissioners<sup>28</sup>. To be valid, the notice of assessment (taken together, if necessary, with any accompanying documents) must specify the full period assessed, and not merely the date on which it ends<sup>29</sup>.

Where, after the making of an assessment, further evidence of facts, sufficient in the opinion of the Commissioners to justify the making of an assessment, comes to the Commissioners'

knowledge, they may make another assessment, in addition to any earlier assessment<sup>30</sup>, provided that the further assessment falls within the limitation rules for making assessments<sup>31</sup>.

1     le an assessment made under the Value Added Tax Act 1994 s 73, s 75 or s 76 (as amended): see PARAS 294-298 ante.

2     For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante. In relation to an assessment under ibid s 76 (as amended), any reference in s 77(1) or (2) to the prescribed accounting period concerned is a reference to that period which, in the case of the penalty, interest or surcharge concerned, is the relevant period referred to in s 76(3) (as amended) (see PARA 298 ante): s 77(3).

3     Ibid s 77(1)(a) (s 77(1), (4) amended by the Finance Act 1997 s 47(10)). In the case of an assessment under the Value Added Tax Act 1994 s 76 (as amended) of an amount due by way of a penalty which is not among those referred to in s 76(3) (as amended) (see PARA 298 ante), an assessment may not be made more than three years after the event giving rise to the penalty: s 77(1)(b) (as so amended). An assessment under s 76 (as amended) of an amount due by way of any penalty, interest or surcharge referred to in s 76(3) (as amended) may be made at any time before the expiry of the period of two years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined: s 77(2) (s 77(2) substituted, and s 77(2A) added, by the Finance Act 1999 s 18(1)). Subject to the Value Added Tax 1994 s 77(5) (see the text and notes 9-12 infra), an assessment of a penalty under s 65 or s 66 (see PARAS 326-327 post) may be made at any time before the expiry of the period of two years beginning with the time when facts sufficient in the opinion of the Commissioners for Her Majesty's Revenue and Customs to indicate, as the case may be, either that the statement in question contained a material inaccuracy or that there had been a default (within the meaning of s 66(1): see PARA 327 post) came to the Commissioners' knowledge: s 77(2A) (as so added). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

An assessment is made when the decision to assess is recorded, together with the amount of the assessment, and not when a notice of assessment is delivered to the trader: *Grunwick Processing Laboratories Ltd v Customs and Excise Comrs* [1986] STC 441 (affd [1987] STC 357, CA); *Babber (t/a Ram Parkash Sunderdass) v Customs and Excise Comrs* [1991] VATTR 268; *Customs and Excise Comrs v Post Office* [1995] STC 749; and see *British Teleflower Service Ltd v Customs and Excise Comrs* (1996) VAT Decision 13756, [1996] STI 290; *Staffquest Group Holdings Ltd v Customs and Excise Comrs* (2002) VAT Decision 17632, [2002] STI 1362. Where there are multiple assessments making up a global assessment, each is made when the particular requirements relating to it are fulfilled: see *Hicks (t/a Parc Golf Centre) v Customs and Excise Comrs* (2003) VAT Decision 18121, [2003] STI 1515; and the text and notes 23-26 infra. A notice that an assessment has been made is not invalidated by the heading 'without prejudice' (although this was described as a 'dangerous course' for the assessing officer to take): *Piero's Restaurant and Pizzeria v Customs and Excise Comrs* (2002) VAT Decision 17711, [2003] STI 189.

An assessment which is made out of time is a nullity ab initio, with the consequence, it seems, that the person assessed may defend the collection proceedings, rather than appealing the assessment: *Lord Advocate v Shanks (t/a Shanks & Co)* [1992] STC 928, Ct of Sess; but see also *IRC v Pearlberg* [1953] 1 All ER 388, 34 TC 57, CA; *IRC v Soul* (1976) 51 TC 86, CA; *IRC v Aken* [1990] 1 WLR 1374, [1990] STC 497, CA; and INCOME TAXATION vol 23(2) (Reissue) PARA 1739.

4     le conduct falling within the Value Added Tax Act 1994 s 60(1): see PARA 321 post. It is not necessary for such conduct to have resulted in a penalty: *Hindle (t/a DJ Baker Bar) v Customs and Excise Comrs* [2003] EWHC 1665 (Ch), [2004] STC 412.

5     Value Added Tax Act 1994 s 77(4)(a).

6     Ibid s 77(4)(b). As to these circumstances see s 67 (as amended); and PARA 328 post.

7     Ibid s 77(4).

8     See ibid s 83(r); and PARA 346 post.

9     As to sums due by way of penalty, interest or surcharge see PARA 321 et seq post.

10    Value Added Tax Act 1994 s 77(5)(a).

11    le the circumstances are as set out in ibid s 77(4): see the text and notes 4-7 supra.

12    Ibid s 77(5)(b). The consequence of this is that the extended time limit under s 77(4) (see the text and notes 4-7 supra) applies to determine whether the Commissioners could have made an assessment immediately after the death; and, if they could (eg the death fell five years after the end of the prescribed

accounting period in which the VAT was lost by reason of the deceased's fraud), they retain power to make an assessment within the three years following the death.

13    Ie under *ibid* s 73(1), (2) or (3) (as amended): see PARA 294 ante.

14    In *Customs and Excise Comrs v Croydon Hotel and Leisure Co Ltd* [1996] STC 1105, CA, a taxpayer who did not possess a valid VAT invoice in consequence became entitled to claim credit for input tax not in the prescribed accounting period in which the supply was made, but at a later time when the Commissioners allowed the deduction. The Commissioners imposed a condition that the credit would be repaid if the payment in respect of which the tax credit was claimed proved to be compensation, rather than consideration (see *Holiday Inns (UK) Ltd v Customs and Excise Comrs* [1993] VATTR 321). The tribunal had held that the payment was indeed compensation (and thus outside the scope of VAT), whereupon an assessment was raised to recover the input tax overpaid; and it was held (revsg *Customs and Excise Comrs v Croydon Hotel and Leisure Co Ltd* [1995] STC 855 per Popplewell J), that the essential commencement of the limitation period for assessment was not when the right to repayment arose, but when the right to claim repayment arose, ie when the trader received the Commissioners' direction that he might make such a claim. The Commissioners' assessment was, therefore, made in time.

As to the correct accounting period for these purposes see also *Customs and Excise Comrs v Laura Ashley Ltd* [2003] EWHC 2832 (Ch), [2004] STC 635.

15    Value Added Tax Act 1994 s 73(6)(a).

16    See *Parekh v Customs and Excise Comrs* [1984] STC 284 (Commissioners issued assessments under what is now the Value Added Tax Act 1994 s 73(1) because the traders had failed to render any VAT returns; traders responded by making nil returns and Commissioners thereupon withdrew the original assessments and raised fresh assessments; it was held that the later assessments were out of time, because the nil returns did not amount to or contain evidence of facts relating to the liability to be assessed). This point is significant because, unless a trader has made all the returns which he is obliged to make, he cannot appeal; accordingly where an assessment is raised because of a failure to make returns, it would follow, but for *Parekh v Customs and Excise Comrs* supra, that a fresh limitation period would be started by the trader making returns to enable himself to bring an appeal against the original assessment. Although an assessment must be made within one year of evidence of facts coming to the knowledge of the Commissioners, it does not have to be notified to the taxpayer within the year; but it is unenforceable until notification has been made: *Grunwick Processing Laboratories Ltd v Customs and Excise Comrs* [1986] STC 441 (affd without discussion of this point [1987] STC 357, CA). See also *Schlumberger Inland Services Inc v Customs and Excise Comrs* [1987] STC 228; *Cutts v Customs and Excise Comrs* [1989] STC 201. See also *Cheesman (t/a Well in Tune) v Customs and Excise Comrs* [2000] STC 1119 (where an assessment which is subject of notification repeats figures from assessments which are not, only the date of latter assessment is relevant for determining time limits).

17    Value Added Tax Act 1994 s 73(6)(b). The purpose of the time limit in s 73(6)(b) is to protect the taxpayer from tardy assessment, not to penalise the Commissioners for failing to spot some fact which might have become available to them in a document obtained during a raid: see *Customs and Excise Comrs v Pegasus Birds Ltd* [2000] STC 91.

Actual and not constructive knowledge of the Commissioners is necessary before time starts running: *Spillane v Customs and Excise Comrs* [1990] STC 212; *Customs and Excise Comrs v Post Office* [1995] STC 749; *British Teleflower Service Ltd v Customs and Excise Comrs* (1996) VAT Decision 13756, [1996] STI 290. Whether the Commissioners have evidence of facts sufficient to justify the making of the assessment is a mixed question of fact and law: *Customs and Excise Comrs v Post Office* supra. Accordingly, save where the Commissioners have been perverse, the tribunal cannot substitute its own view of what facts justify the making of the assessment, but only decide when the last of those facts came to the knowledge of the Commissioners: *Cumbræ Properties (1963) Ltd v Customs and Excise Comrs* [1981] STC 799; *GT Garages (Scarborough) Ltd v Customs and Excise Comrs* [1983] VATTR 214.

18    Ie an assessment under the Value Added Tax Act 1994 s 75: see PARA 295 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

19    Ie by regulations made under *ibid* Sch 11 para 2(4) (see PARA 245 ante): see the Value Added Tax Regulations 1995, SI 1995/2518, regs 36, 148; and PARA 295 ante.

20    Value Added Tax Act 1994 s 75(2)(a).

21    Ibid s 75(2)(b). As to the meaning of 'knowledge' in this context see note 17 supra.

22    See *ibid* s 83(p)(iii); and PARA 346 post.

23    *SJ Grange Ltd v Customs and Excise Comrs* [1979] 1 WLR 239 at 242, [1979] STC 183 at 193, CA; *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139; *International Language Centres Ltd v*

*Customs and Excise Comrs* [1983] STC 394 at 396; *Customs and Excise Comrs v Le Rififi Ltd* [1995] STC 103, CA. In *International Language Centres Ltd v Customs and Excise Comrs* supra, Woolf J held the assessments before him to be invalid as global assessments. In later proceedings in relation to the same tax, the Commissioners brought proceedings to recover VAT on the basis that it had been included in the trader's VAT returns; and the court held that the trader had no defence to the action, notwithstanding that the assessments themselves were out of time: *Customs and Excise Comrs v International Language Centres Ltd* [1986] STC 279.

24 See *Customs and Excise Comrs v Le Rififi Ltd* [1995] STC 103 at 107, CA; *House (t/a P & J Autos) v Customs and Excise Comrs* [1996] STC 154, CA (not following *SJ Grange Ltd v Customs and Excise Comrs* [1979] 1 WLR 239, [1979] STC 183, CA, per Lord Denning MR; and disapproving *International Language Centres Ltd v Customs and Excise Comrs* [1983] STC 394 at 396 per Woolf J on this point).

25 See *Hicks (t/a Parc Golf Centre) v Customs and Excise Comrs* (2003) VAT Decision 18121, [2003] STI 1515.

26 *SJ Grange Ltd v Customs and Excise Comrs* [1979] 1 WLR 239, [1979] STC 183, CA; *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139; *International Language Centres Ltd v Customs and Excise Comrs* [1983] STC 394; *Customs and Excise Comrs v Le Rififi Ltd* [1995] STC 103, CA.

27 *Customs and Excise Comrs v Le Rififi Ltd* [1995] STC 103, CA (not following *Don Pasquale (a firm) v Customs and Excise Comrs* [1990] STC 556, CA, on whether a notice of assessment in the form used in both cases constituted a global assessment).

28 However, in many cases, the only material available to the tribunal will be the notice of assessment itself which then stands as the best evidence: *Customs and Excise Comrs v Le Rififi Ltd* [1995] STC 103 at 107, CA.

29 *House (t/a P & J Autos) v Customs and Excise Comrs* [1996] STC 154 at 162, CA (the assessment of the tax considered due and the notification of the assessment to the taxpayer are separate operations and the form of notification is, for that reason, of little importance provided that the taxpayer is adequately notified), following *Grunwick Processing Laboratories Ltd v Customs and Excise Comrs* [1986] STC 441 at 442, *Don Pasquale (a firm) v Customs and Excise Comrs* [1990] STC 556 at 562, CA, and *Customs and Excise Comrs v Le Rififi Ltd* [1995] STC 103 at 106-107, CA, and disapproving *Bell v Customs and Excise Comrs* [1979] VATTR 115 and *SAS Fashions Ltd v Customs and Excise Comrs* (1993) VAT Decision 9426, [1993] STI 343.

30 Value Added Tax Act 1994 ss 73(6), 75(2). If, however, otherwise than in circumstances falling within s 73(6)(b) (see the text and notes 16-17 supra) or s 75(2)(b) (see the text and notes 21 supra), it appears to the Commissioners that the amount which ought to have been assessed in an assessment under s 73, s 75 or s 76 (as amended) exceeds the amount which was so assessed, then the Commissioners may make a supplementary assessment of the amount of the excess (under the like provision as that assessment was made) on or before the last day on which that assessment could have been made and may notify the person concerned accordingly: s 77(6). A supplementary assessment is not limited to correcting the quantum of the earlier assessment, since 'amount' in this context goes beyond arithmetic and can concern issues of principle as well as quantum: *Roberts v Customs and Excise Comrs* (1998) VAT Decision 15759, [1999] STI 129.

31 See *Parekh v Customs and Excise Comrs* [1984] STC 284 per Woolf J (if the two year limitation period has expired, so that the Commissioners are relying on the extension given to them of one year after further facts have come to their knowledge, they should only be able to make an assessment based on those additional facts). See also *Jeudwine v Customs and Excise Comrs* [1977] VATTR 115 (further assessment held to be invalid because no new facts had come to the Commissioners' knowledge between making the first assessment and the further assessment). Cf *Yuen Tung Restaurant Ltd v Customs and Excise Comrs*, *Far East Restaurant v Customs and Excise Comrs*, *Tsun Loi Cheung and Yuen Tung Restaurant Ltd v Customs and Excise Comrs* [1993] VATTR 226 (Commissioners withdrew the original assessment (which they considered to be invalid for failing to specify the period of assessment) and issued a fresh assessment; it was held that the Commissioners were entitled to treat the withdrawn assessment as never having been issued and to make a fresh assessment within the time limit applicable to the original assessment). See also *Bennett v Customs and Excise Comrs (No 2)* [2001] STC 137 (fresh assessment was valid notwithstanding that an appeal against the original assessment was allowed and the matter remitted for rehearing before a freshly constituted tribunal).

## UPDATE

### 299 Time limits for making assessments

TEXT AND NOTES 1-12--Value Added Tax Act 1994 s 77 amended: Finance Act 2008 Sch 39 para 34.

NOTE 2--See *Revenue and Customs Comrs v Dunwood Travel Ltd* [2008] EWCA Civ 174, [2008] STC 959.

NOTE 3--The effect of the Value Added Tax Act 1994 s 77(2) is that a civil penalty cannot be determined by reference to VAT which is not the subject of a valid assessment: see *Ali (t/a Vakas Balti) v Revenue and Customs Comrs* [2006] EWHC 23 (Ch), [2006] STC 1872.

TEXT AND NOTES 13-17--In the case of an assessment under the Value Added Tax Act 1994 s 73(2) (see PARA 294), the prescribed accounting period is the prescribed accounting period in which the repayment or refund of VAT, or the VAT credit, was paid or credited: s 73(6A) (added by Finance Act 2008 s 120(1)).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(5) RECOVERY OF VALUE ADDED TAX/300. Recovery by civil action.

## **(5) RECOVERY OF VALUE ADDED TAX**

### **300. Recovery by civil action.**

Value added tax due from any person is recoverable as a debt due to the Crown<sup>1</sup>. In addition to the general right to bring the proceedings, the Commissioners for Her Majesty's Revenue and Customs may apply in a summary manner<sup>2</sup> to the High Court for payment of VAT<sup>3</sup>.

The Commissioners may also levy distress on any person who neglects or refuses to pay any VAT due from him<sup>4</sup>.

<sup>1</sup> Value Added Tax Act 1994 s 58, Sch 11 para 5(1). VAT is due if it has been collected by the trader from his customers, even if an assessment to recover has failed by reason of the statutory limitation rules (see PARA 299 ante); accordingly, the Commissioners for Her Majesty's Revenue and Customs may bring proceedings to recover the VAT identified in the trader's returns in accordance with Sch 11 para 5(1): *Customs and Excise Comrs v International Language Centres Ltd* [1986] STC 279; cf *Barratt Construction Ltd v Customs and Excise Comrs* [1989] VATTR 204. Where an amount by way of surcharge, interest or penalty has been assessed under the Value Added Tax Act 1994 s 76 (as amended), it is recoverable as if it were VAT due from the person assessed, except to the extent that the assessment is withdrawn or reduced: see s 76(9); and PARA 298 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

<sup>2</sup> For the procedure see CPR Sch 1 RSC Ord 77 r 8; and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 128.

<sup>3</sup> See the Crown Proceedings Act 1947 s 14(2)(c) (amended by the Finance Act 1972 s 55(1)); and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 128.

<sup>4</sup> See the Finance Act 1997 s 51; the Distress for Customs and Excise Duties and Other Indirect Taxes Regulations 1997, SI 1997/1431; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 1139-1144.

## **UPDATE**

### **300 Recovery by civil action**

NOTES--The recovery provisions of the Value Added Tax Act 1994 are without prejudice to HM Revenue and Customs' right of recovery at common law, except in so far as they are inconsistent therewith: *Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19, [2008] 2 All ER 413.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(5) RECOVERY OF VALUE ADDED TAX/301. Set-off of credits.

### 301. Set-off of credits.

Where an amount is due from the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> to any person under any provision relating to value added tax ('the credit')<sup>2</sup>, and that person is liable to pay a sum by way of VAT, penalty, interest or surcharge<sup>3</sup>, the amount which the Commissioners are due to pay him is set against the amount he is liable to pay the Commissioners ('the debit') and, to the extent of the set-off, the obligations of the Commissioners and the person concerned are discharged<sup>4</sup>. This provision does not, however, require the credit to be set off against the debit in any case where an insolvency procedure has been applied<sup>5</sup> to the person entitled to the credit<sup>6</sup>, if the credit became due after that procedure was applied to him<sup>7</sup> and the liability to pay the debit either arose before that procedure was so applied or, having arisen afterwards, relates to, or to matters occurring in the course of, the carrying on of any business<sup>8</sup> at times before the procedure was so applied<sup>9</sup>.

Where the Commissioners are liable to pay or repay any amount to any person in respect of VAT<sup>10</sup>, that amount falls to be paid or repaid in consequence of a mistake previously made about whether or to what extent amounts were payable to or by that person<sup>11</sup>, and by reason of that mistake a liability of that person to pay a sum by way of VAT, penalty, interest or surcharge was not assessed, was not enforced or was not satisfied<sup>12</sup>, any limitation on the time within which the Commissioners are entitled to take steps for recovering that sum are disregarded in determining whether that sum is required<sup>13</sup> to be set against the amount which the Commissioners are liable to pay or repay<sup>14</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Value Added Tax Act 1994 s 81(3)(a). See *R v Customs and Excise Comrs, ex p Richmond, Re Potco Realisation Ltd* [1989] STC 429.

3 Value Added Tax Act 1994 s 81(3)(b).

4 Ibid s 81(3).

5 An insolvency procedure is taken to be applied to any person: (1) when a bankruptcy order, winding-up order or award of sequestration is made, or an administrator is appointed, in relation to that person (ibid s 81(4B)(a) (s 81(4A)-(4D) added by the Finance Act 1995 s 27; and the Value Added Tax Act 1994 s 81(4B)(a), (4C)(b)(i) substituted, and s 81(4C)(a) amended, by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096, art 4, Schedule paras 24, 26(a)); (2) when that person is put into administrative receivership (Value Added Tax Act 1994 s 81(4B)(b) (as so added)); (3) when that person, being a corporation, passes a resolution for voluntary winding up (s 81(4B)(c) (as so added)); (4) when any voluntary arrangement approved in accordance with the Insolvency Act 1986 Pt I (ss 1-7B) (as amended) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 71 et seq) or Pt VIII (ss 252-263) (as amended) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 81 et seq) comes into force in relation to that person (Value Added Tax Act 1994 s 81(4B)(d) (as so added)); (5) when a deed of arrangement registered in accordance with the Deeds of Arrangement Act 1914 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 859 et seq) takes effect in relation to that person (Value Added Tax Act 1994 s 81(4B)(e) (as so added)); or (6) when that person's estate becomes vested in any other person as that person's trustee under a trust deed within the meaning of the Bankruptcy (Scotland) Act 1985 (Value Added Tax Act 1994 s 81(4B)(f), (5)(c) (s 81(4B)(f) as so added)).

References, in relation to any person, to the application of an insolvency procedure to that person do not, however, include: (a) the making of a bankruptcy order, winding-up order or award of sequestration, or the appointment of an administrator, at a time when any such arrangement or deed as is mentioned in s 81(4B)(d)-(f) (as added) is in force in relation to that person (s 81(4C)(a) (as so added and amended)); (b) the making of a winding-up order either immediately upon the appointment of an administrator in respect of the person ceasing to have effect (s 81(4C)(b)(i) (as so added and substituted)), when that person is being wound up voluntarily (s

81(4C)(b)(iii) (as so added)), or when that person is in administrative receivership (s 81(4C)(b)(iii) (as so added)); or (c) the making of an administration order in relation to that person at any time when that person is in administrative receivership (s 81(4C)(c) (as so added)).

For these purposes, a person is regarded as being in administrative receivership throughout any continuous period for which, disregarding any temporary vacancy in the office of receiver, there is an administrative receiver of that person, and the reference in s 81(4B) (as added and amended) to a person being put into administrative receivership is to be construed accordingly: s 81(4D) (as so added). 'Administration order' means an administration order under the Insolvency Act 1986 Pt II (s 8) (as substituted) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 145 et seq): Value Added Tax Act 1994 s 81(5)(a) (s 81(5) amended by the Finance Act 1995 s 27(3), (4)). 'Administrative receiver' means an administrative receiver within the meaning of the Insolvency Act 1986 s 251 (see COMPANIES vol 15 (2009) PARA 1337): Value Added Tax Act 1994 s 81(5)(b).

- 6 Ibid s 81(4A)(a) (as added: see note 5 supra).
- 7 Ibid s 81(4A)(b) (as added: see note 5 supra).
- 8 For the meaning of 'business' see PARA 23 ante.
- 9 Value Added Tax Act 1994 s 81(4A)(c) (as added: see note 5 supra).
- 10 Ibid s 81(3A)(a) (s 81(3A) added by the Finance Act 1997 s 48).
- 11 Ibid s 81(3A)(b) (as added: see note 10 supra).
- 12 Ibid s 81(3A)(c) (as added: see note 10 supra).
- 13 Ie by virtue of ibid s 81(3) (see the text and notes 1-4 supra).
- 14 Ibid s 81(3A) (as added: see note 10 supra).

## UPDATE

### 301 Set-off of credits

NOTE 5--References to the application of an insolvency procedure do not include the application of such a procedure to a person (1) at a time when another insolvency procedure applies to him; or (2) immediately on another such procedure ceasing to have effect: Value Added Tax Act 1994 s 81(4C) (substituted by Finance Act 2008 s 132(2)). 'Administrator' is defined as a person appointed to manage the affairs, business and property of another person under the Insolvency Act 1986 Sch B1 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY) or corresponding Northern Ireland legislation: Value Added Tax Act 1994 s 81(5) (amended by Finance Act 2008 s 132(3)(b), (c)). Definition of 'administration order' repealed: Finance Act 2008 s 132(3)(a).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(5) RECOVERY OF VALUE ADDED TAX/302. Recovery of amount shown on invoice as tax.

### **302. Recovery of amount shown on invoice as tax.**

Where an invoice<sup>1</sup> shows a supply<sup>2</sup> of goods or services as taking place with value added tax chargeable on it, an amount equal to that which is shown on the invoice as VAT or, if VAT is not separately shown, to so much of the total amount shown as payable as is to be taken as representing VAT on the supply, is recoverable from the person who issued the invoice<sup>3</sup>. The amount is recoverable whether or not:

- 937 (1) the invoice is a VAT invoice<sup>4</sup>;
- 938 (2) the supply shown on the invoice actually takes or has taken place, or the amount shown as VAT, or any amount of VAT, is or was chargeable on the supply<sup>5</sup>;  
or
- 939 (3) the person issuing the invoice is a taxable person<sup>6</sup>.

Any sum which is recoverable from a person under this provision is recoverable as a debt due to the Crown<sup>7</sup>.

1 For the meaning of 'invoice' see PARA 17 note 9 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 Value Added Tax Act 1994 s 58, Sch 11 para 5(2). See *Customs and Excise Comrs v Wells* [1981] STC 588 (a person is liable for VAT shown on invoices which he issues in the name of a company prior to its registration; but is not liable for invoices issued after the company is registered, even though the later invoices are issued in the wrong name).

4 Value Added Tax Act 1994 Sch 11 para 5(3)(a). For these purposes, an invoice is a VAT invoice if it is issued in pursuance of Sch 11 para 2(1) (as amended): see PARA 245 ante. For the meaning of 'VAT invoice' see PARA 35 note 9 ante; as to the obligation to issue such an invoice see PARA 278 ante; and as to the contents of the invoice see PARA 281 ante.

5 Ibid Sch 11 para 5(3)(b).

6 Ibid Sch 11 para 5(3)(c). For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

7 Ibid Sch 11 para 5(3). If the sum so recoverable is VAT, it is recoverable as such (and thus as a debt due to the Crown: see PARA 300 ante); and the sum is otherwise recoverable as a debt so due: Sch 11 para 5(3).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(5) RECOVERY OF VALUE ADDED TAX/303. Evidence by certificate.

### **303. Evidence by certificate.**

A certificate<sup>1</sup> of the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> that:

- 940 (1) a person was, or was not, at any date registered for value added tax<sup>3</sup>;
- 941 (2) any return required<sup>4</sup> to be made has not been made or had not been made at any date<sup>5</sup>;
- 942 (3) any statement or notification required to be submitted or given to the Commissioners in accordance with any relevant regulations<sup>6</sup> has not been submitted or given or had not been submitted or given at any date<sup>7</sup>; or
- 943 (4) any VAT shown as due in any return or assessment<sup>8</sup> has not been paid<sup>9</sup>,

is sufficient evidence of the fact until the contrary is proved<sup>10</sup>. A photograph of any document<sup>11</sup> furnished to the Commissioners for the purpose of the provisions relating to VAT and certified by them to be such a photograph is admissible in any proceedings, whether civil or criminal, to the same extent as the document itself<sup>12</sup>.

1 Any document purporting to be a certificate under the Value Added Tax Act 1994 s 58, Sch 11 para 14(1) or (2) (see the text and notes 2-12 infra) is deemed to be such a certificate until the contrary is proved: Sch 11 para 14(3).

2 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 Value Added Tax Act 1994 Sch 11 para 14(1)(a). As to registration for VAT under the Value Added Tax Act 1994 see PARA 64 et seq ante. For the meaning of 'registered' see PARA 64 note 2 ante.

4 Ie by or under the Value Added Tax Act 1994: see Sch 11 para 14(1)(b). For the meaning of 'return' see PARA 115 note 13 ante.

5 Ibid Sch 11 para 14(1)(b).

6 Ie regulations made under ibid Sch 11 para 2(3) or (4): see PARA 245 ante.

7 Ibid Sch 11 para 14(1)(c).

8 Ie made in pursuance of the Value Added Tax Act 1994: see Sch 11 para 14(1)(d). As to assessments see PARAS 294-299 ante.

9 Ibid Sch 11 para 14(1)(d).

10 Ibid Sch 11 para 14(1).

11 For the meaning of 'document' see PARA 17 note 9 ante.

12 Value Added Tax Act 1994 Sch 11 para 14(2).

## **UPDATE**

### **303 Evidence by certificate**

TEXT AND NOTES 8, 9--Head (4) omitted: Value Added Tax Act 1994 Sch 11 para 14(1)(d) repealed by Finance Act 2008 Sch 44 para 6.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/304. Refund of tax to local authorities and other public bodies.

## **(6) REFUNDS OF VALUE ADDED TAX**

### **304. Refund of tax to local authorities and other public bodies.**

Local authorities and other specified public bodies are entitled to refunds of value added tax chargeable<sup>1</sup> on supplies, acquisitions or importations of goods and services made to or by them other than for the purposes of their business<sup>2</sup>. The authorities and bodies to whom these provisions apply are:

- 944 (1) local authorities<sup>3</sup>;
- 945 (2) internal drainage boards<sup>4</sup>;
- 946 (3) passenger transport authorities or executives<sup>5</sup>;
- 947 (4) port health authorities<sup>6</sup>;
- 948 (5) police authorities<sup>7</sup>;
- 949 (6) the Receiver for the Metropolitan Police District<sup>8</sup>;
- 950 (7) development corporations<sup>9</sup> and the Commission for the New Towns<sup>10</sup>;
- 951 (8) general lighthouse authorities<sup>11</sup>;
- 952 (9) the British Broadcasting Corporation<sup>12</sup>;
- 953 (10) the appointed news provider<sup>13</sup>;
- 954 (11) the Commissions for Local Administration in England and Wales<sup>14</sup>;
- 955 (12) magistrates' courts committees<sup>15</sup>;
- 956 (13) charter trustees<sup>16</sup>;
- 957 (14) waste disposal bodies<sup>17</sup>;
- 958 (15) the Environment Agency<sup>18</sup>;
- 959 (16) National Park authorities<sup>19</sup>;
- 960 (17) fire authorities constituted by combination schemes<sup>20</sup>;
- 961 (18) the Broads Authority<sup>21</sup>;
- 962 (19) the Greater London Authority<sup>22</sup>;
- 963 (20) the London Fire and Emergency Planning Authority<sup>23</sup>;
- 964 (21) Transport for London<sup>24</sup>;
- 965 (22) the Greater London Magistrates' Courts Authority<sup>25</sup>; and
- 966 (23) local probation boards<sup>26</sup>.

The Commissioners must refund all VAT chargeable on supplies of goods or services to, acquisitions of goods from another member state by, or importations of goods from a place outside the member states<sup>27</sup> by, the authority or body in question<sup>28</sup>. Where goods or services so supplied to, or acquired or imported by, the authority or body cannot conveniently be distinguished from goods or services supplied to, or acquired or imported by, it for the purpose of a business carried on by it, the amount to be refunded under these provisions is the amount which remains after deducting from the whole of the VAT chargeable on the supply, acquisition or importation such proportion as appears to the Commissioners to be attributable to the carrying on of the business<sup>29</sup>. The Commissioners may, however, include in the VAT so refunded any VAT attributable to exempt supplies<sup>30</sup> by the authority or body<sup>31</sup>, where the VAT attributable to the carrying on of the business includes such VAT but it is, in the Commissioners' opinion, an insignificant proportion of the VAT so chargeable<sup>32</sup>.

The Commissioners must also refund to the government of Northern Ireland the amount of the VAT charged on the supply of goods or services to that government, on the acquisition of any

goods by that government from another member state or on the importation of any goods by that government from a place outside the member states, after deducting an agreed amount attributable to supplies, acquisitions and importations for the purpose of a business carried on by the government of Northern Ireland<sup>33</sup>.

Provision is also made for refunds of VAT to museums and galleries<sup>34</sup>.

1 For these purposes, references to VAT chargeable do not include any VAT which, by virtue of any order under the Value Added Tax Act 1994 s 25(7) (see PARA 218 ante), is excluded from credit under s 25 (see PARA 216 ante): see s 33(6); and *R v Customs and Excise Comrs, ex p Greater Manchester Police Authority* [2001] EWCA Civ 213, [2001] STC 406.

2 Value Added Tax Act 1994 s 33(1)(b). For the meaning of 'business' see PARA 23 ante. Repayments are subject to the three-year time-limit: see Customs and Excise Business Brief 26/99 [2000] STI 16.

3 Value Added Tax Act 1994 s 33(3)(a). For the meaning of 'local authority' see PARA 64 note 25 ante; and note also for these purposes the local authorities and local authority bodies specified by the Value Added Tax (Refund of Tax) Order 1985, SI 1985/1101 (amended by SI 2000/1094; SI 2005/772), and the bodies listed under heads (2)-(23) in the text. A local authority grant, for which it received no supply of goods or services and made in satisfaction of a third party's liability, does not entitle it to a refund for any VAT included in the payment: *Ashfield District Council v Customs and Excise Comrs* [2001] STC 1706. For recovery in connection with community projects and local authority pension funds see VAT Information Sheet 4/98 *Local Authorities: Community Projects and VAT Recovery* (June 1998); VAT Information Sheet 6/98 *Local Authority Pension Funds: VAT Treatment and Administrative Concession* (June 1998); and VAT Information Sheet 7/98 *Local Authorities: Amendments to the Section 33 Refund Methods* (June 1998).

4 Value Added Tax Act 1994 s 33(3)(c). As to internal drainage boards see WATER AND WATERWAYS vol 101 (2009) PARA 569 et seq.

5 Ibid s 33(3)(d). As to passenger transport authorities and executives (ie within the meaning of the Transport Act 1968 Pt II (ss 9-23A) (as amended)) see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 246 et seq.

6 Value Added Tax Act 1994 s 33(3)(e). As to port health authorities (ie within the meaning of the Public Health (Control of Disease) Act 1984) see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 102.

7 Value Added Tax Act 1994 s 33(3)(f). As to police authorities see POLICE vol 36(1) (2007 Reissue) PARA 139 et seq. The Service Authority for the National Crime Squad and the National Criminal Intelligence Service are not included under these provisions: see *R v HM Treasury, ex p Service Authority for the National Crime Squad* [2000] STC 638.

8 Value Added Tax Act 1994 s 33(3)(f). The reference to the Receiver for the Metropolitan Police District is repealed, as from a day to be appointed, by the Greater London Authority Act 1999 ss 325, 423, Sch 27 para 68, Sch 34 Pt VII. At the date at which this volume states the law no such day had been appointed. As to police generally see POLICE.

9 Ie within the meaning of the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq).

10 Value Added Tax Act 1994 s 33(3)(g). As to the Commission for the New Towns see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1383-1395.

11 Ibid s 33(3)(h) (amended by the Merchant Shipping Act 1995 s 314, Sch 13 para 95). As to general lighthouse authorities (ie within the meaning of the Merchant Shipping Act 1995 Pt VIII (ss 193-223) (as amended)) see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1068 et seq. No VAT may be refunded under these provisions to a general lighthouse authority if that VAT is, in the opinion of the Commissioners for Her Majesty's Revenue and Customs, attributable to activities other than those concerned with the provision, maintenance or management of lights or other navigational aids: Value Added Tax Act 1994 s 33(4). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

12 Ibid s 33(3)(i). As to the British Broadcasting Corporation see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 306 et seq.

13 Ibid s 33(3)(j) (s 33(3)(j) substituted, and s 33(5) amended, by the Communications Act 2003 s 406(1), Sch 17 para 129(1), (2)). As to the appointed news provider see the Communications Act 2003 s 280; and TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 277. No VAT may be refunded under these

provisions to an appointed news provider if that VAT is, in the Commissioners' opinion, attributable to activities other than the provision of news programmes for broadcasting by holders of regional Channel 3 licences (within the meaning of the Broadcasting Act 1990 Pt I (ss 1-71) (as amended): see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 279); Value Added Tax Act 1994 s 33(5) (as so amended).

14 Ibid s 33(3)(k); Value Added Tax (Refund of Tax) Order 1976, SI 1976/2028, art 3. As to the Commissions see LOCAL GOVERNMENT vol 69 (2009) PARA 839 et seq.

15 Value Added Tax (Refund of Tax) Order 1986, SI 1986/336, art 2. As to magistrates' courts committees see MAGISTRATES vol 29(2) (Reissue) PARA 612 et seq.

16 Ibid art 2; Value Added Tax (Refund of Tax) Order 1997, SI 1997/2558, art 2. The charter trustees referred to are those constituted by the Local Government Act 1972 s 246(4) or (5) (see LOCAL GOVERNMENT vol 69 (2009) PARA 113) and those established by an order made under the Local Government Act 1992 s 17 (see ELECTIONS AND REFERENDUMS) or by any other statutory instrument made under Pt II (ss 12-27). See also note 3 supra.

17 Value Added Tax (Refund of Tax) (No 2) Order 1986, SI 1986/532, art 2. As to the waste disposal bodies see the Local Government Act 1985 s 10 (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARA 17.

18 Value Added Tax (Refund of Tax) Order 1995, SI 1995/1978, art 2. As to the Environment Agency see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 68 et seq.

19 Value Added Tax (Refund of Tax) (No 2) Order 1995, SI 1995/2999, art 2. As to National Park authorities (ie within the meaning of the Environment Act 1995 s 63) see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

20 Value Added Tax (Refund of Tax) (No 2) Order 1995, SI 1995/2999, art 2. As to fire authorities constituted by combination schemes see the Fire Services Act 1947 s 6 (as amended); and FIRE SERVICES vol 18(2) (Reissue) PARA 24 et seq.

21 Value Added Tax (Refund of Tax) Order 1999, SI 1999/2076, art 2. The Broads Authority is established by the Norfolk and Suffolk Broads Act 1988 s 1: see WATER AND WATERWAYS vol 101 (2009) PARA 734.

22 Value Added Tax (Refund of Tax) Order 2000, SI 2000/1046, art 2. As to the Greater London Authority see the Greater London Authority Act 1999 s 1; and LONDON GOVERNMENT vol 29(2) (Reissue) PARA 79 et seq.

23 Value Added Tax (Refund of Tax) (No 2) Order 2000, SI 2000/1515, art 2. As to the London Fire and Emergency Planning Authority see the Greater London Authority Act 1999 s 328; and LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

24 Value Added Tax (Refund of Tax) (No 3) Order 2000, SI 2000/1672, art 2. As to Transport for London see the Greater London Authority Act 1999 s 154; and LONDON GOVERNMENT vol 29(2) (Reissue) PARA 269 et seq.

25 Value Added Tax (Refund of Tax) Order 2001, SI 2001/3453, art 2. As to the Greater London Magistrates' Courts Authority see the Justice of the Peace Act 1997 s 30A (as added); and MAGISTRATES vol 29(2) (Reissue) PARA 616.

26 The Value Added Tax (Refund of Tax) Order 1986, SI 1986/336, art 2 refers to probation committees constituted by the Powers of Criminal Courts Act 1973 s 47(a) (repealed), but it is submitted that these provisions now apply to the local probation boards established under the Criminal Justice and Court Services Act 2000 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737), which replaced those committees.

27 For the meaning of 'another member state' see PARA 4 note 15 ante; and as to acquisition from another member state see PARA 19 ante. As to goods imported from a place outside the member states see PARA 113 note 2 ante.

28 Value Added Tax Act 1994 s 33(1)(a). Refunds are made on a claim made by the authority or body at such time and in such manner as the Commissioners may determine: s 33(1). For the Commissioners' views on the operation of s 33 (as amended) see Customs and Excise Public Notice 749 *Local Authorities and Similar Bodies* (April 2002); and *Haringey London Borough Council v Customs and Excise Comrs* [1995] STC 830. It is a peculiarity of the Value Added Tax Act 1994 s 33 (as amended) that it does not appear to be authorised by any provision of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'): see *Haringey London Borough Council v Customs and Excise Comrs* (1994) VAT Decision 12050, [1994] VATTR 70; on appeal [1995] STC 830. EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4(5), which it most closely resembles, is not designed to allow a refund of tax incurred by a local authority otherwise than for its business purposes, but only to define for what purposes such a body is to be treated as a taxable person for VAT. As to the application of art 4(5) see Case 235/85 *EC Commission v Netherlands* [1987] ECR 1471, [1988] 2 CMLR 921, ECJ; Case C-202/90 *Ayuntamiento de Sevilla v*

*Recaudadores de Tributos de las Zonas Primera y Segunda* [1991] ECR I-4247, [1993] STC 659, ECJ; Cases 231/87, 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino and Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* [1989] ECR 3233, [1991] STC 205, ECJ (activities carried on by a local authority under the same legal conditions as other private traders should be considered taxable economic activities despite EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) art 4(5); *Customs and Excise Comrs v Isle of Wight Council* [2004] EWHC 2541 (Ch), [2005] STC 257). As to the Sixth Directive see PARA 1 note 1 ante.

29 Value Added Tax Act 1994 s 33(2). The Commissioners have set out directions as to the manner in which local authorities should carry out this apportionment in Customs and Excise Public Notice 749 *Local Authorities and Similar Bodies* (April 2002).

30 In accordance with regulations under the Value Added Tax Act 1994 s 26: see PARA 217 ante. For the relevant regulations see the Value Added Tax Regulations 1995, SI 1995/2518, regs 99-111 (as amended); and PARA 217 et seq ante. For the meaning of 'exempt supplies' see PARA 155 ante.

31 Value Added Tax Act 1994 s 33(2)(a).

32 Ibid s 33(2)(b). For the Commissioners' views see Customs and Excise Notice 749 *Local Authorities and Similar Bodies* (April 2002) PARA 8.2; and see also *Haringey London Borough Council v Customs and Excise Comrs* [1995] STC 830.

33 Value Added Tax Act 1994 s 99. As to the government of Northern Ireland see further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 67 et seq.

34 See PARA 305 post.

## UPDATE

### 304 Refund of tax to local authorities and other public bodies

TEXT AND NOTES 3-26--Also, heads (24) the London Pension Fund Authority (established by the London Government Reorganisation (Pensions etc) Order 1989, SI 1989/1815, art 2(1)); and (25) a transport partnership created by an order made under the Transport (Scotland) Act 2005 s 1(1): Value Added Tax Act 1994 s 33(3)(k); Value Added Tax (Refund of Tax) Order 2006, SI 2006/1793.

TEXT AND NOTE 5--Value Added Tax Act 1994 s 33(3)(d) substituted: Local Transport Act 2008 Sch 4 para 59.

NOTE 16--See also the bodies specified in the Value Added Tax (Refund of Tax to Charter Trustees and Conservators) Order 2009, SI 2009/1177. Local Government Act 1992 s 17 repealed: Local Democracy, Economic Development and Construction Act 2009 Sch 7 Pt 3.

NOTE 25--Justices of the Peace Act 1997 repealed: Courts Act 2003 s 6(4), Sch 10.

NOTE 28--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax: see PARA 2.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/305. Refund of value added tax to museums and galleries.

### **305. Refund of value added tax to museums and galleries.**

The bodies controlling certain museums and galleries<sup>1</sup> are entitled to refunds of value added tax<sup>2</sup> chargeable on supplies of goods or services<sup>3</sup>, acquisitions of goods from another member state<sup>4</sup>, or importations of any goods from a place outside the member states<sup>5</sup>, where such supplies, acquisitions or importations are attributable to the provision by the body of free rights of admission to a relevant museum or gallery<sup>6</sup>. Where goods or services supplied to, or acquired or imported by, an applicable body that are attributable to free admissions<sup>7</sup> cannot conveniently be distinguished from goods or services supplied to, or acquired or imported by, the body that are not attributable to free admissions<sup>8</sup>, the amount to be refunded on a claim<sup>9</sup> by the body is such amount as remains after deducting from the VAT related to the claim<sup>9</sup> such proportion of that VAT as appears to the Commissioners to be attributable otherwise than to free admissions<sup>10</sup>.

1 The bodies and institutions in respect of which refunds are payable are specified in the Value Added Tax (Refund of Tax to Museums and Galleries) Order 2001, SI 2001/2879 (amended by SI 2004/1709; SI 2005/1993), which is made pursuant to the Value Added Tax Act 1994 s 33A(9) (s 33A added by the Finance Act 2001 s 98(1), (2)). The Treasury is empowered by order: (1) to specify a body as being a body to which the Value Added Tax Act 1994 s 33A (as added) applies (s 33A(9)(a) (as so added)); (2) when so specifying a body, to specify any museum or gallery that is a 'relevant' museum or gallery in relation to the body for these purposes (s 33A(9)(b) (as so added)); (3) to specify an additional museum or gallery as being, for these purposes, a 'relevant' museum or gallery in relation to a body to which s 33A (as added) applies (s 33A(9)(c) (as so added)); and (4) when so specifying a museum or gallery, to provide that s 33A (as added) has effect in the case of the museum or gallery as if in s 33A(1)(c) (as added) (which provides that s 33A (as added) is applicable in respect of supplies made, or acquisitions or importations taking place, on or after 1 April 2001: see s 33A(1)(c) (as so added)) there were substituted for that date a later date specified in the order (s 33A(9)(d) (as so added)). As to the making of orders generally see PARA 14 ante.

2 For these purposes, references to VAT do not include any VAT which, by virtue of any order under *ibid* s 25(7) (see PARA 218 ante), is excluded from credit under s 25 (see PARA 216 ante): see s 33A(10) (as added: see note 1 supra). See also *R v Customs and Excise Comrs, ex p Greater Manchester Police Authority* [2001] EWCA Civ 213, [2001] STC 406 (decided under the Value Added Tax Act 1994 s 33(6) (see PARA 304 ante)).

3 Value Added Tax Act 1994 s 33A(1)(a)(i), (2) (as added: see note 1 supra).

4 *Ibid* s 33A(1)(a)(ii) (as added: see note 1 supra). For the meaning of 'another member state' see PARA 4 note 15 ante; and as to acquisition from another member state see PARA 19 ante.

5 *Ibid* s 33A(1)(a)(iii) (as added: see note 1 supra). As to goods imported from a place outside the member states see PARA 113 note 2 ante.

6 *Ibid* s 33A(1)(b) (as added: see note 1 supra). Refunds are made on a claim made by the body at such time and in such manner as the Commissioners for Her Majesty's Revenue and Customs may determine: s 33(2). Claims must be made before the end of the period of three years beginning with the day on which the supply is made or the acquisition or importation takes place ('the claim period') (s 33A(3), (4) (as so added)), although the Commissioners may determine that the claim period may be such shorter period beginning with that day as they determine (s 33A(5) (as so added)). See also the concessionary treatment set out in Customs and Excise Business Brief 16/01 [2001] STI 1494. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

7 For these purposes, goods or services are, and VAT is, attributable to free admissions if they are, or it is, attributable to the provision by the body of free rights of admission to a relevant museum or gallery: Value Added Tax Act 1994 s 33A(8)(a) (as added: see note 1 supra).

8 *Ibid* s 33A(6) (as added: see note 1 supra).



9 For these purposes, the VAT related to a claim is the whole of the VAT chargeable on the supplies to the body (ibid s 33A(8)(b)(i) (as added: see note 1 supra)) and the acquisitions and importations by the body (s 33A(8)(b)(ii) (as so added)) to which the claim relates.

10 Ibid s 33A(7) (as added: see note 1 supra).

## **UPDATE**

### **305 Refund of value added tax to museums and galleries**

NOTE 1--SI 2001/2879 further amended: SI 2008/1339, SI 2010/608.

NOTE 6--Value Added Tax Act 1994 s 33A(4) amended: Finance Act 2008 Sch 39 para 33.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/306. Refund of value added tax to persons constructing certain buildings.

### **306. Refund of value added tax to persons constructing certain buildings.**

A person is entitled to have refunded to him the amount of value added tax chargeable on the supply<sup>1</sup>, acquisition or importation of any goods used by him for the purposes<sup>2</sup> of:

- 967 (1) the construction of a building designed as a dwelling or number of dwellings<sup>3</sup>;
- 968 (2) the construction of a building for use solely for a relevant residential purpose<sup>4</sup> or relevant charitable purpose<sup>5</sup>; and
- 969 (3) a residential conversion<sup>6</sup>,

provided his carrying out of those works is lawful and is otherwise than in the course or furtherance of any business<sup>7</sup>. Refunds are also available to a person who carries out a residential conversion by arranging for any of the work of the conversion to be done by another person<sup>8</sup> who is not acting as an architect, surveyor or consultant or in a supervisory capacity<sup>9</sup> and in respect of whose services consisting in the work VAT is chargeable<sup>10</sup>, again providing that the carrying out of the conversion is lawful and otherwise than in the course or furtherance of any business<sup>11</sup>.

In any of these circumstances, refunds are made by the Commissioners for Her Majesty's Revenue and Customs<sup>12</sup> on a claim made by the person<sup>13</sup>. A claimant must make his claim in respect of a relevant building by furnishing to the Commissioners, no later than three months after the completion of the building, the prescribed form containing the full particulars required therein<sup>14</sup> and at the same time furnishing to them the necessary certificates<sup>15</sup>, invoices<sup>16</sup> and other documentary evidence<sup>17</sup>.

A penalty may be imposed for dishonestly claiming such a refund<sup>18</sup>, and it is also an offence for a person knowingly to be concerned in, or in the taking of steps with a view to, the fraudulent obtaining, by himself or another, of a such refund<sup>19</sup>.

The amount of any refund under these provisions is a matter on which appeal lies to a VAT and duties tribunal<sup>15</sup>.

1 These provisions have effect as if this reference to the VAT chargeable on the supply of any goods included a reference to VAT chargeable on the supply in accordance with the law of another member state: Value Added Tax Act 1994 s 35(3)(a). In relation to VAT chargeable in accordance with the law of another member state, s 35 (as amended) has effect as if references to refunding VAT to any person were references to paying that person an amount equal to the VAT chargeable in accordance with the law of that member state: s 35(3)(b). The provisions of the Value Added Tax Act 1994 and of any other enactment or subordinate legislation, whenever passed or made, so far as they relate to a refund under s 35 (as amended) are to be construed accordingly: s 35(3). For the meaning of 'supply' see PARA 27 ante; for the meaning of 'another member state' see PARA 4 note 15 ante; and as to references to the law of another member state see PARA 17 ante.

2 Goods are treated as used for the purposes of works to which these provisions apply by the person carrying out the works in so far only as they are building materials which, in the course of the works, are incorporated in the building in question or its site: *ibid* s 35(1B) (s 35(1) substituted, s 35(1A)-(1D), (4), (5) added, and s 35(2) amended, by the Finance Act 1996 s 30).

3 Value Added Tax Act 1994 s 35(1)(a), (c) (as substituted: see note 2 supra), s 35(1A)(a) (as added: see note 2 supra). As to when a building is designed as a dwelling or a number of dwellings see PARA 179 note 8 ante (definition applied by s 35(4) (as added: see note 2 supra)). The Treasury's power by order under s 30 (as amended) to vary Sch 8 (as amended) (see s 30(4); and PARA 174 ante) includes power to apply any variation so

made for the purposes of s 35 (as amended) and to make such consequential modifications of s 35 (as amended) as it thinks fit: s 35(5) (as added: see note 2 supra).

4 For the meaning of 'use for a relevant residential purpose' see PARA 179 note 9 ante (definition applied by *ibid* s 35(4) (as added: see note 2 supra)).

5 *Ibid* s 35(1A)(b) (as added: see note 2 supra). For the meaning of 'use for a relevant charitable purpose' see PARA 179 note 10 ante (definition applied by s 35(4) (as added: see note 2 supra)).

6 *Ibid* s 35(1A)(c) (as added: see note 2 supra). For these purposes, works constitute a residential conversion to the extent that they consist in the conversion of a non-residential building, or a non-residential part of a building, into: (1) a building designed as a dwelling or a number of dwellings (s 35(1D)(a) (as so added)); (2) a building intended for use solely for a relevant residential purpose (s 35(1D)(b) (as so added)); or (3) anything which would fall within either such category if different parts of a building were treated as separate buildings (s 35(1D)(c) (as so added)). For the meaning of 'non-residential' see PARA 179 note 12 ante (definition applied by s 35(4) (as so added)). A person effecting an enlargement of an existing residential building is not entitled to a refund of VAT under these provisions: see eg *Customs and Excise Comrs v Perry* [1983] STC 383. Where a building contains both residential and non-residential parts, the conversion of the non-residential part is not treated as conversion of a non-residential part of a building for these purposes unless the result of that conversion is to create an additional dwelling or dwellings: see *Customs and Excise Comrs v Blom-Cooper* [2003] EWCA Civ 493, [2003] STC 669; and see also *Revenue and Customs Comrs v Jacobs* [2005] EWCA Civ 930, [2005] STC 1518.

7 Value Added Tax Act 1994 s 35(1)(b) (as substituted: see note 2 supra). For the meaning of 'in the course or furtherance of a business' see PARAS 18 note 5, 23 note 2 ante.

8 *Ibid* s 35(1C)(a) (as added: see note 2 supra).

9 *Ibid* s 35(1C)(c) (as added: see note 2 supra).

10 *Ibid* s 35(1C)(d) (as added: see note 2 supra).

11 *Ibid* s 35(1C)(b) (as added: see note 2 supra).

12 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

13 Value Added Tax Act 1994 s 35(1) (as substituted: see note 2 supra), s 35(1C) (as added: see note 2 supra). The Commissioners are not required to entertain a claim for a refund of VAT under these provisions unless it is made within such time and in such form and manner (s 35(2)(a)), contains such information (s 35(2)(b)), and is accompanied by such documents, whether by way of evidence or otherwise (s 35(2)(c)), as the Commissioners may by regulations prescribe (or, in the case of documents, determine in accordance with the regulations) (s 35(2)). For the meaning of 'document' see PARA 17 note 9 ante. As to the regulations see the text and notes 14-17 *infra*.

14 Value Added Tax Regulations 1995, SI 1995/2518, reg 201(a).

15 *Ie* a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners (*ibid* reg 201(b)(i)) and a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgment, were likely to have been, incorporated into the building or its site (reg 201(b)(v)).

16 *Ie* an invoice showing the registration number of the person supplying the goods, whether or not such an invoice is a VAT invoice, in respect of each supply of goods on which VAT has been paid which have been incorporated into the building or its site: *ibid* reg 201(b)(ii). For the meaning of 'registration number' see PARA 22 note 14 ante.

17 Documentary evidence that planning permission for the building had been granted must be supplied (*ibid* reg 201(b)(iv)) and so also, where any imported goods have been incorporated into the building or its site, must documentary evidence of those goods' importation and of the VAT paid thereon (reg 201(b)(iii)).

18 See the Value Added Tax Act 1994 s 60(1), (2)(c); and PARA 321 post.

19 See *ibid* s 72(1), (2)(b); and PARA 317 post.

20 See *ibid* s 83(g); and PARA 346 post.

## UPDATE

### **306 Refund of value added tax to persons constructing certain buildings**

NOTE 14--The relevant form for the purposes of a claim is SI 1995/2518 Sch 1 Form 11A where the claim relates to works described in the Value Added Tax Act 1994 s 35(1A) (a), and SI 1995/2518 Sch 1 Form 11B where the claim relates to works described in the Value Added Tax Act 1994 s 35(1A)(c): SI 1995/2518 reg 201A (added by SI 2009/1967).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/307. Bad debt relief.

### 307. Bad debt relief.

Where a person has supplied goods or services<sup>1</sup> and has accounted for and paid value added tax on the supply<sup>2</sup>, then if the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt<sup>3</sup>, the value of the supply<sup>4</sup> is not equal to or less than its open market value<sup>5</sup>, and a period of six months, beginning with the date of the supply<sup>6</sup>, has elapsed<sup>7</sup>, the person is entitled<sup>8</sup>, on making a claim to the Commissioners for Her Majesty's Revenue and Customs<sup>9</sup> within the prescribed time limits<sup>10</sup> to a refund of the amount of VAT chargeable by reference to the outstanding amount<sup>11</sup>. The 'outstanding amount' means:

- 970 (1) if at the time of the claim no part of the consideration written off in the claimant's accounts as a bad debt<sup>12</sup> has been received<sup>13</sup>, an amount equal to the amount of the consideration so written off<sup>14</sup>; or
- 971 (2) if at that time any part of the consideration so written off has been received, an amount by which that part is exceeded by the amount of the consideration written off<sup>15</sup>.

Regulations made by the Commissioners for these purposes may:

- 972 (a) require a claim to be made at such time and in such form and manner as may be specified<sup>16</sup>;
- 973 (b) require a claim to be evidenced and quantified by reference to such records and other documents<sup>17</sup> as may be specified<sup>18</sup>;
- 974 (c) require the claimant to keep, for such period and in such form and manner as may be specified, those records and documents and a record of such information relating to the claim and to anything subsequently received by way of consideration as may be specified<sup>19</sup>;
- 975 (d) require the repayment of a refund allowed under these provisions where any requirement of the regulations is not complied with<sup>20</sup>;
- 976 (e) require the repayment of the whole or, as the case may be, an appropriate part of a refund so allowed where any part (or further part) of the consideration written off in the claimant's accounts as a bad debt is subsequently received<sup>21</sup> either by the claimant or, except in such circumstances as may be prescribed, by a person to whom has been assigned a right to receive the whole or any part of that consideration<sup>22</sup>;
- 977 (f) include such supplementary, incidental, consequential or transitional provisions as appear to the Commissioners to be necessary or expedient for these purposes<sup>23</sup>; and
- 978 (g) make different provision for different circumstances<sup>24</sup>.

1 Relief in the United Kingdom was formerly restricted to cases where the goods or services in question were supplied for a consideration in money, but this requirement was removed following an adverse decision of the European Court of Justice in Case C-330/95 *Goldsmiths (Jewellers) Ltd v Customs and Excise Comrs* [1997] STC 1073. Hence, for these purposes, it is now provided that where the whole or any part of the consideration for the supply does not consist of money, the amount in money that is taken to represent any non-monetary part of the consideration is so much of the amount made up of the value of the supply and the VAT charged on the supply as is attributable to the non-monetary consideration in question: Value Added Tax Act 1994 s 36(3A) (s 36(3A) added by the Finance Act 1998 s 23(3)). For the meaning of 'consideration' generally see PARA 95 ante.

2 Value Added Tax Act 1994 s 36(1)(a) (amended by the Finance Act 1998 ss 23(1), 165, Sch 27 Pt II). For the meaning of 'supply' see PARA 27 ante.

3 Value Added Tax Act 1994 s 36(1)(b).

4 As to the value of a supply see PARA 94 et seq ante.

5 Value Added Tax Act 1994 s 36(4)(a). For the meaning of 'open market value' see PARA 96 ante.

6 Ibid s 6 (as amended) (see PARA 35 et seq ante) applies for determining the time when a supply is to be treated as taking place for the purposes of construing these provisions: s 36(8).

7 Ibid s 36(1)(c).

8 Ie subject to the provisions of ibid s 36 (as amended) and to regulations under it: s 36(2). See the text and notes 9-11 infra. As to the power to make regulations generally see PARA 14 ante.

9 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

10 A claim must be made within the period of three years and six months following the later of the date on which the consideration (or part) which has been written off as a bad debt becomes due and payable to or to the order of the person who made the relevant supply (Value Added Tax Regulations 1995, SI 1995/2518, reg 165A(1)(a) (reg 165A added by SI 1997/1086)) and the date of the supply (Value Added Tax Regulations 1995, SI 1995/2518, reg 165A(1)(b) (as so added)). 'Relevant supply' means any taxable supply upon which a claim is based: reg 165. For the meaning of 'taxable supply' see PARA 18 note 3 ante. A person who is entitled to a refund by virtue of these provisions but has not made a claim within the specified period is regarded as having ceased to be entitled to a refund accordingly: reg 165A(2) (as so added).

11 Value Added Tax Act 1994 s 36(2). Save as the Commissioners may otherwise allow or direct, the claimant must make a claim to them by including the correct amount of the refund in the box opposite the legend 'VAT reclaimed in this period on purchases and other inputs' on his return for the prescribed accounting period in which he becomes entitled to make the claim or, subject to the Value Added Tax Regulations 1995, SI 1995/2518, reg 165A (as added) (see note 10 supra), any later return: reg 166(1) (amended by SI 1997/1086). If at a time the claimant becomes entitled to a refund he is no longer required to make a return to the Commissioners, he must make a claim to them in such form and manner as they may direct: Value Added Tax Regulations 1995, SI 1995/2518, reg 166(2). For the meaning of 'return' see PARA 115 note 13 ante. For the meaning of 'prescribed accounting period' see PARA 224 note 5 ante. Where the purchaser is a taxable person and the relevant supply was made before 1 January 2003, the claimant must not before, but within seven days from, the day he makes a claim give to the purchaser a notice in writing containing: (1) the date of issue of the notice (reg 166A(a) (reg 166A added by SI 1997/1086; and the Value Added Tax Regulations 1995, SI 1995/2518, reg 166A(a) amended by SI 2002/3027)); (2) the date of the claim (Value Added Tax Regulations 1995, SI 1995/2518, reg 166A(b) (as so added)); (3) the date and number of any VAT invoice issued in relation to each relevant supply (reg 166A(c) (as so added)); (4) the amount of the consideration for each relevant supply which the claimant has written off as a bad debt (reg 166A(d) (as so added)); and (5) the amount of the claim (reg 166A(e) (as so added)). For the meaning of 'VAT invoice' see PARA 35 note 9 ante.

The origin of bad debt relief is EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') art 11(C)(1), by which the 'taxable amount' for VAT purposes is reduced (under conditions which are to be determined by the member states) in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place. As to the Sixth Directive see PARA 1 note 1 ante.

12 Neither the whole nor any part of the consideration for a supply is taken to have been written off in accounts as a bad debt until a period of not less than six months has elapsed from the time when such whole or part first became due and payable to or to the order of the person who made the relevant supply: Value Added Tax Regulations 1995, SI 1995/2518, reg 172(1), (1A) (reg 172(1A) added by SI 1996/2960; and amended by SI 1997/1086). Subject to this, the whole or any part of the consideration for a relevant supply is taken to have been written off as a bad debt when an entry is made in relation to that supply in the refunds for bad debt account in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 168 (as amended) (see note 19 infra): reg 172(2) (substituted by SI 1996/2960; and amended by SI 1997/1086). Where the claimant owes an amount of money to the purchaser which can be set off, the consideration written off in the accounts is reduced by the amount so owed (Value Added Tax Regulations 1995, SI 1995/2518, reg 172(3)); and where the claimant holds in relation to the purchaser an enforceable security, the consideration written off in the accounts of the claimant is reduced by the value of that security (reg 172(4)). 'Purchaser' means a person to whom the claimant made a relevant supply; and 'security' means any mortgage, charge, lien or other security: reg 165. See also *Alpha Leisure (Scotland) Ltd v Customs and Excise Comrs* (2003) VAT Decision 18199, [2003] STI 1800 (entitlement to bad debt relief where debt discharged).

Where by virtue of the claimant's having exercised an option under an order made under the Value Added Tax Act 1994 s 50A (as added) (margin schemes: see PARA 202 ante) the VAT chargeable on the relevant supply is charged by reference to the profit margin (Value Added Tax Regulations 1995, SI 1995/2518, reg 172A(1) (regs 172A, 172B added by SI 1997/1086)), and where by virtue of an order under the Value Added Tax Act 1994 s 53 (see PARA 214 ante) the value of the relevant supply falls to be determined otherwise than in accordance with s 19 (see PARA 95 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 172B(1) (as so added)), the consideration for the relevant supply which is to be taken to have been written off as a bad debt may not exceed either the profit margin (in a case where no payment has been received in relation to the relevant supply (Value Added Tax Regulations 1995, SI 1995/2518, regs 172A(2), (3)(a)(i), 172B(3)(a)(i) (as so added)) or the total of such payments as have been received does not exceed the consideration for the relevant supply less the profit margin (or, in the case of tour operators, does not exceed the consideration for the relevant supply less the sum of the value of the relevant supply and the VAT chargeable on that supply) ('the non-profit element') (regs 172A(3)(a)(ii), (4), 172B(3)(a)(ii), (4) (as so added))) or, where the total of such payments as have been received exceeds the non-profit element, the amount (if any) by which the consideration for the relevant supply exceeds that total (regs 172A(3)(b), 172B(3)(b) (as so added)).

13    le received either by the claimant or by a person to whom has been assigned a right to receive the whole or any part of the consideration written off: Value Added Tax Act 1994 s 36(3) (substituted by the Finance Act 1999 s 15(1)).

14    Value Added Tax Act 1994 s 36(3)(a) (as substituted: see note 13 supra).

15    Ibid s 36(3)(b) (as substituted: see note 13 supra). Where, due to errors of the Commissioners, the trader was obliged to issue 'VAT only' invoices, the outstanding amount was held to be equal to the value of the invoices: *Palmer (t/a R & K Engineering) v Customs and Excise Comrs* (1994) VAT Decision 11739, [1994] STI 540.

16    Value Added Tax Act 1994 s 36(5)(a). See the Value Added Tax Regulations 1995, SI 1995/2518, reg 165A (as added), reg 166 (as amended), reg 166A (as added and amended); and the text and notes 10-11 supra.

17    For the meaning of 'document' see PARA 17 note 9 ante.

18    Value Added Tax Act 1994 s 36(5)(b). Save as the Commissioners may otherwise allow, before he makes a claim the claimant must hold in respect of each relevant supply:

- 111   (1)   either a copy of any VAT invoice which was provided in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, Pt III (regs 13-20) (as amended) (see PARA 278 et seq ante) (reg 167(a)(i)) or, where there was no obligation to provide a VAT invoice, a document which shows the time, nature and purchaser of the relevant goods and services, and the consideration for them (reg 167(a)(ii));
- 112   (2)   records or other documents showing that he has accounted for and paid the VAT on them (reg 167(b)); and
- 113   (3)   records or other documents showing that the consideration has been written off in his accounts as a bad debt (reg 167(c)).

Save as the Commissioners may otherwise allow, the claimant must preserve the documents, invoices and records which he holds in accordance with regs 167, 168 (as amended) (see note 19 infra) for a period of four years from the date of the making of the claim (reg 169(1)) and upon demand made by an authorised person must produce or cause to be produced any such documents, invoices and records for inspection by the authorised person and permit him to remove them at a reasonable time and for a reasonable period (reg 169(2)). For the meaning of 'authorised person' see PARA 91 note 6 ante.

Where a claim for a refund of VAT has been made in respect of a relevant supply made before 1 January 2003 (regs 172ZC, 172C, 172D(1)(a) (reg 172ZC added by SI 2002/3027; Value Added Tax Regulations 1995, SI 1995/2518, regs 172C-172E added by SI 1997/1086)) and the purchaser has claimed deduction of the whole or part of the VAT on the relevant supply as input tax ('the deduction') (Value Added Tax Regulations 1995, SI 1995/2518, reg 172D(1)(b) (as so added)), the purchaser must make in the VAT allowable portion of that part of his VAT account which relates to the prescribed accounting period of his in which the claim has been made a negative entry (reg 172D(2) (as so added)) of such amount as is found by multiplying the amount of the deduction by a fraction of which the numerator is the amount of the claim and the denominator is the total VAT chargeable on the relevant supply (reg 172D(3) (as so added)). Where the purchaser has made such an entry ('the input tax repayment') (reg 172E(1)(a) (as so added)), has made the return for the prescribed accounting period concerned and paid any VAT payable by him in respect of that period (reg 172E(1)(b) (as so added)), and has made a repayment in accordance with reg 171 (as amended) (see notes 20, 22 infra) in relation to the claim concerned (reg 172E(1)(c) (as so added)), he must make in the VAT allowable portion of that part of his VAT account which relates to the prescribed accounting period of his in which the repayment has been made a

positive entry (reg 172E(2) (as so added)) of such amount as is found by multiplying the amount of the input tax repayment by a fraction of which the numerator is the amount repaid by the claimant and the denominator is the total amount of the claim (reg 172E(3) (as so added)). None of these circumstances are to be regarded as giving rise to any application of regs 34, 35 (reg 34 as amended) (see PARA 276 ante): regs 172D(4), 172E(4) (as so added).

19 Value Added Tax Act 1994 s 36(5)(c) (amended by the Finance Act 1998 s 23(4)(a)). Any person who makes a claim to the Commissioners must keep a record of that claim: Value Added Tax Regulations 1995, SI 1995/2518, reg 168(1). Save as the Commissioners may otherwise allow, the record must consist of the following information in respect of each claim made:

- 114 (1) in respect of each relevant supply for that claim: (a) the amount of VAT chargeable (reg 168(2)(a)(i)); (b) the prescribed accounting period in which the VAT chargeable was accounted for and paid to the Commissioners (reg 168(2)(a)(ii)); (c) the date and number of any invoice issued in relation to the supply or, where there is no such invoice, such information as is necessary to identify the time, nature and purchaser of it (reg 168(2)(a)(iii)); and (d) any payment received for it (reg 168(2)(a)(iv));
- 115 (2) the outstanding amount to which the claim relates (reg 168(2)(b));
- 116 (3) the amount of the claim (reg 168(2)(c));
- 117 (4) the prescribed accounting period in which the claim was made (reg 168(2)(d) (reg 168(2)(d), (e) added by SI 1997/1086)); and
- 118 (5) a copy of the notice required to be given in accordance with the Value Added Tax Regulations 1995, SI 1995/2518, reg 166A (as added and amended) (see note 11 supra) (reg 168(2)(e) (as so added)).

Any records created in pursuance of these provisions must be kept in a single account to be known as the 'refunds for bad debts account': reg 168(3). 'Payment' means any payment or part payment which is made by any person by way of consideration for a supply regardless of whether such payment extinguishes the purchaser's debt to the claimant or not: reg 165 (amended by SI 1999/3029). For the meaning of 'prescribed accounting period' see PARA 115 note 15 ante; and for the meaning of 'invoice' see PARA 17 note 9 ante. As to the preservation, production etc of records and documents see note 18 supra.

20 Value Added Tax Act 1994 s 36(5)(d). Save as the Commissioners may otherwise allow, where the claimant fails to comply with the requirements of the Value Added Tax Regulations 1995, SI 1995/2518, reg 167 (see note 18 supra), reg 168 (as amended) (see note 19 supra), reg 169 (see note 18 supra), reg 170 (see note 21 infra) or reg 170A (as added) (see note 21 infra), he must repay to them the amount of the refund obtained by the claim to which the failure to comply relates; and he must repay the money by including that amount in the box opposite the legend 'VAT due in this period on sales and other outputs' on his return for the prescribed accounting period which the Commissioners designate for that purpose: reg 171(3) (amended by SI 2002/3027). If, at the time the claimant is required to repay any amount, he is no longer required to make returns to the Commissioners, he must repay that amount to them at such time and in such form and manner as they may direct: reg 171(4).

21 Where the claimant made more than one supply, whether taxable or otherwise, to the purchaser (ibid reg 170(1)(a)) and a payment is received in relation to those supplies (reg 170(1)(b)), the payment must be attributed to the supply which is the earliest in time and, if not wholly attributed to that supply, thereafter to supplies in the order of the dates on which they were made, except that such attribution must not be made to any supply if the payment was allocated to that supply by the purchaser at the time of payment and the consideration for that supply was paid in full (reg 170(2)). Where in such circumstances either the earliest supply and other supplies to which the whole of the payment could be attributed under this rule occur on one day (reg 170(3)(a)) or the supplies to which the balance of the payment could be attributed thereunder occur on one day (reg 170(3)(b)), the payment must be attributed to those supplies by multiplying, for each supply, the payment received by a fraction of which the numerator is the outstanding consideration for that supply and the denominator is the total outstanding consideration for those supplies (reg 170(3)). This is subject to reg 170A (as added), which provides that where the claimant made a supply of goods and, in connection with that supply, a supply of credit (Value Added Tax Regulations 1995, SI 1995/2518, reg 170A(1)(a) (reg 170A added by SI 2002/3027)), those supplies were made under a hire purchase, conditional sale or credit sale agreement (Value Added Tax Regulations 1995, SI 1995/2518, reg 170A(1)(b) (as so added)), and a payment is received in relation to those supplies (other than a payment of an amount upon which interest is not charged) (reg 170A(1)(c) (as so added)), the payment must be attributed: (1) as to the amount obtained by multiplying it by the fraction



$$\frac{A}{B}$$

(where *A* is the total of the interest on the credit provided under the agreement under which the supplies are made (determined as at the date of the making of the agreement) and *B* is the total amount payable under the agreement, less any amount upon which interest is not charged), to the supply of credit (reg 170A(2)(a) (as so added)); and (2) as to the balance, to the supply of goods (reg 170A(2)(b) (as so added)). Where an agreement provides for variation of the rate of interest after the date of the making of the agreement then, for the purposes of the calculation described above, it is assumed that the rate is not varied: reg 170A(3) (as so added). For bad debt relief on goods supplied on hire purchase or conditional sale see Customs and Excise Business Brief 19/01 [2001] STI 1693. As to hire purchase and conditional sale and credit agreements generally see CONSUMER CREDIT.

22 Value Added Tax Act 1994 s 36(5)(e) (amended by the Finance Act 1999 s 15(2)). Where a claimant has received a refund upon a claim (Value Added Tax Regulations 1995, SI 1995/2518, reg 171(1)(a)) and either a payment for the relevant supply is subsequently received (reg 171(1)(b)(i)) or a payment is, by virtue of reg 170 (as amended) or reg 170A (as added) (see note 21 *supra*), treated as attributed to the relevant supply (reg 171(1)(b)(ii) (amended by SI 2002/3027)), he must repay to the Commissioners such an amount as equals the amount of the refund or the balance of it, multiplied by a fraction of which the numerator is the amount so received or attributed and the denominator is the amount of the outstanding consideration (Value Added Tax Regulations 1995, SI 1995/2518, reg 171(1)). For these purposes, a reference to 'payment' does not include a reference to a payment received by a person to whom a right to receive it has been assigned (reg 171(5) (added by SI 1999/3029; and amended by SI 2003/3220)) unless the person to whom the right to receive a payment has been assigned (whether by the claimant or any other person) is connected to the claimant (as determined in accordance with the Income and Corporation Taxes Act 1988 s 839 (as amended): see INCOME TAXATION vol 23(2) (Reissue) PARA 1258) (Value Added Tax Regulations 1995, SI 1995/2518, reg 171(6)-(8) (added by SI 2003/3220)). The claimant must repay the Commissioners by including the appropriate amount in the box opposite the legend 'VAT due in this period on sales and other outputs' on his return for the prescribed accounting period in which the payment is received: Value Added Tax Regulations 1995, SI 1995/2518, reg 171(2). As to the method of payment where he is no longer required to make returns see reg 171(4); and note 20 *supra*.

23 Value Added Tax Act 1994 s 36(5)(f). The provisions which may be so included in regulations may include rules for ascertaining: (1) whether, when and to what extent consideration is to be taken to have been written off in accounts as a bad debt (see s 36(6)(a); and note 12 *supra*); (2) whether anything received is to be taken as received by way of consideration for a particular supply (see s 36(6)(b) (s 36(6)(b), (c), (7) amended by the Finance Act 1998 s 23(5), (6)); and (3) whether, and to what extent, anything received is to be taken as received by way of consideration written off in accounts as a bad debt (Value Added Tax Act 1994 s 36(6)(c) (as so amended)). Regulations may also include rules dealing with particular cases, such as those involving receipt of part of the consideration or mutual debts; and in particular such rules may vary the way in which the outstanding amount mentioned in s 36(2) (see the text and note 11 *supra*) and the amount of any repayment where a refund has been allowed under s 36 (as amended) are calculated: s 36(7) (as so amended).

24 *Ibid* s 36(5)(g). For the disallowance of input tax on unpaid debts see PARA 219 *ante*.

## UPDATE

### 307 Bad debt relief

NOTES 1-11--See *Times Right Marketing Ltd (in liquidation) v Revenue and Customs Comrs* (2008) VAT Decision 20611; [2008] SWTI 1263 (appellant, who had paid none of net input tax to HM Revenue and Customs, entitled to choose individual supplies to make up amount it claimed to have paid and also to treat proportion of bad debts as having been paid); and HM Revenue and Customs Business Brief 18/2009.

NOTE 10--The time limit is extended to four years and six months: SI 1995/2518 reg 165A(1) (amended by SI 2009/586). A person is regarded for the purposes of SI 1995/2518 regs 165A-172B as having ceased to be entitled to a refund where the date mentioned in reg 165A(1)(a) or (b), whichever is the later, is on or before 30 September 2005: reg 165A(4) (added by SI 2009/586).

NOTE 11--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (see PARA 2).

NOTE 21--See *Abbey National plc v Customs and Excise Comrs* [2005] EWHC 1187 (Ch), [2006] STC 1 (internal accounting arrangements cannot override SI 1995/2518 reg 170(2) but taxpayer is entitled to insist that it be strictly applied).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/308. Repayment of value added tax to Community traders.

### **308. Repayment of value added tax to Community traders.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may provide, by means of a scheme embodied in regulations<sup>2</sup>, for the repayment to persons carrying on business<sup>3</sup> in another member state<sup>4</sup> of value added tax on supplies to them in the United Kingdom or on the importation of goods by them from places outside the member states<sup>5</sup> which would be input tax<sup>6</sup> if they were taxable persons<sup>7</sup> in the United Kingdom<sup>8</sup>. The relief is not available to persons carrying on business in the United Kingdom<sup>9</sup>.

Repayment must be made in such cases only, and subject to such conditions<sup>10</sup>, as the scheme may prescribe<sup>11</sup>. The scheme may provide:

- 979 (1) for claims and repayments to be made only through agents in the United Kingdom<sup>12</sup>;
- 980 (2) either generally or for specified purposes for the agents to be treated as if they were taxable persons<sup>13</sup> and for treating claims as if they were returns<sup>14</sup> and repayments as if they were repayments of input tax<sup>15</sup>; and
- 981 (3) for generally regulating the methods by which the amount of any repayment is to be determined and the repayment is to be made<sup>16</sup>.

A person to whom the scheme applies is entitled<sup>17</sup> to be repaid VAT charged on goods imported by him from a place outside the member states in respect of which no other relief is available or on supplies made to him in the United Kingdom if that VAT would be input tax of his were he a taxable person in the United Kingdom<sup>18</sup>. The scheme applies to any supply of goods or services made in the United Kingdom or to any importation of goods from a place outside the member states but does not apply to:

- 982 (a) a supply or importation of goods or a supply of services which the claimant has used or intends to use for the purpose of any supply by him in the United Kingdom<sup>19</sup>; or
- 983 (b) a supply or importation of goods which the claimant has removed or intends to remove to another member state, or which he has exported or intends to export to a place outside the member states<sup>20</sup>.

VAT charged on a supply which, if made to a taxable person, would be excluded from any credit for input tax<sup>21</sup> is not, however, to be repaid under the scheme<sup>22</sup>; nor is VAT charged on a supply to a travel agent<sup>23</sup> which is for the direct benefit of a traveller other than the travel agent or his employee<sup>24</sup>. No claim may be made for less than £16<sup>25</sup>; and no claim may be made for less than £130 in respect of VAT charged on supplies or on importations from a place outside the member states made during a period of less than one calendar year, except where that period represents the final part of a calendar year<sup>26</sup>. An appeal lies to a VAT and duties tribunal against a decision as to the amount of a repayment to which a person is entitled<sup>27</sup>.

If any claimant furnishes or sends to the Commissioners for the purposes of the scheme a document which is false, or which has been altered after issue to that person, the Commissioners may refuse to repay any VAT claimed by that claimant for the period of two years from the date when the relevant claim was made<sup>28</sup>; and if a sum has been repaid to a

claimant as a result of an incorrect claim, the amount of any subsequent repayment to that claimant may be reduced by that sum<sup>29</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 The scheme for Community traders is contained in the Value Added Tax Regulations 1995, SI 1995/2518, Pt XX (regs 173-184) (as amended): see notes 4-29 infra. As to the power to make regulations generally see PARA 14 ante.

3 For the meaning of 'business' see PARA 23 ante.

4 For the meaning of 'another member state' see PARA 4 note 15 ante. The Value Added Tax Regulations 1995, SI 1995/2518, Pt XX (as amended) applies to a person carrying on a business in a member state other than the United Kingdom but does not apply to such a person in any period referred to in reg 179 (see the text and notes 11, 25, 26 infra) if during that period: (1) he was established in the United Kingdom (reg 175(a)); or (2) he made supplies in the United Kingdom of goods or services other than transport of freight outside the United Kingdom or to or from a place outside the United Kingdom or services ancillary thereto (reg 175(b)(i)), services where the VAT on the supply is payable solely by the person to whom the services are supplied in accordance with the provisions of the Value Added Tax Act 1994 s 8 (as amended) (the reverse charge: see PARA 33 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 175(b)(ii)), or goods where the VAT on the supply is payable solely by the person to whom they are supplied as provided for in the Value Added Tax Act 1994 s 9A (as added) (reverse charge on gas and electricity supplied by persons outside the United Kingdom: see PARA 33 ante) or s 14 (acquisitions from other member states: see PARAS 22, 47 ante) (Value Added Tax Regulations 1995, SI 1995/2518, reg 175(c) (amended by SI 2004/3140)). A person is treated as being established in a country for these purposes if either he has there an establishment from which business transactions are effected (Value Added Tax Regulations 1995, SI 1995/2518, reg 173(2)(a)) or he has no such establishment, there or elsewhere, but his usual place of residence is there (reg 173(2)(b)). A person carrying on business through a branch or agency in any country is treated as having there an establishment from which business transactions are effected (reg 173(3)(a)); and 'usual place of residence' in relation to a body corporate, means the place where it is legally constituted (reg 173(3)(b)). For the meaning of 'supply' see PARA 27 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

5 As to the importation of goods from a place outside the member states see PARA 113 note 2 ante.

6 For the meaning of 'input tax' see PARAS 4, 215 ante.

7 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

8 Value Added Tax Act 1994 s 39(1), (2)(a). This power to provide for the repayment to such persons of VAT which would be input tax if they were taxable persons in the United Kingdom includes power to provide for the payment to such persons of sums equal to amounts which, if they were taxable persons in the United Kingdom, would be input tax by virtue of regulations under s 54 (flat-rate scheme for farmers: see PARA 88 et seq ante); and references in s 39, or in any other enactment, to a repayment of VAT are to be construed accordingly: s 54(5).

9 Ibid s 39(2).

10 The conditions specified in the regulations or imposed by the Commissioners either generally or in particular cases: *ibid* s 39(3).

11 *Ibid* s 39(3). A person claiming a repayment of VAT under the Value Added Tax Regulations 1995, SI 1995/2518, Pt XX (as amended) must: (1) complete in the English language and send to the Commissioners either the prescribed form or a form designed for the purpose by any official authority, containing full information in respect of all the matters specified in the form and a declaration as set out in it (reg 178(1)(a)); (2) at the same time furnish a certificate of status issued by the official authority of the member state in which the claimant is established, either on the prescribed form or on the form designed by the official authority for the purpose (reg 178(1)(b)(i)) and such documentary evidence of an entitlement to deduct VAT as may be required of a taxable person claiming a deduction of input tax in accordance with the provisions of reg 29 (as amended) (see PARA 274 ante) (reg 178(1)(b)(ii)), although the Commissioners must refuse to accept any such document if it bears an official stamp indicating that it had been furnished in support of an earlier claim (reg 178(3)). Where the Commissioners are in possession of a certificate of status issued not more than 12 months before the date of the claim, the claimant is not required to furnish a further certificate: reg 178(2). For the prescribed forms for these purposes see reg 178(1), Sch 1, Forms 15, 16. 'Official authority' means the authority in a member state designated to issue the certificate referred to in reg 178(1)(b)(i); and 'claimant' means a person making a claim under Pt XX (as amended) or a person on whose behalf such a claim is made: reg 173(1). For the meaning of 'document' see PARA 17 note 9 ante.

The claim for repayment must be made not later than six months after the end of the calendar year in which the VAT was charged, and must be in respect of VAT charged on supplies or on importations from a place outside the member states made during a period of not less than three months and not more than one calendar year, provided that a claim may be in respect of VAT charged on supplies or on importations from a place outside the member states made during a period of less than three months where that period represents the final part of a calendar year: reg 179(1). 'Calendar year' means the period of 12 months beginning with the first day of January in any year: reg 173(1).

12 Value Added Tax Act 1994 s 39(3)(a).

13 Ibid s 39(3)(b)(i).

14 For the meaning of 'return' see PARA 115 note 13 ante. For the purposes of ibid s 73 (as amended) (see PARAS 294, 299 ante), any claim made under the Value Added Tax Regulations 1995, SI 1995/2518, Pt XX (as amended) is treated as a return required under the Value Added Tax Act 1994 Sch 11 para 2 (as amended) (see PARA 245 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 181.

15 Value Added Tax Act 1994 s 39(3)(b)(ii). For the purposes of s 83(c) (appeals: see the text and note 27 infra; and PARA 346 post), repayments claimed under the Value Added Tax Regulations 1995, SI 1995/2518, Pt XX (as amended) are treated as the amount of any input tax which may be credited to a person: reg 182.

16 Value Added Tax Act 1994 s 39(3)(c). Where any repayment is to be made to a claimant in the country in which he is established, the Commissioners may reduce the amount of the repayment by the amount of any bank charges or costs incurred as a result of it: Value Added Tax Regulations 1995, SI 1995/2518, reg 180.

17 Ie subject to the other provisions of ibid Pt XX (as amended).

18 Ibid reg 174.

19 Ibid reg 176(a).

20 Ibid reg 176(b).

21 Ie under the Value Added Tax Act 1994 s 25: see PARA 216 ante.

22 Value Added Tax Regulations 1995, SI 1995/2518, reg 177(1)(a).

23 'Travel agent' includes a tour operator and any person who purchases and supplies services of a kind enjoyed by travellers: ibid reg 177(2).

24 Ibid reg 177(1)(b).

25 Ibid reg 179(2).

26 Ibid reg 179(3).

27 See the Value Added Tax Act 1994 s 83(c) (applied by the Value Added Tax Regulations 1995, SI 1995/2518, reg 182 (see note 15 supra)); and PARA 346 post.

28 Ibid reg 183.

29 Ibid reg 184.

## UPDATE

### 308 Repayment of value added tax to Community traders

TEXT AND NOTES--In accordance with EC Council Directive 79/1072 arts 2 and 5, where a taxpayer is established in a member state other than the member state in which the services were received, VAT that was invoiced in error and paid by the taxpayer to the tax authorities of the member state where the services were received is not refundable: Case C-35/05 *Reemtsma Cigarettenfabriken GmbH v Ministero Delle Finanze* [2007] 2 CMLR 874, ECJ. Directive 79/1072 replaced in relation to refund applications submitted from 1 January 2010: EC Council Directive 2008/9 (OJ L44, 20.2.2008, p23).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/309. Repayment of value added tax to third country traders.

### **309. Repayment of value added tax to third country traders.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may provide, by means of a scheme embodied in regulations<sup>2</sup>, for the repayment to persons carrying on business<sup>3</sup> in countries other than the member states<sup>4</sup> of value added tax on supplies to them in the United Kingdom or on the importation of goods by them from places outside the member states<sup>5</sup> which would be input tax<sup>6</sup> if they were taxable persons in the United Kingdom<sup>7</sup>. The relief is not available to persons carrying on business in the United Kingdom<sup>8</sup>.

Repayment must be made in such cases only, and subject to such conditions<sup>9</sup>, as the scheme may prescribe<sup>10</sup>.

A person to whom the scheme applies is entitled<sup>11</sup> to be repaid VAT charged on goods imported by him into the United Kingdom in respect of which no other relief is available or on supplies made to him in the United Kingdom if that VAT would be input tax of his were he a taxable person in the United Kingdom<sup>12</sup>. The scheme applies to any supply of goods or services made in the United Kingdom or to any importation of goods into the United Kingdom but does not apply to any supply or importation which:

- 984 (1) the trader has used or intends to use for the purpose of any supply by him in the United Kingdom<sup>13</sup>; or
- 985 (2) has been exported or is intended for exportation from the United Kingdom by or on behalf of the trader<sup>14</sup>.

VAT charged on a supply which, if made to a taxable person, would be excluded from any credit for input tax<sup>15</sup> is not, however, to be repaid under the scheme<sup>16</sup>; nor is VAT charged on a supply to a travel agent<sup>17</sup> which is for the direct benefit of a traveller other than the travel agent or his employee to be repaid<sup>18</sup>; nor is VAT charged on a supply used or to be used in making exempt supplies of certain insurance or financial services to persons belonging outside the member states which are directly linked to the export of goods to a place outside the member states to be repaid<sup>19</sup>. No claim may be made for less than £16<sup>20</sup>; and no claim may be made for less than £130 in respect of VAT charged on supplies or on importations made during a period of less than the prescribed year, except where that period represents the final part of the prescribed year<sup>21</sup>. An appeal lies to a VAT and duties tribunal against a decision as to the amount of a repayment to which a person is entitled<sup>22</sup>.

If any claimant furnishes or sends to the Commissioners for the purposes of the scheme a document which is false, or which has been altered after issue to that person, the Commissioners may refuse to repay any VAT claimed by that claimant for the period of two years from the date when the relevant claim was made<sup>23</sup>; and if a sum has been repaid to a claimant as a result of an incorrect claim, the amount of any subsequent repayment to that claimant may be reduced by that sum<sup>24</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 The scheme for third country traders is contained in the Value Added Tax Regulations 1995, SI 1995/2518, Pt XXI (regs 185-197) (as amended). As to the power to make regulations generally see PARA 14 ante.

3 For the meaning of 'business' see PARA 23 ante.

4    le if, pursuant to any Community directive, rules are adopted by the EU Council about refunds of VAT to persons established elsewhere than in the member states: see the Value Added Tax Act 1994 s 39(2)(b). For the meaning of 'another member state' see PARA 4 note 15 ante; and as to the territories treated as included in, or excluded from, the territory of the member states for VAT purposes see PARA 16 ante.

The Value Added Tax Regulations 1995, SI 1995/2518, Pt XXI (as amended) applies to any trader, but not if during any period determined under reg 192 (see note 10 infra): (1) he was established in any of the member states (reg 188(2)(a)); or (2) he made supplies in the United Kingdom of goods or services other than transport of freight outside the United Kingdom or to or from a place outside the United Kingdom or services ancillary thereto (reg 188(2)(b)(i)), services where the VAT on the supply is payable solely by the person to whom the services are supplied in accordance with the provisions of the Value Added Tax Act 1004 s 8 (as amended) (the reverse charge: see PARA 33 ante) (reg 188(2)(b)(ii)), or goods where the VAT on the supply is payable solely by the person to whom they are supplied (reg 188(2)(b)(iii)). A person is treated as being established in a country for these purposes if either he has there a business establishment (reg 185(2)(a)) or he has no such establishment, there or elsewhere, but his usual place of residence is there (reg 185(2)(b)). A person carrying on business through a branch or agency in any country is treated as being established there (reg 185(3)(a)) and where the person is a body corporate its usual place of residence is the place where it is legally constituted (reg 185(3)(b)). 'Trader' means a person carrying on a business who is established in a third country and who is not a taxable person in the United Kingdom; and 'third country' means a country other than those comprising the member states of the European Community: reg 185(1). For the meaning of 'supply' see PARA 27 ante; and for the meaning of 'taxable person' see PARAS 18 note 4, 63 ante. As to the meaning of 'United Kingdom' see PARA 4 note 3 ante.

5    As to the importation of goods from a place outside the member states see PARA 113 note 2 ante.

6    For the meaning of 'input tax' see PARAS 4, 215 ante.

7    Value Added Tax Act 1994 s 39(1), (2)(b). See also s 54(5); and PARA 308 note 8 ante.

8    Ibid s 39(2).

9    le conditions specified in the regulations or imposed by the Commissioners either generally or in particular cases: ibid s 39(3).

10   Ibid s 39(3). As to the matters for which the scheme may provide see s 39(3)(a)-(c); and PARA 308 ante.

A person claiming a repayment of VAT under the Value Added Tax Regulations 1995, SI 1995/2518, Pt XXI (as amended) must: (1) complete in the English language and send to the Commissioners either the prescribed form or a like form produced by any official authority, containing full information in respect of all the matters specified in the form and a declaration as set out in it (reg 191(1)(a)); (2) at the same time furnish a certificate of status issued by the official authority of the third country in which the trader is established, either on the prescribed form or on a like form produced by the official authority (reg 191(1)(b)(i)), and such documentary evidence of an entitlement to deduct input tax as may be required of a taxable person claiming a deduction of input tax in accordance with the provisions of reg 29 (as amended) (see PARA 274 ante) (reg 191(1)(b)(ii)). Where the Commissioners are in possession of a certificate of status issued not more than 12 months before the date of the claim, the claimant is not required to furnish a further certificate: reg 191(2). The Commissioners must refuse to accept any document referred to in reg 191(1)(b)(ii) if it bears an official stamp indicating that it had been furnished in support of an earlier claim: reg 191(3). For the prescribed forms for the purposes of heads (1)-(2) supra see reg 191(1), Sch 1, Forms 9, 10. For the meaning of 'document' see PARA 17 note 9 ante. 'Official authority' means any government body or agency in any country which is recognised by the Commissioners as having authority to act for these purposes; and 'claimant' means a person making a claim under Pt XXI (as amended) or a person on whose behalf a claim is made and any agent acting on his behalf as his VAT representative: reg 185(1). As a condition of allowing a repayment, the Commissioners may require to appoint a VAT representative to act on his behalf: reg 187. For these purposes, 'VAT representative' means any person established in the United Kingdom and registered for VAT purposes in accordance with the provisions of the Value Added Tax Act 1994 s 3(2), Sch 1 (as amended) (see PARA 64 et seq ante) who acts as agent on behalf of a claimant: Value Added Tax Regulations 1995, SI 1995/2518, reg 185(1). As to VAT representatives generally see PARA 71 ante.

A claim must be made not later than six months after the end of the prescribed year in which the VAT was charged, and must be in respect of VAT charged on supplies or on importations made during a period of not less than three months and not more than 12 months, provided that a claim may be in respect of VAT charged on supplies or on importations made during a period of less than three months where that period represents the final part of the prescribed year: reg 192(1). 'Prescribed year' means the period of 12 months beginning on the first day of July in any year: reg 185(1).

11   le subject to the other provisions of ibid Pt XXI (as amended).



- 12 Ibid reg 186. Save as the Commissioners may otherwise allow, however, a trader to whom Pt XXI (as amended) applies who is established in a third country having a comparable system of turnover taxes is not entitled to any refunds under Pt XXI (as amended) unless that country provides reciprocal arrangements for refunds to be made to taxable persons who are established in the United Kingdom: reg 188(1).
- 13 Ibid reg 189(a).
- 14 Ibid reg 189(b).
- 15 Ie under the Value Added Tax Act 1994 s 25: see PARA 216 ante.
- 16 Value Added Tax Regulations 1995, SI 1995/2518, reg 190(1)(a).
- 17 'Travel agent' includes a tour operator and any person who purchases and supplies services of a kind enjoyed by travellers: ibid reg 190(2).
- 18 Ibid reg 190(1)(b).
- 19 Ibid reg 190(1)(c) (added by SI 2004/3140). The supplies referred to in the text are those of a description falling within the Value Added Tax (Input Tax) (Specified Supplies) Order 1999, SI 1999/3121, art 3 (see PARA 217 ante).
- 20 Value Added Tax Regulations 1995, SI 1995/2518, reg 192(2).
- 21 Ibid reg 192(3).
- 22 See the Value Added Tax Act 1994 s 83(c) (applied by the Value Added Tax Regulations 1995, SI 1995/2518, reg 195); and PARA 346 post. Repayments claimed under Pt XXI (as amended) are to be treated for appeal purposes as the amount of any input tax which may be credited to a person: see reg 195. Where any repayment is to be made to a claimant in the country in which he is established, the Commissioners may reduce the amount of the repayment by the amount of any bank charges or costs incurred as a result of it: reg 193. For the purposes of the Value Added Tax Act 1994 s 73 (as amended) (assessments: see PARAS 294, 299 ante), any claim made under the Value Added Tax Regulations 1995, SI 1995/2518, Pt XXI (as amended) is treated as a return required under the Value Added Tax Act 1994 s 58, Sch 11 para 2 (as amended) (see PARA 245 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 194.
- 23 See ibid reg 196.
- 24 Ibid reg 197.

## UPDATE

### 309 Repayment of value added tax to third country traders

TEXT AND NOTES 9, 10--Repayment must now be made in such cases only and to such extent only, and subject to such conditions, as the scheme may prescribe: Value Added Tax Act 1994 s 39(3) (amended by Finance Act 2009 s 77(2)). The scheme may provide either generally or for specified purposes (1) for the agents to be treated under the Value Added Tax Act 1994 in respect of such period as may be prescribed and repayments as if they were repayments of input tax: s 39(3)(b); (2) for and in connection with the payment of interest to or by the Commissioners (including in relation to the payment of interest wrongly paid; and (3) for generally regulating the regime by which and manner in which, claims must be made: s 39(3)(ba), (c) (s 39(3)(ba) added, s 39(3)(c) amended, by Finance Act 2009 s 77(2)). The Commissioners must make arrangements for dealing with applications made to them by taxable persons, in accordance with EC Council Directive 2008/9, for the forwarding to the tax authorities of another member state of claims for refund of VAT on supplies to them in that member state, or the importation of goods by them into that member state from places outside the member states: Value Added Tax Act 1994 s 39A (added by Finance Act 2009 s 77(3)). For the meaning of 'taxable person' see PARA 18 NOTE 4; and for the meaning of 'supply' see PARA 27.

NOTE 10--A claim is 'made' when it is sent to the Commissioners, not when it is received by them: *ARM Inc v HMRC Comrs* (2007) VAT Decision 20238, [2007] STI 2761.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/310. Refunds in relation to new means of transport supplied to other member states.

### **310. Refunds in relation to new means of transport supplied to other member states.**

Where a person who is not a taxable person<sup>1</sup> makes a supply<sup>2</sup> of goods, consisting in a new means of transport<sup>3</sup>, which involves the removal of the goods to another member state<sup>4</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup> must refund to him, on a claim made in that behalf, either the amount of any value added tax on the supply to him of that means of transport<sup>6</sup> or the amount of any VAT paid by him on the acquisition of that means of transport from another member state<sup>7</sup>, or on its importation from a place outside the member states<sup>8</sup>. The amount of VAT so refunded must not, however, exceed the amount that would have been payable on the supply involving the removal if it had been a taxable supply<sup>9</sup> by a taxable person and had not been a zero-rated supply<sup>10</sup>.

A claimant for a refund must make his claim in writing no earlier than one month, and no later than 14 days, prior to making the supply of the new means of transport by virtue of which the claim arises<sup>11</sup>. The claim must be made at, or sent to, any office designated by the Commissioners for the receipt of such claims<sup>12</sup>, and must contain prescribed information<sup>13</sup> and be accompanied by prescribed documents<sup>14</sup>. It must then be completed by the submission to the Commissioners of the sales invoice or similar document identifying the new means of transport and showing the price paid by the claimant's customer<sup>15</sup> and documentary evidence that the new means of transport has been removed to another member state<sup>16</sup>. The amount of any refund under these provisions is a matter on which an appeal lies to a VAT and duties tribunal<sup>17</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'supply' see PARA 27 ante.

3 For the meanings of 'means of transport' and 'new means of transport' see PARA 19 note 7 ante.

4 For the meaning of 'another member state' see PARA 4 note 15 ante.

5 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 Value Added Tax Act 1994 s 40(1)(a).

7 As to acquisition from another member state see PARA 19 note 6 ante.

8 Value Added Tax Act 1994 s 40(1)(b). As to importation from a place outside the member states see PARA 113 note 2 ante.

9 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

10 Value Added Tax Act 1994 s 40(2). The effect of this is that the claimant cannot recover the full amount of the VAT which he paid on the acquisition of the means of transport if he subsequently sells it for a smaller sum. For the meaning of 'zero-rated' see PARA 174 ante.

11 Value Added Tax Regulations 1995, SI 1995/2518, reg 149. Regulations 149, 150 (see the text and note 12 infra) are made pursuant to the Value Added Tax Act 1994 s 40(3)(a), which provides that the Commissioners are not entitled to entertain a claim for refund of VAT under these provisions unless it is made within such time, and in such form and manner, as they may by regulations prescribe. As to the power to make regulations generally see PARA 14 ante.

12 Value Added Tax Regulations 1995, SI 1995/2518, reg 150. See note 11 *supra*.

13 See the Value Added Tax Act 1994 s 40(3)(b), which provides that the Commissioners are not entitled to entertain a claim for refund of VAT under these provisions unless it contains such information as they may by regulations prescribe. The prescribed information is: (1) the name, current address and telephone number of the claimant (Value Added Tax Regulations 1995, SI 1995/2518, reg 151(a)); (2) the place where the new means of transport is kept and the times when it may be inspected (reg 151(b)); (3) the name and address of the person who supplied the new means of transport to the claimant (reg 151(c)); (4) the price paid by the claimant for the supply to him of the new means of transport excluding any VAT (reg 151(d)); (5) the amount of any VAT paid by the claimant on the supply to him of the new means of transport (reg 151(e)); (6) the amount of any VAT paid by the claimant on the acquisition of the new means of transport from another member state or on its importation from a place outside the member states (reg 151(f)); (7) the name and address of the proposed purchaser, the member state to which the new means of transport is to be removed, and the date of the proposed purchase (reg 151(g)); (8) the price to be paid by the proposed purchaser (reg 151(h)); (9) a full description of the new means of transport including, in the case of motorised land vehicles, its mileage since its first entry into service and, in the case of ships and aircraft, its hours of use since its first entry into service (reg 151(i)); (10) in the case of a ship, its length in metres (reg 151(j)); (11) in the case of an aircraft, its take-off weight in kilograms (reg 151(k)); (12) in the case of a motorised land vehicle powered by a combustion engine, its displacement or cylinder capacity in cubic centimetres, and in the case of an electrically propelled motorised land vehicle, its maximum power output in kilowatts, described to the nearest tenth of a kilowatt (reg 151(l)); and (13) the amount of the refund being claimed (reg 151(m)).

14 See the Value Added Tax Act 1994 s 40(3)(c), which provides that the Commissioners are not entitled to entertain a claim for refund of VAT under these provisions unless it is accompanied by such documents, whether by way of evidence or otherwise, as they may prescribe by regulations. For the meaning of 'document' see PARA 17 note 9 *ante*. The prescribed documents are: (1) the invoice issued by the person who supplied the new means of transport to the claimant or such other documentary evidence of purchase as is satisfactory to the Commissioners (Value Added Tax Regulations 1995, SI 1995/2518, reg 152(a)); (2) in respect of a new means of transport imported from a place outside the member states by the claimant, documentary evidence of its importation and of the VAT paid on it (reg 152(b)); and (3) in respect of a new means of transport acquired by the claimant from another member state, documentary evidence of the VAT paid on it (reg 152(c)). For the meaning of 'invoice' see PARA 17 note 9 *ante*. The claim must also include a declaration, signed by the claimant or a person authorised by him in that behalf in writing, that all the information entered in or accompanying it is true and complete: reg 153.

15 *Ibid* reg 154(a).

16 *Ibid* reg 154(b).

17 See the Value Added Tax Act 1994 s 83(j); and PARA 346 *post*.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/311. Recovery of overpaid value added tax by credit or repayment.

### **311. Recovery of overpaid value added tax by credit or repayment.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> are in general<sup>2</sup> liable to repay any amount which a person has paid<sup>3</sup> by way of value added tax for a prescribed accounting period<sup>4</sup> (whenever ended) which was not VAT due to them<sup>5</sup>; they are also liable to credit a person with any amount which in their assessing him<sup>6</sup>, or in his accounting to them<sup>7</sup>, for value added tax for a prescribed accounting period (whenever ended), they have or he has brought into account as output tax that was not output tax due<sup>8</sup>, and subsequent to such crediting to pay (or repay) to the person any amount which thereby falls to be credited to him<sup>9</sup>.

In each case the Commissioners are liable to credit or repay an amount only on a claim being made for the purpose<sup>10</sup> no more than three years after the relevant date<sup>11</sup> (in the case of a claim for credit<sup>12</sup>) or the date on which the payment was made<sup>13</sup> (in the case of a claim for repayment<sup>14</sup>), are not otherwise<sup>15</sup> liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them<sup>16</sup>, and may not be required to credit an amount if so to do would unjustly enrich the claimant<sup>17</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 No liability for repayment under the Value Added Tax Act 1994 s 80(1B) (as added) arises in respect of sums paid as a result of an amount that was not output tax due being brought into account as output tax or an amount of input tax allowable under s 26 (see PARA 217 ante) not being brought into account: s 80(1B)(a), (b) (s 80(1B) added by the Finance (No 2) Act 2005 s 3). For the meanings of 'output tax' and 'input tax' see PARAS 4, 215 ante.

3 See *R (on the application of Cardiff County Council) v Customs and Excise Comrs* [2002] EWHC 2085 (Admin), [2002] STC 1318; affd [2003] EWCA Civ 1456, [2004] STC 356 ('paid' to be given a practical and commercial meaning).

4 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

5 Value Added Tax Act 1994 s 80(1B) (as added: see note 2 supra). An appeal lies to a VAT and duties tribunal with respect to a claim for the repayment of an amount under these provisions: see s 83(t) (amended by the Finance Act 1997 s 47; and by the Finance (No 2) Act 2005 s 4). As to appeals see generally para 343 et seq post. The relevant substantive question regarding the right to repayment is whether the claimant has paid more VAT than was due, and for this reason the right to repayment is not limited to a single claim: *Hayward Gill & Associates Ltd v Customs and Excise Comrs* (1998) VAT Decision 15635, [1998] STI 1525. The making and acceptance of a claim are not final in the absence of any adjudication by some independent authority, and a taxpayer's calculation of the amount of consideration properly attributable to taxable supplies (see PARA 94 ante) is not conclusive and he is entitled to claim repayment to correct an error notwithstanding that the Commissioners have accepted the original calculation: *Hayward Gill & Associates Ltd v Customs and Excise Comrs* supra.

6 Value Added Tax Act 1994 s 80(1A)(a) (s 80(1A) added by the Finance (No 2) Act 2005 s 3).

7 Value Added Tax Act 1994 s 80(1)(a) (s 80(1) substituted by the Finance (No 2) Act 2005 s 3).

8 Value Added Tax Act 1994 s 80(1)(b) (as substituted: see note 7 supra), s 80(1A)(b) (as added: see note 6 supra). Where under these provisions an amount has been credited to a person which exceeded the amount which the Commissioners were liable at that time to credit to him the Commissioners may, to the best of their judgement, assess the excess credited to that person and notify it to him: s 80(4A) (added by the Finance Act 1997 s 47; and substituted by the Finance (No 2) Act 2005 s 3). The Value Added Tax Act 1994 s 78A(2)-(8) (as added) (see PARA 314 post) applies in the case of this assessment as it applies to an assessment under s 78A(1) (as added): s 80(4C) (added by the Finance Act 1997 s 47). An appeal lies to a VAT and duties tribunal against

an assessment under the Value Added Tax Act 1994 s 80(4A) (as added and substituted) or the amount of such an assessment: see s 83(t) (as amended: see note 5 supra).

9 Ibid s 80(2A)(a) (s 80(2A) added by the Finance (No 2) Act 2005 s 3). The amount which falls to be repayable under this provision is such of the amount credited to him by virtue of a claim under the Value Added Tax Act 1994 s 80(1) (as substituted) or s 80(1A) (as added) as remains to his credit after setting any sums against it under or by virtue of the Value Added Tax Act 1994: see s 80(2A)(a) (as so added). An appeal lies to a VAT and duties tribunal with respect to a claim for the crediting or repayment of an amount under these provisions: see s 83(t) (as amended: see note 5 supra).

10 Ibid s 80(2) (amended by the Finance (No 2) Act 2005 s 3). A claim must be made in writing to the Commissioners and must state, by reference to such documentary evidence as is in the possession of the claimant, the amount of the claim and the method by which that amount was calculated: Value Added Tax Regulations 1995, SI 1995/2518, reg 37. This provision is made under the Value Added Tax Act 1994 s 80(6), which provides that a claim must be made in such form and manner, and be supported by such documentary evidence, as the Commissioners prescribe by regulations, and that the regulations may make different provision for different cases.

11 The relevant date in the case of a claim for credit (ie a claim under ibid s 80(1) (as substituted), s 80(1A) (as added)) is the end of the prescribed accounting period for which the person has accounted or been assessed (s 80(4ZA)(a), (d) (s 80(4ZA), (4ZB) added by the Finance (No 2) Act 2005 s 3)), unless the claim was made in respect of an erroneous voluntary disclosure or in respect of an assessment issued on the basis of such a disclosure, in which case the relevant date is the end of the prescribed accounting period in which the disclosure was made (Value Added Tax Act 1994 s 80(4ZA)(b), (c) (as so added)). In the case of a person who has ceased to be registered for value added tax, any reference in s 80(4ZA)(b)-(d) (as added) to a prescribed accounting period includes a reference to a period that would have been a prescribed accounting period had the person continued to be so registered: s 80(4ZA) (as so added). As to registration see PARA 64 et seq ante. For these purposes, the cases where there is an erroneous voluntary disclosure are those cases where a person discloses to the Commissioners that he has not brought into account for a prescribed accounting period (whenever ended) an amount of output tax due for the period (s 80(4ZB)(a) (as so added)), the disclosure is made in a later prescribed accounting period (whenever ended) (s 80(4ZB)(b) (as so added)), and some or all of the amount is not output tax due (s 80(4ZB)(c) (as so added)).

12 Ibid s 80(4)(a) (s 80(4) substituted by the Finance (No 2) Act 2005 s 3).

13 Value Added Tax Act 1994 s 80(4)(ZA)(e) (as added: see note 11 supra).

14 Ibid s 80(4)(b) (as substituted: see note 12 supra).

15 Ie except as provided by ibid s 80 (as amended) (see the text and notes 1-14 supra; and PARA 312 post): s 80(7) (substituted by the Finance (No 2) Act 2005 s 3).

16 Value Added Tax Act 1994 s 80(7) (as substituted: see note 15 supra).

17 See ibid s 80(3) (as amended); and PARA 312 post. Note that the unjust enrichment provisions defence does not apply to a claim for the repayment of an amount under s 80(1B) (as added): s 80(3) (amended by the Finance (No 2) Act 2005 s 3).

## UPDATE

### 311 Recovery of overpaid value added tax by credit or repayment

NOTES 1-9--The benefit of a repayment claim is transferable: *Midlands Co-operative Society Ltd v Revenue and Customs Comrs* [2007] EWHC 1432 (Ch), [2007] STC 421.

NOTE 8--An assessment under the Value Added Tax Act 1994 s 80(4A) cannot be made more than two years after the later of (1) the end of the prescribed accounting period in which the amount was credited to the person; and (2) the time when evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment comes to the knowledge of the Commissioners: s 80(4AA) (added by Finance Act 2008 s 120(3)). Reference to Value Added Tax Act 1994 s 78(2)-(8) now to s 78(3)-(8): s 80(4C) (amended by Finance Act 2008 s 120(4)).

TEXT AND NOTES 10-17--The requirement in the Value Added Tax Act 1994 s 80(4) that a claim be made within three years of the relevant date does not apply to a claim in

respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009: s 80(4) (amended by Finance Act 2008 s 121(1), Sch 39 para 36).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/312. Restriction of overpayment credits on grounds of 'unjust enrichment'.

### **312. Restriction of overpayment credits on grounds of 'unjust enrichment'.**

In relation to a claim for the crediting of overpaid value added tax<sup>1</sup>, it is a defence that the crediting of the amount claimed would unjustly enrich<sup>2</sup> the claimant<sup>3</sup>. Two factors are to varying degrees to be disregarded in considering the matter of unjust enrichment: the extent to which the loss arising from the overcharged or overpaid amount is borne by a person other than the taxpayer<sup>4</sup>; and any reimbursement arrangements<sup>5</sup> which may have been made by the claimant<sup>6</sup>.

In the former case, it is provided that where an amount would, without the unjust enrichment provisions<sup>7</sup>, fall to be credited<sup>8</sup> to any person ('the taxpayer')<sup>9</sup>, and the whole or a part of the amount brought into account<sup>10</sup> has, for practical purposes, been borne by a person other than the taxpayer<sup>11</sup>, any loss or damage which has been or may be incurred by the taxpayer as a result of mistaken assumptions made in his case about the operation of any VAT provisions<sup>12</sup> is to a specified extent to be disregarded<sup>13</sup> in the making of any determination of whether or to what extent the crediting of an amount to the taxpayer would enrich him<sup>14</sup> or of whether or to what extent any enrichment of the taxpayer would be unjust<sup>15</sup>.

In the latter case it is provided that reimbursement arrangements made by a claimant<sup>16</sup> are to be disregarded in considering the matter of unjust enrichment except where they provide, and are supported by undertakings<sup>17</sup> to the appropriate effect, that:

- 986 (1) the reimbursement for which they provide will be completed by no later than 90 days after the crediting of the amount to which they relate<sup>18</sup>;
- 987 (2) no deduction will be made from that part (which may be the whole) of the amount of a claim which the claimant has reimbursed or intends to reimburse to consumers ('the relevant amount')<sup>19</sup> by way of fee or charge (howsoever expressed or effected)<sup>20</sup>;
- 988 (3) reimbursement will be made only in cash or by cheque<sup>21</sup>;
- 989 (4) any part of the relevant amount credited to the claimant that is not reimbursed by the time mentioned in head (1) above will be notified by the claimant to the Commissioners for Her Majesty's Revenue and Customs<sup>22</sup>;
- 990 (5) any part of the relevant amount paid (or repaid) to the claimant that is not reimbursed by the time mentioned in head (1) above will be repaid by the claimant to the Commissioners<sup>23</sup>;
- 991 (6) any interest paid by the Commissioners on any relevant amount paid (or repaid) by them will be treated by the claimant in the same way as the relevant amount falls to be treated under heads (1) and (2) above<sup>24</sup>; and
- 992 (7) specified records<sup>25</sup> will be kept by the claimant and produced by him to the Commissioners or, on notice, to one of their officers<sup>26</sup>.

1 le a claim under the Value Added Tax Act 1994 s 80(1) (as substituted) or s 80(1A) (as added) (see PARA 311 ante). Note that the unjust enrichment defence does not apply to a claim for the repayment of an amount under s 80(1B) (as added): s 80(3) (amended by the Finance (No 2) Act 2005 s 3).

2 For the meaning of 'unjust enrichment' in this context see Case 68/79 *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1980] ECR 501, [1981] 2 CMLR 714, ECJ; Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, [1985] 2 CMLR 658, ECJ; Joined Cases 331/85, 376/85, 378/85 *Les Fils de Jules Bianco SA and J Girard Fils SA v Directeur Général des Douanes et Droits Indirects* [1988] ECR 1099, [1989] 3 CMLR 36, ECJ; Case 104/86 *EC Commission v Italy* [1988] ECR 1799, [1989] 3 CMLR 25, ECJ; Case 207/87 *Weissgerber v Finanzamt Neustadt an der Weinstrasse* [1988] ECR 4433, [1991] STC 589, ECJ; *Customs*



*and Excise Comrs v McMaster Stores (Scotland) Ltd (in receivership)* [1995] STC 846; *Lamdec Ltd v Customs and Excise Comrs* [1991] VATTR 296; *Creative Facility Ltd v Customs and Excise Comrs, Oblique Press Ltd v Customs and Excise Comrs* (1993) VAT Decision 10891, [1993] STI 1276; *Computeach International Ltd v Customs and Excise Comrs* [1994] VATTR 237; *National and Provincial Building Society v Customs and Excise Comrs* [1996] V & DR 153; *Hardman v Customs and Excise Comrs* (1996) VAT Decision 14045, [1996] STI 998. See also *Woolwich Equitable Building Society v IRC* [1993] AC 70, [1992] 3 All ER 737, HL; *RIBA Publications v Customs and Excise Comrs* [1999] V & DR 230 (customs could refuse to refund money despite overpayment being due to their error and notwithstanding that a charity would have been enriched); *King (t/a The Barbury Shooting School) v Customs and Excise Comrs* (2002) VAT Decision 17822, [2003] STI 510 (taxpayers showed they had charged market rate for services, irrespective of VAT; customs' plea of unjust enrichment rejected).

3 Value Added Tax Act 1994 s 80(3) (as amended: see note 1 supra). It is for the Commissioners for Her Majesty's Revenue and Customs to establish that repayment would unjustly enrich the claimant: *Customs and Excise Comrs v National Westminster Bank plc* [2003] EWHC 1822 (Ch), [2003] STC 1072. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4 See the Value Added Tax Act 1994 s 80(3A)-(3C) (as added, substituted and amended); and the text and notes 7-15 infra.

5 'Reimbursement arrangements' means any arrangements for the purposes of a claim under ibid s 80 (as amended) (see PARA 311 ante) which are made by a claimant for the purpose of securing that he is not unjustly enriched by the crediting of any amount in pursuance of the claim and provide for the reimbursement of persons (ie consumers) who have, for practical purposes, borne the whole or any part of the original amount brought into account as output tax that was not output tax due (ie as mentioned in s 80(1)(b) (as substituted) or s 80(1A)(b) (as added) (see PARA 311 ante)): s 80A(2) (ss 80A, 80B added by the Finance Act 1997 s 46(2); and the Value Added Tax Act 1994 s 80A(2) amended by the Finance (No 2) Act 2005 s 4); Value Added Tax Regulations 1995, SI 1995/2518, reg 43A (regs 43A-43H added by SI 1998/59; the Value Added Tax Regulations 1995, SI 1995/2518, regs 43A-43C renumbered and amended by SI 1999/438; and the Value Added Tax Regulations 1995, SI 1995/2518, regs 43C(d), 43D, 43G(2)(d) substituted, and regs 43C(da), 43G(2)(da) added, by SI 2005/2231). As to the making of regulations see note 6 infra; and PARA 14 ante. For the meanings of 'output tax' and 'input tax' see PARAS 4, 215 ante.

6 See the Value Added Tax Act 1994 ss 80A, 80B (as added and amended); the Value Added Tax Regulations 1995, SI 1995/2518, Pt VA (regs 43A-43H) (as added and amended); and the text and notes 18-26 infra. Regulations under the Value Added Tax Act 1994 s 80A (as added and amended) may contain any such incidental, supplementary, consequential or transitional provision as appears to the Commissioners to be necessary or expedient (s 80A(6)(a) (as added: see note 5 supra)), may make different provision for different circumstances (s 80A(6)(b) (as so added)), and may have effect (irrespective of when the claim for credit was made) for the purposes of the crediting of any amount by the Commissioners after the time when the regulations are made; and, accordingly, they may apply to arrangements made before that time (s 80A(7) (as so added; and amended by the Finance (No 2) Act 2005 s 4)).

7 Ie apart from the Value Added Tax Act 1994 s 80(3) (as amended) (see the text and notes 1-3 supra).

8 Ie under ibid s 80(1) (as substituted) or s 80(1A) (as added) (see PARA 311 ante).

9 Ibid s 80(3A)(a) (s 80(3A) added by the Finance Act 1997 s 47; and substituted by the Finance (No 2) Act 2005 s 3).

10 Ie as mentioned in the Value Added Tax Act 1994 s 80(1)(b) (as substituted) or s 80(1A)(b) (as added) (see PARA 311 ante).

11 Ibid s 80(3A)(b) (as added and substituted: see note 9 supra).

12 'VAT provisions' means the provisions of any enactment, subordinate legislation or Community legislation (whether or not still in force) which relates to VAT or to any matter connected with VAT or any notice published by the Commissioners for Her Majesty's Revenue and Customs under or for the purposes of any such enactment or subordinate legislation: ibid s 80(3C) (added by the Finance Act 1997 s 47).

13 Ie it is disregarded except to the extent of the amount (if any) which is shown by the taxpayer to constitute the amount that would appropriately compensate him for loss or damage shown by him to have resulted, for any business carried on by him, from the making of the mistaken assumptions ('the quantified amount'): Value Added Tax Act 1994 s 80(3C) (as added: see note 12 supra). For the meaning of 'business' see PARA 23 ante.

14 Ibid s 80(3B)(a) (s 80(3B) added by the Finance Act 1997 s 47; and the Value Added Tax Act 1994 s 80(3B)(a) amended by the Finance (No 2) Act 2005 s 3).

15 Value Added Tax Act 1994 s 80(3B)(b) (as added: see note 14 supra).

16 Ie a claimant under *ibid* s 80 (as amended) (see PARA 311 ante).

17 The undertakings must be in writing, signed and dated by the claimant (Value Added Tax Regulations 1995, SI 1995/2518, reg 43G(2) (as added and amended: see note 5 supra)) and given to the Commissioners by the claimant no later than the time at which he makes the claim for which the reimbursement arrangements have been made (reg 43G(1) (as so added)). These requirements are imposed pursuant to the Value Added Tax Act 1994 s 80A(5) (as added: see note 5 supra), which provides that regulations may make provision for the form and manner in which, and the times at which, undertakings are to be given to the Commissioners in accordance with the regulations; and that any such provision may allow for those matters to be determined by the Commissioners in accordance with the regulations. The claimant is also required to undertake that at the date of the undertakings he is able to identify the names and addresses of those consumers whom he has reimbursed or whom he intends to reimburse: Value Added Tax Regulations 1995, SI 1995/2518, reg 43G(2)(a) (as so added).

18 Value Added Tax Act 1994 s 80A(1)(a) (as added: see note 5 supra); Value Added Tax Regulations 1995, SI 1995/2518, regs 43B(a), 43C(a) (as added, renumbered and amended: see note 5 supra). These regulations are made under the Value Added Tax Act 1994 s 80A(3)(a) (as so added; and amended by the Finance (No 2) Act 2005 s 4), which provides that regulations may require reimbursement arrangements to include provision requiring a reimbursement to be made within such period after the crediting of the amount to which it relates as may be specified in the regulations. For the required undertaking see note 20 *infra*.

19 Value Added Tax Regulations 1995, SI 1995/2518, reg 43A (as added and renumbered: see note 5 supra).

20 *Ibid* reg 43C(b) (as added and renumbered: see note 5 supra). The claimant is required to undertake that he will apply the whole of the relevant amount credited to him, without any deduction by way of fee or charge or otherwise, to the reimbursement in cash or by cheque, of such consumers by no later than 90 days after his receipt of that amount (except in so far as he has already so reimbursed them) (Value Added Tax Act 1994 s 80A(1)(b) (as added: see note 5 supra); Value Added Tax Regulations 1995, SI 1995/2518, regs 43B(b), 43G(2)(b) (as added, renumbered and amended: see note 5 supra)), that he will notify the Commissioners of the whole or such part of the relevant amount credited to him as he fails to apply in accordance with this undertaking (reg 43G(2)(d) (as added, renumbered and substituted: see note 5 supra)), and that he will repay to the Commissioners without demand the whole or such part of the relevant amount paid (or repaid) to him or of any interest paid to him as he fails to apply in accordance with this undertaking (reg 43G(2)(da) (as added and renumbered: see note 5 supra)).

21 *Ibid* reg 43C(c) (as added and renumbered: see note 5 supra).

22 *Ibid* reg 43C(d) (as added, renumbered and substituted: see note 5 supra). This provision is made under the Value Added Tax Act 1994 s 80A(3)(b) (as added (see note 5 supra); and substituted by the Finance (No 2) Act 2005 s 4), which provides that regulations may require reimbursement arrangements to include provision for cases where an amount is credited but an equal amount is not reimbursed in accordance with the arrangements, and under the Value Added Tax Act 1994 s 80A(4)(a) (as so added; and amended by the Finance (No 2) Act 2005 s 4), which provides that regulations may impose obligations on such persons as may be specified to make the repayments, or give the notifications, to the Commissioners that they are required to make or give in pursuance of any provisions contained in any reimbursement arrangements by virtue of the Value Added Tax Act 1994 s 80A(3)(b) (as added and substituted) or s 80A(3)(c) (as added and amended) (see the text and note 24 *infra*).

Where any person is liable to pay any amount to the Commissioners in pursuance of an obligation imposed by virtue of s 80A(4)(a) (as added and amended), the Commissioners may, to the best of their judgement, assess the amount (which may be nil) due from that person and notify it to him: s 80B(1), (1D) (s 80B as added (see note 5 supra); and s 80B(1A)-(1E) added by the Finance (No 2) Act 2005 s 4). In determining such an amount, any amount reimbursed in accordance with the reimbursement arrangements is regarded as first reducing so far as possible the amount that he would have been liable so to pay, but for the reimbursement of that amount: Value Added Tax Act 1994 s 80B(1C) (as so added). Section 78A(2)-(8) (as added) (see PARA 314 post) applies in the case of this assessment as it applies to an assessment under s 78A(1) (as added): s 80B(2) (as so added). In any case where an amount ('the gross credit') has been credited to any person under s 80(1) (as substituted) or s 80(1A) (as added) (see PARA 311 ante) (s 80B(1A)(a) (as so added)), any sums were set against that amount in accordance with s 80(2A) (as added) (see PARA 311 ante) (s 80B(1A)(b) (as so added)), and the amount reimbursed in accordance with the reimbursement arrangements was less than the gross credit (s 80B(1A)(c) (as so added)), then the person ceases to be entitled to so much of the gross credit as exceeds the amount so reimbursed (s 80B(1B)(a) (as so added)) and the Commissioners may, to the best of their judgement, assess the amount due from that person and notify it to him (s 80B(1B)(b) (as so added)), although an amount may not be so assessed to the extent that the person is liable to pay it to the Commissioners as mentioned in s 80B(1) (as added) (see s 80B(1B) (as so added)). Any reference in any other provision of the Value Added Tax Act 1994 to an assessment under s 80B(1) (as added) includes, if the context so admits, a reference to an assessment

under s 80B(1B) (as added): s 80B(1E) (as so added). An appeal lies to a VAT and duties tribunal with respect to an assessment under s 80B(1) (as added) or s 80B(1B) (as added) or the amount of such an assessment: see s 83(ta) (added by the Finance Act 1997 s 46(2); and amended by the Finance (No 2) Act 2005 s 4). As to appeals see generally para 343 et seq post.

The claimant must give any notification to the Commissioners that he is required by these provisions to give within 14 days of the expiration of the 90 days referred to in head (1) in the text (Value Added Tax Regulations 1995, SI 1995/2518, reg 43D (as added and substituted: see note 5 supra)), and is required to undertake that he will notify the Commissioners of the whole or such part of the relevant amount credited to him as he fails to apply in accordance with this undertaking (reg 43G(2)(d) (as added and substituted: see note 5 supra)).

23 Ibid reg 43C(da) (as added and renumbered: see note 5 supra). This provision is made under the Value Added Tax Act 1994 s 80A(3)(b), (4)(a) (as added and substituted) (see note 22 supra). The claimant must without any prior demand make any repayment to the Commissioners that he is required to make by virtue of this provision and the Value Added Tax Regulations 1995, SI 1995/2518, reg 43C(e) (as added, renumbered and amended) within 14 days of the expiration of the 90 days referred to in head (1) in the text: reg 43D (as added and substituted: see note 5 supra).

24 Ibid reg 43C(e) (as added, renumbered and amended: see note 5 supra). This provision is made under the Value Added Tax Act 1994 s 80A(3)(c) (as added (see note 5 supra); and amended by the Finance (No 2) Act 2005 s 4), which provides that regulations may require reimbursement arrangements to include provision requiring interest paid by the Commissioners on any amount paid (or repaid) by them to be treated in the same way as that amount for the purposes of any requirement under the arrangements to make reimbursement or to repay the Commissioners, and under the Value Added Tax Act 1994 80A(4)(a) (as so added; and amended (see note 22 supra)). The claimant is required to undertake that he will apply any interest paid to him on the relevant amount paid (or repaid) to him wholly to the reimbursement of consumers by no later than 90 days after his receipt of that interest (Value Added Tax Regulations 1995, SI 1995/2518, reg 43G(2)(c) (as added: see note 5 supra)), that he will notify the Commissioners of the whole or such part of the relevant amount credited to him as he fails to apply in accordance with this undertaking (reg 43G(2)(d) (as added and substituted: see note 5 supra)), and that he will repay to the Commissioners without demand the whole or such part of the relevant amount paid (or repaid) to him or of any interest paid to him as he fails to apply in accordance with this undertaking (reg 43G(2)(da) (as added: see note 5 supra)).

25 The records of the names and addresses of those consumers whom the claimant has reimbursed or whom he intends to reimburse (ibid reg 43E(a) (as added: see note 5 supra)), the total amount reimbursed to each such consumer (reg 43E(b) (as so added)), the amount of interest included in each total amount reimbursed to each consumer (reg 43E(c) (as so added)), and the date that each reimbursement is made (reg 43E(d) (as so added)). The claimant is required to undertake that he will keep such records: reg 43G(2)(e) (as added: see note 5 supra).

26 Ibid reg 43C(f) (as added, renumbered and amended: see note 5 supra). This provision is made under the Value Added Tax Act 1994 s 80A(3)(d) (as added: see note 5 supra), which provides that regulations may require reimbursement arrangements to include provision requiring such records relating to the carrying out of the arrangements as may be described in the regulations to be kept and produced to the Commissioners or one of their officers, and under s 80A(4)(b) (as so added: see note 5 supra), which provides that regulations may impose on such persons as may be specified obligations to comply with any requirements contained in any such arrangements by virtue of s 80A(3)(d) (as added)). Where a claimant is given notice he must in accordance therewith produce to the Commissioners, or to one of their officers, the records that he is required to keep pursuant to the Value Added Tax Regulations 1995, SI 1995/2518, reg 43E (as added) (see note 25 supra): reg 43F(1) (as added: see note 5 supra)). Such a notice may be given before or after, or both before and after the Commissioners have credited the relevant amount to the claimant, and must be in writing (reg 43F(2)(a) (as so added)), must state the place and time at which, and the date on which the records are to be produced (reg 43F(2)(b) (as so added)), and must be signed and dated by the Commissioners or an officer of theirs (reg 43F(2)(c) (as so added)). The claimant is required to undertake that he will comply with any such notice concerning the production of such records: reg 43G(2)(f) (as so added)).

## UPDATE

### 312 Restriction of overpayment credits on grounds of 'unjust enrichment'

NOTE 3--See also *Baines & Ernst Ltd v Customs and Excise Comrs* [2006] EWCA Civ 1040, [2006] STC 1632; *Case C-309/06 Marks & Spencer plc v Revenue and Customs Comrs* [2008] STC 1408, ECJ; and *Case C-566/07 Staatssecretaris van Financiën v Stadeco BV* [2009] STC 1622, ECJ.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/313. Interest in certain cases of official error.

### 313. Interest in certain cases of official error.

Where, due to an error on the part of the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup>, a person has:

- 993 (1) accounted to them for an amount by way of output tax<sup>2</sup> which was not output tax due from him, in circumstances under which they are in consequence liable<sup>3</sup> to pay (or repay) an amount to him<sup>4</sup>;
- 994 (2) failed to claim credit for input tax<sup>5</sup> for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him<sup>6</sup>;
- 995 (3) otherwise paid to them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him<sup>7</sup>; or
- 996 (4) suffered delay in receiving payment of an amount due to him from them in connection with VAT<sup>8</sup>,

then the Commissioners must pay interest<sup>9</sup> to him on that amount<sup>10</sup> for the applicable period<sup>11</sup> if, and to the extent that, they would not otherwise be liable to do so<sup>12</sup>. They are, however, so liable to pay interest only on a claim made in writing for that purpose<sup>13</sup>; and no such claim may be made more than three years after the end of the applicable period to which it relates<sup>14</sup>.

Nothing in these provisions requires the Commissioners to pay interest on any amount which falls to be increased by a repayment supplement<sup>15</sup> or, where an amount is so increased, on so much of the increased amount as represents the supplement<sup>16</sup>.

Any interest payable by the Commissioners<sup>17</sup> to a person on a sum due to him<sup>18</sup> is treated as an amount due<sup>19</sup> by way of credit<sup>20</sup>. Provision is also made for the recovery of interest overpaid under these provisions<sup>21</sup>.

1 As to the meaning of 'error' see *Customs and Excise Comrs v Fine Art Developments plc* [1989] AC 914, [1989] STC 85, HL; *Aer Lingus v Customs and Excise Comrs* [1992] VATTR 438; *University of Edinburgh v Customs and Excise Comrs* (1991) VAT Decision 6569 (unreported); *North East Media Development Trust Ltd v Customs and Excise Comrs* [1996] V & DR 396; *Trustees of the Victoria and Albert Museum v Customs and Excise Comrs* [1996] STC 1016. In *North East Media Development Trust Ltd v Customs and Excise Comrs* supra, the tribunal held that the failure of the United Kingdom properly to implement a provision of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive') having direct effect would not have been an 'error on the part of the Commissioners' having regard to the constitutional doctrine of the separation of powers (but see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 8), but that the Commissioners had erred in giving incorrect guidance to the appellant in the course of correspondence. It is not sufficient for the operation of the Value Added Tax Act 1994 s 78 (as amended) (see the text and notes 2-16 infra) that there has been an error on the part of the Commissioners; it must have been relied upon by the claimant, since the over-payment etc by the claimant must have been due to the error of the Commissioners: *North East Media Development Trust Ltd v Customs and Excise Comrs* supra. See also *American Express Bank Ltd v Customs and Excise Comrs* (1993) VAT Decision 9748 (unreported); *Wheeler (t/a Wheeler Motor Co) v Customs and Excise Comrs* (1995) VAT Decision 13617, [1995] STI 1971. The failure of an officer to identify an under-claim of credit during control visits does not constitute an error on the part of the Commissioners: *Newton Newton v Customs and Excise Comrs* (1993) VAT Decision 11372 (unreported). As to the Sixth Directive see PARA 1 note 1 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 For the meaning of 'output tax' see PARAS 4, 215 ante.

3 Ie under the Value Added Tax Act 1994 s 80(2A) (as added): see PARA 311 ante.

4 Ibid s 78(1)(a) (amended by the Finance (No 2) Act 2005 s 4). References in the Value Added Tax Act 1994 s 78(1) (as amended) to an amount which the Commissioners are liable in consequence of any matter to pay or repay to any person are references, where a claim for the payment or repayment has to be made, to only so much of that amount as is the subject of a claim that the Commissioners are required to satisfy or have satisfied: s 78(1A)(a) (s 78(1A) added by the Finance Act 1997 s 44).

5 Ie under the Value Added Tax Act 1994 s 25: see PARA 216 ante. For the meaning of 'input tax' see PARAS 4, 216 ante.

6 Ibid s 78(1)(b).

7 Ibid s 78(1)(c).

8 Ibid s 78(1)(d). These amounts do not include any amount payable under s 78 (as amended): s 78(1A)(b) (as added: see note 4 supra).

9 The interest is payable at the rate applicable pursuant to provision made under the Finance Act 1996 s 197 (see PARA 296 note 8 ante): Value Added Tax Act 1994 s 78(3) (amended by the Finance Act 1996 s 197(6)(d) (ii)). The interest is simple interest only, but the interest itself may be a payment due, attracting interest from the date on which a written claim for interest is furnished to the Commissioners: *National Council of YMCAs Inc v Customs and Excise Comrs* [1993] VATTR 299. See also *S & DE Jarman v Customs and Excise Comrs* (1993) VAT Decision 11637 (unreported). Note that the right to interest in respect of repayments of charges or taxes voluntarily (albeit mistakenly) made exists only under domestic (as opposed to European) law: see *R (on the application of British Telecommunications plc) v Revenue and Customs Comrs* [2005] EWHC 1043 (Admin), [2005] STC 1148.

10 In *North East Media Development Trust Ltd v Customs and Excise Comrs (No 2)* (1995) VAT Decision 13425, [1995] STI 1365, and in *North East Media Development Trust Ltd v Customs and Excise Comrs (No 3)* (1996) VAT Decision 14416, [1996] STI 1645, the tribunal held that, where the Commissioners' error had caused the claimant to fail not only to claim sufficient credit for input tax but also to account for an amount of output tax, interest was payable on the net amount of input tax under-claimed less output tax undeclared.

11 Where a person has accounted for an amount by way of output tax which was not output tax due from him or failed to claim credit for input tax for an amount for which he was entitled so to claim credit, the 'applicable period' is the period beginning with the appropriate commencement date (Value Added Tax Act 1994 s 78(4)(a)) and ending with the date on which the Commissioners authorise payment of the amount on which the interest is payable (s 78(4)(b)). The 'appropriate commencement date' is: (1) in a case where an amount would have been due from the person by way of VAT in connection with the return in which the person accounted for, or ought to have claimed credit for, the amount on which the interest is payable, had his input tax and output tax been as stated in that return, the date on which the Commissioners received payment of that amount (s 78(5)(a)); or (2) in a case where no such payment would have been due from him in connection with that return, the date on which the Commissioners would, apart from the error, have authorised payment of the amount on which the interest is payable (s 78(5)(b)). Where a person has otherwise paid to the Commissioners by way of VAT an amount that was not VAT due, the 'applicable period' is the period beginning with the date on which the payment is received by the Commissioners (s 78(6)(a)) and ending with the date on which they authorise payment of the amount on which the interest is payable (s 78(6)(b)); and where a person has suffered delay in receiving payment of an amount due to him from the Commissioners in connection with VAT the 'applicable period' is the period beginning with the date on which, apart from the error, the Commissioners might reasonably have been expected to authorise payment of the amount on which the interest is payable (s 78(7)(a)) and ending with the date on which they in fact authorise payment of that amount (s 78(7)(b)). For these purposes, references to the authorisation by the Commissioners of the payment of any amount include references to the discharge by way of set-off (whether under s 81(3) (see PARA 301 ante) or otherwise) of the Commissioners' liability to pay that amount (s 78(12)(a) (substituted by the Finance Act 1997 s 44)), and any reference to a return is a reference to a return required to be made in accordance with the Value Added Tax Act 1994 Sch 11 para 2 (as amended) (see PARA 245 ante): s 78(12)(b). For the meaning of 'return' generally see PARA 115 note 13 ante.

In determining the applicable period for these purposes, there must be left out of account any period by which the Commissioners' authorisation of the payment of interest is delayed by the conduct of the person who claims the interest (s 78(8) (substituted by the Finance Act 1997 s 41)), such period including, in particular, any period which is referable to any unreasonable delay in the making of the claim for interest or in the making of any claim for the payment or repayment of the amount on which interest is claimed (Value Added Tax Act 1994 s 78(8A)(a) (s 78(8A) added by the Finance Act 1997 s 41)), to any failure by that person or a person acting on his behalf or under his influence to provide the Commissioners, either at or before the time of making of a claim (Value Added Tax Act 1994 s 78(8A)(b)(i) (as so added)) or subsequently in response to a request for information by the Commissioners (s 78(8A)(b)(ii) (as so added)), with all the information required by them to enable the existence and amount of the claimant's entitlement to a payment or repayment, and to interest on that payment or repayment, to be determined (s 78(8A)(b) (as so added)), and to the making, as part of or in

association with either the claim for interest (s 78(8A)(c)(i) (as so added)) or any claim for the payment or repayment of the amount on which interest is claimed (s 78(8A)(c)(ii) (as so added)), of a claim to anything to which the claimant was not entitled (s 78(8A)(c) (as so added)). In determining for these purposes whether any period of delay is referable to a failure by any person to provide information in response to a request by the Commissioners, there must be taken to be so referable, except so far as may be prescribed, any period which begins with the date on which the Commissioners require that person to provide information which they reasonably consider relevant to the matter to be determined (s 78(9)(a) (s 78(9) added by the Finance Act 1997 s 41)) and ends with the earliest date on which it would be reasonable for the Commissioners to conclude that they have received a complete answer to their request for information (Value Added Tax Act 1994 s 78(9)(b)(i) (as so added)), that they have received all that they need in answer to that request (s 78(9)(b)(ii) (as so added)), or that it is unnecessary for them to be provided with any information in answer to that request (s 78(9)(b)(iii) (as so added)).

12 Ibid s 78(1). As to the interaction of s 78(1) with the courts' power to award interest under the Supreme Court Act 1981 s 35A (as added) (see DAMAGES vol 12(1) (Reissue) PARA 848), see *R (on the application of Elite Mobile plc) v Customs and Excise Comrs* [2004] EWHC 2923 (Admin), [2005] STC 275.

13 Value Added Tax Act 1994 s 78(10).

14 Ibid s 78(11) (substituted by the Finance Act 1997 s 44).

15 Value Added Tax Act 1994 s 78(2)(a). The reference in the text to an amount which falls to be increased by a repayment supplement is a reference to an amount which falls to be so increased under s 79 (as amended) (see PARA 315 post). If and so long as a supplement could be ordered in respect of the whole of an amount, then that whole amount is an amount which, for the purposes of s 78(2)(a), falls to be increased by a supplement and is thus outside any requirement on the Commissioners to pay interest under s 78(1): see *R (on the application of Elite Mobile plc) v Customs and Excise Comrs* [2004] EWHC 2923 (Admin), [2005] STC 275.

The Value Added Tax Act 1994 s 78(2) does not render interest under s 78 (as amended) and a repayment supplement under s 79 (as amended) (see PARA 315 post) mutually exclusive; the provision is permissive, giving the Commissioners discretion to pay interest where the taxpayer is also entitled to a repayment supplement, and a repayment supplement may accordingly be claimed where interest has been paid under s 78 (as amended): see *National Galleries of Scotland v Customs and Excise Comrs* (2003) VAT Decision 18413, [2004] STI 506.

16 Value Added Tax Act 1994 s 78(2)(b).

17 Ie whether under an enactment or instrument or otherwise: ibid s 81(1).

18 Ie under or by virtue of any provision of the Value Added Tax Act 1994: see s 81(1).

19 Ie under ibid s 25(3): see PARA 216 ante.

20 Ibid s 81(1). Section 81(1) is to be disregarded for the purpose of determining a person's entitlement to interest or the amount of interest to which he is entitled: s 81(2).

21 See ibid s 78A (as added); and PARA 314 post.

## UPDATE

### 313 Interest in certain cases of official error

NOTE 1--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended): see PARA 2.

NOTE 9--The payment of compound interest on overpaid VAT is a requirement of Community law, but the implementation of that rule is a matter for national law: *F J Chalke Ltd v Revenue and Customs Comrs* [2010] EWCA Civ 313, [2010] All ER (D) 252 (Mar). See also *Littlewoods Retail Ltd v Revenue and Customs Comrs* [2010] EWHC 1071 (Ch), [2010] All ER (D) 190 (May).

NOTE 12--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

TEXT AND NOTE 14--Value Added Tax Act 1994 s 78(11) amended: Finance Act 2008 Sch 39 para 35.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/314. Recovery of overpaid interest.

### **314. Recovery of overpaid interest.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may, to the best of their judgement, assess any amount which has been paid<sup>2</sup> to any person by way of interest to which that person was not entitled and notify it to him<sup>3</sup>, whereupon such amount is (unless the assessment has been withdrawn or reduced<sup>4</sup>) deemed<sup>5</sup> to be an amount of VAT due from him and may be recovered accordingly<sup>6</sup>. Amounts so assessed may also carry interest<sup>7</sup>, and the Commissioners may make supplementary assessments if they under-assess any amount recoverable<sup>8</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 I.e. under the Value Added Tax Act 1994 s 78 (as amended) (see PARA 313 ante). An appeal lies to a VAT and duties tribunal against an assessment under these provisions: s 83(sa) (s 78A added by the Finance Act 1997 s 45). As to appeals see generally para 343 et seq post. No assessment may be made more than two years after the time when evidence of facts sufficient in the opinion of the Commissioners to justify its making comes to the knowledge of the Commissioners: Value Added Tax Act 1994 s 78A(2) (s 78A added by the Finance Act 1997 s 45). While the enactment of a statute or the pronouncement of a judicial decision are undoubtedly 'facts', as are the form which they take and the words in which they are expressed, their legal effect is of an entirely different, non-factual nature, and accordingly 'facts' does not for this purpose include the legal effect of either a statute or a judicial decision: *Customs and Excise Comrs v DFS Furniture Co plc* [2004] EWCA Civ 243, [2004] STC 559.

3 Value Added Tax Act 1994s 78A(1) (as added: see note 2 supra). For these purposes, notification to a personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting in a representative capacity in relation to another is treated as notification to the person in relation to whom he so acts: s 78A(8) (as so added).

4 Ibid s 78A(4) (as added: see note 2 supra).

5 I.e. subject to the provisions of the Value Added Tax Act 1994 as to appeals: s 78A(3) (as added: see note 2 supra).

6 Ibid s 78A(3) (as added: see note 2 supra). An assessment under s 78A(1) (as added) is a recovery assessment for the purposes of s 84(3A) (as added) (see PARA 347 post): s 78A(5) (as so added).

7 See ibid s 74 (as amended); and PARA 296 ante. This is applied, subject to specified modifications, in relation to assessments under s 78A(1) (as added) as it applies in relation to assessments under s 73 (as amended) (see PARA 294 ante) by s 78A(6) (as added: see note 2 supra). Where by virtue of s 78A(6) (as added) any person is liable to interest under s 74 (as amended), s 76 (as amended) (assessment of amounts due by way of penalty, interest or surcharge: see PARA 298 ante) has effect in relation to that liability with the omission of s 76(2)-(6) (s 78A(7)(a) (as so added)), s 77(1)-(5) (as amended) (time limits and supplementary assessments: see PARA 299 ante) do not apply to an assessment of the amount due by way of interest (but see the text and note 8 infra) (s 78A(7)(b) (as so added)), and (without prejudice to the power to make assessments for interest for later periods) the interest to which any assessment made under s 76 (as amended) by virtue of s 78A(7)(a) (as added) may relate is confined to interest for a period of no more than two years ending with the time when the assessment to interest is made (s 78A(7) (as so added)).

8 See ibid s 77(6) (as amended); and PARA 299 ante. This is applied in relation to assessments under s 78A(1) (as added) (see the text and note 3 supra) by s 78A(6) (as added: see note 2 supra).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/5. ACCOUNTING AND ASSESSMENT/(6) REFUNDS OF VALUE ADDED TAX/315. Repayment supplement in respect of certain delayed payments or refunds.

### **315. Repayment supplement in respect of certain delayed payments or refunds.**

Where a person is entitled to a value added tax credit<sup>1</sup> or a registered<sup>2</sup> body is entitled to a refund under the provisions relating to refunds to public bodies<sup>3</sup> or museums and galleries<sup>4</sup>, the amount which would otherwise be due by way of that payment or refund is increased by the addition of a supplement equal to 5 per cent of that amount or £50 (whichever is the greater)<sup>5</sup>, provided that:

- 997 (1) the requisite return or claim<sup>6</sup> is received<sup>7</sup> by the Commissioners for Her Majesty's Revenue and Customs not later than the last day on which it is required to be furnished or made<sup>8</sup>;
- 998 (2) a written instruction<sup>9</sup> directing the making of the payment or refund is not issued by the Commissioners for 30 days<sup>10</sup>; and
- 999 (3) the amount shown on that return or claim as due by way of payment or refund does not exceed the payment or refund which was in fact due by more than 5 per cent of that payment or refund or £250 (whichever is the greater)<sup>11</sup>.

1 Value Added Tax Act 1994 s 79(1)(a). Except for the purpose of determining the amount of the supplement, a supplement paid to any person under s 79(1)(a) is treated as an amount due to him by way of a credit under s 25(3) (see PARA 216 ante); s 79(5)(a). The repayment supplement is the equivalent of a penalty for late payment, and not a substitute for interest; accordingly, the supplement may itself attract interest: *Bank Austria Trade Services Gesellschaft GmbH v Customs and Excise Comrs* (2000) VAT Decision 16918, [2001] STI 528. See also *UK Tradecorp Ltd v Customs and Excise Comrs* (2004) VAT Decision 18174, [2004] STI 2358 (interest awarded in addition to a supplement, at a rate disregarding that supplement).

2 For the meaning of 'registered' see PARA 64 note 2 ante.

3 Value Added Tax Act 1994 s 79(1)(b). Except for the purpose of determining the amount of the supplement, a supplement paid to any body under s 79(1)(b) is treated as an amount due to it by way of a refund under s 33 (as amended) (see PARA 304 ante); s 79(5)(b). There is no specific right of appeal against a refusal of the Commissioners to make payment of a refund under s 33 (as amended); it would seem, therefore, that there correspondingly is no specific right to appeal against a refusal to pay a supplement on such a refund.

4 *Ibid* s 79(1)(c) (s 79(1)(c), (5)(c) added by the Finance Act 2001 s 98). Except for the purpose of determining the amount of the supplement, a supplement paid to any body under the Value Added Tax Act 1994 s 79(1)(c) (as added) is treated as an amount due to it by way of a refund under s 33A (as added) (see PARA 305 ante); s 79(5)(c) (as so added).

5 *Ibid* s 79(1). A right to recover input tax which arises on the making of an election to waive exemption (see s 51(1), Sch 10 para 2 (as amended); and PARA 157 ante) which has retrospective effect does not per se also give rise to a right to repayment supplement: *Lawson Mardon Group Pension Scheme v Customs and Excise Comrs* (1993) VAT Decision 10231, [1993] STI 948. There is no right to a repayment supplement until either the Commissioners for Her Majesty's Revenue and Customs have completed their inquiries into the matter (see note 7 infra), or the tribunal directs that a supplement be paid: *British Steel Exports Ltd v Customs and Excise Comrs* (1992) VAT Decision 7562, [1992] STI 689. The distinction between a repayment supplement and interest under the Value Added Tax Act 1994 s 78 (as amended) (see PARA 313 ante) is that the repayment supplement is fixed as 5% of the credit due, and is payable in full if the Commissioners exceed the permitted period for payment by as little as a day. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 'Requisite return or claim' means: (1) in relation to a payment, the return for the prescribed accounting period concerned which is required to be furnished in accordance with regulations under the Value Added Tax Act 1994 (s 79(6)(a)); and (2) in relation to a refund, the claim which is required to be made in accordance with the Commissioners' determination under s 33 (as amended) (see PARA 304 ante) or, as the case may be, s 33A

(as added) (see PARA 305 ante) (s 79(6)(b) (amended by the Finance Act 2001 s 98)). For the meaning of 'return' see PARA 115 note 13 ante; for the meaning of 'prescribed accounting period' see PARA 216 note 6 ante; and as to the furnishing of returns see PARA 247 et seq ante.

7 No repayment supplement is payable unless the requisite return is not only posted by the claimant but actually received by the Commissioners: *Customs and Excise Comrs v W Timms & Son (Builders) Ltd* [1992] STC 374.

8 Value Added Tax Act 1994 s 79(2)(a).

9 The issue of internal forms authorising repayment is not a 'written instruction' for these purposes; such an 'instruction' must be issued to the taxpayer: *National Galleries of Scotland v Customs and Excise Comrs* (2003) VAT Decision 18413, [2004] STI 506.

10 Value Added Tax Act 1994 s 79(2)(b) (amended by the Finance Act 1999 s 19). The 30-day period referred to in the text is a period of 30 days beginning with the later of the day after the last day of the prescribed accounting period to which the return or claim relates and the date of the receipt by the Commissioners of the return or claim: Value Added Tax Act 1994 s 79(2A)(a), (b) (added by the Finance Act 1999 s 19). In computing the 30-day period, the following periods are left out of account: periods referable to the raising and answering of any reasonable inquiry relating to the requisite return or claim (which are taken to have begun on the date when the Commissioners first raised the inquiry and are taken to have ended on the date when they received a complete answer to their inquiry), periods referable to the correction by the Commissioners of any errors or omissions in that requisite return or claim (which are taken to have begun on the date when the error or omission first came to the notice of the Commissioners and are taken to have ended on the date when the error or omission was corrected by them), and (in any case to which the Value Added Tax Act 1994 s 79(1)(a) (see the text and note 1 supra) applies) periods referable to any such continuing failure to submit returns as is referred to in s 25(5) (see PARA 216 ante) (determined in accordance with a certificate of the Commissioners under Sch 11 para 14(1)(b) (see PARA 303 ante)) and to compliance with any such condition as is referred to in Sch 11 para 4(1) (see PARA 216 ante) (which are taken to have begun on the date of the service of the written notice of the Commissioners which required the production of documents or the giving of security, and is taken to have ended on the date when they received the required documents or the required security): s 79(3), (4) (s 79(3) amended by the Finance Act 1999 s 19); Value Added Tax Regulations 1995, SI 1995/2518, regs 198, 199. As to the making of regulations generally see PARA 14 ante. It is immaterial for these purposes whether any inquiry is in fact made or whether it is or might have been made of the person or body making the requisite return or claim or of an authorised person or of some other person: Value Added Tax Act 1994 s 79(4) (revsg *Customs and Excise Comrs v L Rowland & Co (Retail) Ltd* [1992] STC 647 per Auld J, which followed *Five Oaks Properties Ltd v Customs and Excise Comrs* [1991] VATTR 318). As to inquiries by the Commissioners see *Kitsfern Ltd v Customs and Excise Comrs* [1989] VATTR 312; *Olive Tree Press Ltd v Customs and Excise Comrs* (1990) VAT Decision 5349, [1990] STI 995. For the meaning of 'authorised person' see PARA 91 note 6 ante. It is also provided that if the Treasury by order so directs, any period specified in the order is to be disregarded for the purpose of calculating the period of 30 days: Value Added Tax Act 1994 s 79(7) (amended by the Finance Act 1999 s 19). At the date at which this volume states the law, no such order had been made. The burden of proving when a payment instruction has been issued rests on the Commissioners: *Aston v Customs and Excise Comrs* [1991] VATTR 170.

11 Value Added Tax Act 1994 s 79(2)(c).

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## **6. OFFENCES AND PENALTIES**

### **(1) CRIMINAL OFFENCES**

#### **316. Proceedings in respect of criminal offences.**

Certain provisions of the Customs and Excise Management Act 1979 relating to proceedings for offences, mitigation of penalties, and certain other matters<sup>1</sup> apply in relation to offences<sup>2</sup> relating to value added tax<sup>3</sup> and penalties imposed for such offences as they apply in relation to offences and penalties under the Customs and Excise Acts<sup>4</sup>. No proceedings for such an offence may be instituted except by or with the consent of the Director of Revenue and Customs Prosecutions or by order of, or with the consent of, the Commissioners for Her Majesty's Revenue and Customs or by a law officer of the Crown<sup>5</sup>. Proceedings for an indictable offence<sup>6</sup> may not be commenced after the end of 20 years beginning with the day on which the offence was committed<sup>7</sup>; and proceedings for a summary offence<sup>8</sup> may not be commenced after the end of the period of three years beginning with the day on which the offence was committed but, subject to that, may be commenced at any time within six months from the date on which sufficient evidence to warrant the proceedings came to the knowledge of the prosecuting authority<sup>9</sup>.

Although the maximum term of imprisonment which may be imposed for some offences relating to VAT is seven years, such a term can only be imposed upon conviction upon indictment, and on summary conviction the maximum term of imprisonment is six months<sup>10</sup>. If a magistrates' court orders a person to be imprisoned in addition to imposing a penalty for the same offence, and also orders him, whether at the same time or subsequently, to be imprisoned for a further term in respect of his failure to pay the penalty, the aggregate of those terms must not exceed 15 months<sup>11</sup>.

Where in any proceedings for an offence relating to VAT any question arises whether or not VAT on any goods or services has become due or has been paid or secured, the burden of proof lies upon the accused person<sup>12</sup>.

Statements made or documents<sup>13</sup> produced by or on behalf of a person are not inadmissible in any criminal proceedings against the person concerned in respect of any offence in connection with or in relation to VAT by reason only that it has been drawn to his attention that, in relation to VAT, the Commissioners may assess an amount due by way of a civil penalty instead of instituting criminal proceedings and, though no undertaking can be given as to whether the Commissioners will make such an assessment in the case of any person, it is their practice to be influenced by the fact that a person has made a full confession of any dishonest conduct to which he has been a party and has given full facilities for investigation, and that the Commissioners or, on appeal, a tribunal have or has power<sup>14</sup> to reduce a civil penalty imposed<sup>15</sup> for the dishonest evasion of VAT, and he was or may have been induced thereby to make the statements or produce the documents<sup>16</sup>.

<sup>1</sup> I.e. the Customs and Excise Management Act 1979 ss 145-155 (as amended): see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1197 et seq.

<sup>2</sup> I.e. including any act or omission in respect of which a penalty is imposed: see the Value Added Tax Act 1994 s 72(12). For these purposes, references to penalties do not include references to penalties under ss 60-70 (as amended) (see PARA 321 et seq post): s 72(13).

3 As to such offences see PARA 316 et seq post.

4 Value Added Tax Act 1994 s 72(12). For the meaning of 'the Customs and Excise Acts' see PARA 115 note 2 ante.

5 See the Customs and Excise Management Act 1979 s 145(1), (5) (s 145(1) amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 paras 20, 23(a)); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1197. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante. Any proceedings under the Customs and Excise Acts instituted by order of the Commissioners in a magistrates' court, and any such proceedings instituted by order of the Commissioners in a court of summary jurisdiction in Northern Ireland, must be commenced in the name of an officer of Revenue and Customs: Customs and Excise Management Act 1979 s 145(2) (amended by the Commissioners for Revenue and Customs Act 2005 Sch 4 paras 20, 23(b)). Where, however, a person has been arrested for any offence for which he is liable to be arrested under the Customs and Excise Acts, any court before which he is brought may proceed to deal with the case although the proceedings have not been instituted in accordance with the Customs and Excise Management Act 1979 s 145 (as amended): s 145(6) (amended by the Police and Criminal Evidence Act 1984 s 114(1); and the Commissioners for Revenue and Customs Act 2005 Sch 4 paras 20, 23(d)). As to the application of these provisions see the text and notes 1-4 supra.

6 For the meaning of 'indictable offence' see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1102. Fraud cases should be tried summarily unless the fraud has been committed or disguised in a sophisticated manner and/or one of the features of the case is the high value of the unrecovered property: *Practice Note (Mode of Trial: Guidelines)* [1990] 1 WLR 1439, DC. In those circumstances, unless there are mitigating factors, case law suggests that the offence is a serious one for which a period of imprisonment exceeding six months can be expected: *R v Northampton Magistrates' Court, ex p Customs and Excise Comrs* (1994) 158 JP 1083, DC.

7 Customs and Excise Management Act 1979 s 146A(2) (s 146A added by the Finance Act 1989 s 16(1), (4) in relation to offences committed on or after 26 July 1989). As to the application of this provision see the text and notes 1-4 supra.

8 For the meaning of 'summary offence' see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1102.

9 Customs and Excise Management Act 1979 s 146A(3) (as added: see note 7 supra). As to the application of this provision see the text and notes 1-4 supra.

10 See the Value Added Tax Act 1994 s 72(1)(a), (b), (3)(i), (ii), (8)(a), (b); and PARAS 317-318 post.

11 See the Customs and Excise Management Act 1979 s 149(1); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1191. As to the application of this provision see the text and notes 1-4 supra.

12 See *ibid* s 154(2); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1205. As to the application of this provision see the text and notes 1-4 supra.

13 For the meaning of 'document' see PARA 17 note 9 ante.

14 *Ie* under the Value Added Tax Act 1994 s 70 (as amended): see PARA 329 post.

15 *Ie* under *ibid* s 60: see PARA 321 post.

16 *Ibid* s 60(4), (5)(a).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(1) CRIMINAL OFFENCES/317. Fraudulent evasion of value added tax.

### **317. Fraudulent evasion of value added tax.**

If any person is knowingly concerned in, or in the taking of steps<sup>1</sup> with a view to, the fraudulent evasion of value added tax<sup>2</sup> by him or any other person, he is liable: (1) on summary conviction, to a penalty of the statutory maximum<sup>3</sup> or of three times the amount of the VAT<sup>4</sup>, whichever is the greater, or to imprisonment for a term not exceeding six months, or to both<sup>5</sup>; or (2) on conviction on indictment, to a penalty of any amount or to imprisonment for a term not exceeding seven years, or to both<sup>6</sup>.

Where a person's conduct during any specified period must have involved the commission of the offence of the fraudulent evasion of VAT then, whether or not the particulars of that offence are known, he is guilty of an offence and liable: (a) on summary conviction, to a penalty of the statutory maximum or, if greater, three times the amount of the VAT that was or was intended to be evaded by his conduct, or to imprisonment for a term not exceeding six months, or to both<sup>7</sup>; or (b) on conviction on indictment, to a penalty of any amount or to imprisonment for a term not exceeding seven years, or to both<sup>8</sup>.

Where an authorised person<sup>9</sup> has reasonable grounds for suspecting that such an offence has been committed, he may arrest anyone whom he has such grounds for suspecting to be guilty of the offence<sup>10</sup>.

Apart from offences specific to VAT, such as that of the fraudulent evasion of VAT, prosecutions may also be brought under general criminal law for offences such as cheating the public revenue<sup>11</sup>.

1 Necessary particulars of such steps must be given to provide reasonable information as to the nature of the offence: see *Robertson v Rosenberg* [1951] WN 97, [1951] 1 TLR 417, DC (a case decided on a similar provision of the former purchase tax law).

2 Any reference to the evasion of VAT includes a reference to the obtaining of: (1) the payment of a VAT credit (see PARA 216 ante); (2) a refund under the Value Added Tax Act 1994 s 35 (as amended) (refund of VAT to persons constructing certain buildings: see PARA 306 ante), s 36 (as amended) (bad debts: see PARA 307 ante) or s 40 (refunds in relation to new means of transport supplied to other member states: see PARA 310 ante) or under the Value Added Tax Act 1983 s 22 (repealed subject to transitional provisions) (the old system for the refund of VAT on bad debts); (3) a refund under any regulations made by virtue of the Value Added Tax Act 1994 s 13(5) (refunds of VAT paid in the United Kingdom on goods on which VAT paid on acquisition in another member state: see PARA 19 ante); or (4) a repayment under s 39 (repayment of VAT to those in business overseas: see PARAS 308-309 ante): s 72(2)(a)-(d). See also *R v Dealy* [1995] 1 WLR 658, [1995] STC 217, CA.

3 The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140; MAGISTRATES vol 29(2) (Reissue) PARA 804. The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

4 For these purposes, any reference to the amount of the VAT is to be construed: (1) in relation to VAT itself or a VAT credit, as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated; and (2) in relation to a refund or repayment falling within the Value Added Tax Act 1994 s 72(2)(b), (c) or (d) (see note 2 heads (2)-(4) supra) the amount falsely claimed by way of refund or repayment: s 72(2)(i), (ii). For the meanings of 'input tax' and 'output tax' see PARAS 4, 215 ante.

5 Ibid s 72(1)(a).

6 Ibid s 72(1)(b). As to the form of the indictment see *R v Asif* (1985) 82 Cr App Rep 123, CA; *R v Ike* [1996] STC 391, CA. See also *R v Choudhury*, *R v Uddin* [1996] STC 1163, CA.

7 Value Added Tax Act 1994 s 72(8)(a).

8 Ibid s 72(8)(b). While an Order in Council is in force under the Isle of Man Act 1979 s 6 (as amended) (see PARA 15 ante), the Value Added Tax Act 1994 s 72(8) has effect as if the reference to offences under the provisions there mentioned included a reference to offences under the corresponding provisions of the Act of Tynwald: Isle of Man Act 1979 s 6(4)(c) (amended by the Value Added Tax Act 1983 s 50(1), Sch 9 para 3; and the Value Added Tax Act 1994 s 100, Sch 14 para 7(2)).

9 For the meaning of 'authorised person' see PARA 91 note 6 ante.

10 Value Added Tax Act 1994 s 72(9).

11 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 322. There is no anomaly in the continuing existence of both common-law and statutory offences for the same behaviour: *R v Mavji* [1987] 2 All ER 758 at 761, [1986] STC 508 at 510, CA; *R v Ryan* [1994] 2 CMLR 399, [1994] STC 446, CA. The offence of cheating the revenue is satisfied by omission; there is no requirement of a positive act of deception, so that a failure to register for VAT, or to make returns and to pay VAT to the Commissioners when tax was due sufficed to constitute the commission of the offence: *R v Redford* [1988] STC 845, 89 Cr App Rep 1, CA. As to charging statutory conspiracy see *R v Mulligan* [1990] STC 220, CA.

## UPDATE

### 317 Fraudulent evasion of value added tax

TEXT AND NOTES 9, 10--Value Added Tax Act 1994 s 72(9) repealed: Finance Act 2007 Sch 22 para 8(a), Sch 27 Pt 5(1).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(1) CRIMINAL OFFENCES/318. Offences in connection with false documents and false statements.

### **318. Offences in connection with false documents and false statements.**

If any person with intent to deceive produces, furnishes or sends<sup>1</sup> for the purposes of the Value Added Tax Act 1994, or otherwise makes use for those purposes of, any document which is false in a material particular, or in furnishing any information for the purposes of that Act makes any statement which he knows to be false in a material particular or recklessly makes a statement which is false in a material particular, he is liable on summary conviction to a penalty of the statutory maximum<sup>2</sup> or to imprisonment for a term not exceeding six months, or to both; or, on conviction on indictment, to a penalty of any amount or to imprisonment for a term not exceeding seven years, or to both<sup>3</sup>. Where, however, the document which is false in a material particular is a VAT return<sup>4</sup> or the information which he so furnishes is contained in or otherwise relevant to such a return, he is liable on summary conviction to an alternative penalty equal to three times the aggregate of the amount (if any) falsely claimed by way of credit for input tax<sup>5</sup> and the amount (if any) by which output tax<sup>6</sup> was falsely understated, if that is greater than the statutory maximum (as well as being liable to the term of imprisonment stated above)<sup>7</sup>. Likewise, if the document which is false in a material particular is a claim for a refund<sup>8</sup> or repayment of VAT<sup>9</sup>, or the information which he so furnishes is contained in or otherwise relevant to such a claim, he is liable on summary conviction to an alternative penalty equal to three times the amount falsely claimed, if that is greater than the statutory maximum (as well as being liable to the term of imprisonment stated above)<sup>10</sup>.

Where a person's conduct during any specified period must have involved the commission of one or other of the above offences then, whether or not the particulars of that offence or those offences are known, he is guilty of an offence and liable on summary conviction to a penalty of the statutory maximum or, if greater, three times the amount of any VAT that was or was intended to be evaded by his conduct, or to imprisonment for a term not exceeding six months, or to both, or, on conviction on indictment, to a penalty of any amount or to imprisonment for a term not exceeding seven years, or to both<sup>11</sup>.

Where an authorised person<sup>12</sup> has reasonable grounds for suspecting that any such offence as is described above has been committed, he may arrest anyone whom he has such grounds for suspecting to be guilty of the offence<sup>13</sup>.

1 This reference to furnishing, sending or otherwise making use of a document which is false in a material particular, with intent to deceive, includes a reference to furnishing, sending or otherwise making use of such a document, with intent to secure that a machine will respond to the document as if it were a true document: Value Added Tax Act 1994 s 72(6). This obviates unmeritorious contentions in respect of machine-read VAT returns. 'Producing, furnishing or sending' a document includes causing a document to be produced, furnished or sent: see s 72(7). For the meaning of 'document' see PARA 17 note 9 ante.

2 As to the statutory maximum see PARA 317 note 3 ante.

3 Value Added Tax Act 1994 s 72(3). As to the form of the indictment see *R v Asif* (1985) 82 Cr App Rep 123, CA; *R v Ike* [1996] STC 391, CA. See also *R v Choudhury*, *R v Uddin* [1996] STC 1163, CA.

4 For the meaning of 'return' see PARA 115 note 13 ante.

5 For the meaning of 'input tax' see PARAS 4, 215 ante. As to credit for input tax see PARA 216 ante.

6 For the meaning of 'output tax' see PARAS 4, 215 ante.

7 Value Added Tax Act 1994 s 72(3)(i), (4).

8     le under *ibid* s 35 (as amended) (refund of VAT to persons constructing certain buildings: see PARA 306 ante), s 36 (bad debts: see PARA 307 ante) or s 40 (refunds in relation to new means of transport supplied to other member states: see PARA 310 ante), or under the Value Added Tax Act 1983 s 22 (repealed subject to transitional provisions) (the old system for the refund of VAT on bad debts) or under any regulations made by virtue of the Value Added Tax Act 1994 s 13(5) (refunds of VAT paid in the United Kingdom on goods on which VAT paid on acquisition in another member state: see PARA 19 ante).

9     le a repayment under *ibid* s 39 (repayment of VAT to those in business overseas: see PARAS 308-309 ante).

10    *Ibid* s 72(3)(i), (5).

11    *Ibid* s 72(8). See also PARA 317 note 8 ante.

12    For the meaning of 'authorised person' see PARA 91 note 6 ante.

13    Value Added Tax Act 1994 s 72(9).

## UPDATE

### 318 Offences in connection with false documents and false statements

NOTE 7--See *Revenue and Customs Comrs v Dempster (t/a Boulevard)* [2008] EWHC 63 (Ch), [2008] STC 2079.

TEXT AND NOTES 12, 13--Repealed: Finance Act 2007 Sch 22 para 8(a), Sch 27 Pt 5(1).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(1) CRIMINAL OFFENCES/319. Offences in connection with acquiring possession of or dealing with any goods or accepting supply of any services.

**319. Offences in connection with acquiring possession of or dealing with any goods or accepting supply of any services.**

If any person acquires possession of or deals with any goods, or accepts the supply<sup>1</sup> of any services, having reason to believe that value added tax on the supply of the goods or services, on the acquisition of the goods from another member state<sup>2</sup> or on the importation of the goods from a place outside the member states<sup>3</sup>, has been or will be evaded, he is liable on summary conviction to a penalty of level 5 on the standard scale<sup>4</sup> or three times the amount of the VAT, whichever is the greater<sup>5</sup>.

1 As to the meaning of 'supply' see PARA 27 ante.

2 For the meaning of 'another member state' see PARA 4 note 15 ante. As to the acquisition of goods from another member state see PARA 19 ante.

3 As to the importation of goods from a place outside the member states see PARA 113 note 2 ante; and as to the territories included in, or excluded from, the territories of the member states see PARA 16 ante.

4 As to the standard scale see PARA 143 note 5 ante.

5 Value Added Tax Act 1994 s 72(10).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(1) CRIMINAL OFFENCES/320. Offences in connection with the giving of security.

**320. Offences in connection with the giving of security.**

If any person supplies, or is supplied with, goods or services in contravention of the provisions relating to the giving of security<sup>1</sup>, he is liable on summary conviction to a penalty of level 5 on the standard scale<sup>2</sup>.

<sup>1</sup>    le in contravention of the Value Added Tax Act 1994 s 58, Sch 11 para 4(2) (as substituted): see PARA 286 ante.

<sup>2</sup>    Ibid s 72(11) (amended by the Finance Act 2003 s 17(1), (5)). As to the standard scale see PARA 143 note 5 ante.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/321. Value added tax evasion; conduct involving dishonesty.

## (2) CIVIL PENALTIES

### 321. Value added tax evasion; conduct involving dishonesty.

In any case where, for the purpose of evading value added tax<sup>1</sup>, a person does any act or omits to take any action, and his conduct involves dishonesty<sup>2</sup>, whether or not it is such as to give rise to criminal liability<sup>3</sup>, he is liable to a penalty equal to the amount of VAT evaded or sought to be evaded<sup>4</sup> by his conduct<sup>5</sup>. If, however, the person has been convicted of an offence by reason of that conduct, whether under the Value Added Tax Act 1994 or otherwise, that conduct does not also give rise to such a penalty<sup>6</sup>.

Statements made or documents<sup>7</sup> produced by or on behalf of a person are not inadmissible in any proceedings against him for the recovery of any sum due from him in connection with or in relation to VAT by reason only that it has been drawn to his attention that, in relation to VAT, the Commissioners for Her Majesty's Revenue and Customs may assess an amount due by way of a civil penalty instead of instituting criminal proceedings and, though no undertaking can be given as to whether the Commissioners will make such an assessment in the case of any person, it is their practice to be influenced by the fact that a person has made a full confession of any dishonest conduct to which he has been a party and has given full facilities for investigation, and that the Commissioners or, on appeal, a tribunal have or has power<sup>8</sup> to reduce the penalty for the dishonest evasion of VAT and that he was, or may have been, induced thereby to make the statements or produce the documents<sup>9</sup>.

On an appeal against an assessment to a penalty for dishonest evasion of VAT, the burden of proof as to the allegations that for the purpose of evading VAT, a person has done any act or omitted to take any action, and that his conduct involved dishonesty, lies upon the Commissioners<sup>10</sup>.

1 The reference to evading VAT includes a reference to obtaining any of the following sums, in circumstances where the person concerned is not entitled to that sum: (1) a refund under any regulations made by virtue of the Value Added Tax Act 1994 s 13(5) (refunds of VAT paid in the United Kingdom on goods on which VAT was paid on acquisition in another member state: see PARA 19 ante); (2) a VAT credit (see PARA 216 ante); (3) a refund under s 35 (as amended) (refund of VAT to persons constructing certain buildings: see PARA 306 ante), s 36 (bad debts: see PARA 307 ante) or s 40 (refunds in relation to new means of transport supplied to other member states: see PARA 310 ante); or under the Value Added Tax Act 1983 s 22 (repealed subject to transitional provisions) (the old system for the refund of VAT on bad debts); and (4) a repayment under the Value Added Tax Act 1994 s 39 (repayment of VAT to those in business overseas: see PARAS 308-309 ante): s 60(2). An appeal lies against the imposition of a penalty under these provisions: see s 83(n) (as amended); and PARA 346 post. For a statement of practice in relation to civil evasion cases see Customs and Excise Business Brief 9/02 [2002] STI 392.

Penalty assessments under the Value Added Tax Act 1994 s 60 are criminal charges in relation to the taxpayer's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(1) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 134): *Han v Customs and Excise Comrs*; *Martins v Customs and Excise Comrs*; *Morris v Customs and Excise Comrs* [2001] EWCA Civ 1040, [2001] 4 All ER 687.

2 For the meaning of 'dishonesty' see *Ghandi Tandoori Restaurant v Customs and Excise Comrs* [1989] VATTR 39. If it is reasonably possible that the taxpayer had a genuine, albeit mistaken, belief that his conduct was not wrong, he is not guilty of dishonesty: *Nandera v Customs and Excise Comrs* (1992) VAT Decision 7880, [1992] STI 861. Conduct attracting a misdeclaration penalty may be dishonest: *Storey v Customs and Excise Comrs* (2002) VAT Decision 17793, [2003] STI 313.

3 As to criminal offences involving VAT see PARA 316 et seq ante.

4 The reference to the amount of the VAT evaded or sought to be evaded by a person's conduct is to be construed: (1) in relation to VAT itself or a VAT credit, as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated; and (2) in relation to the refunds and repayments mentioned in note 1 supra, the amount falsely claimed by way of refund or repayment: Value Added Tax Act 1994 s 60(3). The phrase is not exhaustive of the kinds of tax which may be evaded, so that tax not included in a return (because none was made) can also be tax evaded: *Stevenson and Telford Building and Design Ltd v Customs and Excise Comrs* [1996] STC 1096, CA. The Commissioners for Her Majesty's Revenue and Customs or, on appeal, a tribunal may reduce the penalty under the Value Added Tax Act 1994 s 60 to such amount (including nil) as they think proper: see s 70(1) (as amended); and PARA 329 post. For the meanings of 'input tax' and 'output tax' see PARAS 4, 215 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

5 Ibid s 60(1). A failure to register or to make any returns for VAT may amount to dishonest acts of omission, for which a penalty may be imposed under s 60: *Stevenson and Telford Building and Design Ltd v Customs and Excise Comrs* [1996] STC 1096, CA.

6 Value Added Tax Act 1994 s 60(6).

7 For the meaning of 'document' see PARA 17 note 9 ante.

8 Ie under the Value Added Tax Act 1994 s 70 (as amended): see PARA 329 post.

9 Ibid s 60(4), (5)(b).

10 Ibid s 60(7). See *Parker v Customs and Excise Comrs* [1989] VATTR 258 (the Commissioners must prove deliberate dishonesty to a high degree of probability). However, in general the civil standard of proof applies to offences under the Value Added Tax Act 1994 s 60: *1st Indian Cavalry Club Ltd v Customs and Excise Comrs* [1998] STC 293, IH. As to appeals against penalties see PARA 346 et seq post.

## UPDATE

### 321 Value added tax evasion; conduct involving dishonesty

TEXT AND NOTES--Value Added Tax Act 1994 s 60 replaced by the Finance Act 2007 Sch 24 (see INCOME TAXATION vol 23(1) (Reissue) PARA 1712A): Sch 24 para 29(d).

NOTE 1--See *Khan v Revenue and Customs Comrs* [2006] EWCA Civ 89, [2006] STC 1167.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/322. Liability of directors.

### 322. Liability of directors.

Where it appears to the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> that a body corporate is liable to a penalty for the dishonest evasion of value added tax<sup>2</sup> and that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is (or at the material time was) a director<sup>3</sup> or managing officer<sup>4</sup> of the body corporate (a 'named officer'), the Commissioners may serve a notice on the body corporate and on the named officer<sup>5</sup>. Such a notice must state the amount of the penalty to which the company is liable (the 'basic penalty') and that the Commissioners propose to recover a specified portion, which may be the whole, of the basic penalty from the named officer<sup>6</sup>. The specified portion of the basic penalty is then recoverable from the named officer as if he were personally liable to a penalty for dishonest evasion of VAT which corresponds to that portion and the amount of that penalty may be assessed<sup>7</sup> and notified to him accordingly<sup>8</sup>. Where such a notice is served, the amount which may be assessed as the amount due by way of penalty from the body corporate is only so much (if any) of the basic penalty as is not assessed on and notified to a named officer by virtue of these provisions<sup>9</sup> and the body corporate is treated as discharged from liability for so much of the basic penalty as is so assessed and notified<sup>10</sup>.

There are only limited rights of appeal where such a notice is served. No appeal lies against the service of the notice as such<sup>11</sup>. Where, however, a body corporate is assessed as liable to any of the basic penalty, it may appeal against the Commissioners' decision as to its liability to a penalty and against the amount of the basic penalty as if it were specified in the assessment<sup>12</sup>; and where an assessment is made on a named officer, he may appeal against the Commissioners' decision that the conduct of the body corporate is, in whole or in part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him<sup>13</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

2 I.e. under the Value Added Tax Act 1994 s 60: see PARA 321 ante.

3 Where the affairs of a body corporate are managed by its members, *ibid* s 61 applies in relation to the conduct of a member in connection with his functions of management as if he were a director of the body corporate: s 61(6).

4 For these purposes, a 'managing officer', in relation to a body corporate, means any manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity or as a director: *ibid* s 61(6).

5 *Ibid* s 61(1). No formality is required in serving a notice under s 61(1) (*Customs and Excise Comrs v Bassimeh* [1995] STC 910 at 915; *affd* [1997] STC 33, CA) so that there is no need to divide the notice into separate penalties for each prescribed accounting period in which the body corporate was guilty of dishonest evasion of VAT, nor indeed to provide more information to the director than that set out in the Value Added Tax Act 1994 s 61(2) (see the text and note 6 *infra*) (*Customs and Excise Comrs v Bassimeh* *supra* at 917). For the required content of a notice under the Value Added Tax Act 1994 s 61 see *Nidderdale Building Ltd v Customs and Excise Comrs* [1997] STC 800.

6 Value Added Tax Act 1994 s 61(2). Before the Commissioners can levy a penalty on a director equal to the whole amount for which the company is liable, they must establish that he is wholly responsible for its dishonest conduct. The relative culpability of one of a number of named officers is a material consideration in the exercise of the powers of the Commissioners under s 61; but where directors have collaborated in procuring the body corporate's dishonest conduct, each is, *prima facie*, responsible for the whole: *Customs and Excise Comrs v Bassimeh* [1997] STC 33, CA.

7 le under the Value Added Tax Act 1994 s 76 (as amended): see PARA 298 ante.

8 Ibid s 61(3).

9 Ibid s 61(4)(a).

10 Ibid s 61(4)(b).

11 Ibid s 61(5).

12 Ibid ss 61(5)(a), 83(o); and see PARA 346 post.

13 Ibid s 61(5)(b), 83(o).

## **UPDATE**

### **322 Liability of directors**

TEXT AND NOTES--Value Added Tax Act 1994 s 61 replaced by the Finance Act 2007 Sch 24 (see INCOME TAXATION vol 23(1) (Reissue) PARA 1712A): Sch 24 para 29(d).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/323. Incorrect certificates as to zero-rating etc.

### **323. Incorrect certificates as to zero-rating etc.**

Where a person to whom one or more supplies<sup>1</sup> are, or are to be, made:

- 1000 (1) gives to the supplier a certificate that the supply or supplies fall, or will fall, wholly or partly within (a) the reduced rate charge<sup>2</sup>; (b) the provisions relating to construction of buildings and protected buildings<sup>3</sup>; or (c) the provisions relating to land<sup>4</sup>; or
- 1001 (2) gives to the supplier a certificate that the goods are subject to a fiscal warehousing regime<sup>5</sup>,

and in either case the certificate is incorrect, the person giving the certificate is liable to a penalty<sup>6</sup> which is equal to the difference between the amount of the value added tax which would have been chargeable on the supply or supplies if the certificate had been correct and the amount of VAT actually chargeable<sup>7</sup>.

The giving or preparing of a certificate does not give rise to a penalty if the person who gave or prepared it satisfies the Commissioners for Her Majesty's Revenue and Customs<sup>8</sup> or, on appeal, a tribunal that there is a reasonable excuse for his having given or prepared it<sup>9</sup>.

Where by reason of giving or preparing a certificate a person is convicted of an offence (whether under the Value Added Tax Act 1994 or otherwise), the giving or preparing of the certificate does not also give rise to a penalty under these provisions<sup>10</sup>.

1 As to the meaning of 'supply' see PARA 27 ante.

2 I.e. any of the Groups of the Value Added Tax Act 1994 s 29A, Schedule 7A (as added and amended): see PARA 6 ante.

3 I.e. *ibid* s 30, Sch 8 Pt II Group 5 or 6 (as substituted and amended): see PARA 179 et seq ante.

4 I.e. *ibid* s 8, Sch 9 Pt II Group 1 (as amended): see PARA 156 et seq ante.

5 I.e. for the purposes of *ibid* s 18B(2)(d) (as added) (see PARA 149 ante) or s 18C(1)(c) (as added) (see PARA 154 ante).

6 *Ibid* s 62(1) (substituted by the Finance Act 1999 s 17(1); and amended by the Finance Act 2001 s 99(6), Sch 31 Pt 2 para 3). An appeal lies against the imposition of a penalty under the Value Added Tax Act 1994 s 62 (as amended): see s 83(n) (as amended); and PARA 346 post.

7 *Ibid* s 62(2)(a) (substituted by the Finance Act 1999 s 17(1)). Similarly, where a person who makes, or is to make, an acquisition of goods from another member state prepares a certificate for the purposes of the Value Added Tax Act 1994 s 18B(1)(d) (as added) and the certificate is incorrect, the person preparing the certificate is liable to a penalty, which is the amount of VAT actually chargeable on the acquisition: s 62(1A), (2)(b) (s 62(1A) added, and s 62(2) substituted, by the Finance Act 1999 s 17(1)). For the meaning of 'another member state' see PARA 4 note 15 ante.

8 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

9 Value Added Tax Act 1994 s 62(3) (amended by the Finance Act 1996 s 26, Sch 3 para 8(3), (4)).

10 Value Added Tax Act 1994 s 62(4) (amended by the Finance Act 1996 Sch 3 para 8(3), (4)).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/324. Penalty for misdeclaration or neglect resulting in value added tax loss.

### **324. Penalty for misdeclaration or neglect resulting in value added tax loss.**

In certain circumstances specified below a person is liable to a penalty where a return<sup>1</sup> is made for a prescribed accounting period<sup>2</sup> which understates his liability to value added tax or overstates his entitlement to a VAT credit<sup>3</sup>, or where an assessment is made for a prescribed accounting period which understates his liability to VAT and, at the end of the period of 30 days beginning on the date of the assessment, he has not taken all such steps as are reasonable to draw the understatement to the attention of the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup>. The penalty is an amount equal to 15 per cent of the VAT which would have been lost<sup>5</sup> if the inaccuracy had not been discovered<sup>6</sup>. The circumstances are that the VAT for the period concerned which would have been lost had the inaccuracy not been discovered equals or exceeds whichever is the lesser of £1 million and 30 per cent of the relevant amount<sup>7</sup> for that period<sup>8</sup>.

Conduct falling within the above provisions does not give rise to liability to a penalty if the person concerned satisfies the Commissioners (or, on appeal, a tribunal) that there is a reasonable excuse for the conduct<sup>9</sup>, or, at a time when he had no reason to believe that inquiries were being made by the Commissioners into his affairs, so far as they relate to VAT, he furnished to the Commissioners full information with respect to the inaccuracy concerned<sup>10</sup>. Where, by reason of conduct falling within this provision, a person is convicted of an offence, whether under the Value Added Tax Act 1994 or otherwise, or a person is assessed to a penalty for evasion of VAT<sup>11</sup>, that conduct does not also give rise to liability to a penalty under the above provisions<sup>12</sup>.

1 For the meaning of 'return' see PARA 115 note 13 ante.

2 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

3 For the meaning of 'VAT credit' see PARA 216 ante.

4 Value Added Tax Act 1994 s 63(1). An appeal lies against the imposition of a penalty: see s 83(n) (as amended); and PARA 346 post. As to the powers of the Commissioners and, on appeal, of the VAT and duties tribunal, to mitigate the penalty see PARA 329 post. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

5 Any reference for these purposes to the VAT for a prescribed accounting period which would have been lost if an inaccuracy had not been discovered is a reference to the amount of the understatement of liability or, as the case may be, overstatement of entitlement referred to, in relation to that period, in *ibid* s 63(1): s 63(3). This reverses the decision in *Customs and Excise Comrs v Peninsular and Oriental Steam Navigation Co* [1994] STC 259, CA. Where, however, a return for any prescribed accounting period overstates or understates to any extent a person's liability to VAT or his entitlement to a VAT credit, and that return is corrected, in such circumstances and in accordance with such conditions as may be prescribed, by a return for a later such period which understates or overstates, to the corresponding extent, that liability or entitlement, it is assumed for these purposes that the statements made by each of those returns, so far as they are not inaccurate in any other respect, are correct statements for the accounting period to which it relates: Value Added Tax Act 1994 s 63(8); and see Customs and Excise Press Release 26/91 [1991] STI 324 (a serious misdeclaration penalty (as this penalty is generally known) will not normally be imposed when a VAT return for a registered trader is misdeclared but this has been corrected by a compensating misdeclaration in respect of the same transactions for the following period with no overall loss of VAT). See also HC Official Report, SC A (Finance Bill), 24 March 1994, cols 819-821. The effect of the Value Added Tax Act 1994 s 63(8) is to avoid the prospect of the maker of the returns being liable to a penalty in respect of both returns (provided that the returns contain no other inaccuracy of a kind falling within the scope of s 63 (as amended)). As to the correction of errors see the Value Added Tax Regulations 1995, SI 1995/2518, regs 34, 35 (reg 34 as amended); and PARA 276 ante.



6 Value Added Tax Act 1994 s 63(1).

7 In relation to a prescribed accounting period, 'the relevant amount' means, where the inaccuracy is contained in the return, the gross amount of VAT for that period; and where the inaccuracy lies in an uncorrected assessment, the true amount of VAT for that period: *ibid* s 63(4). 'The gross amount of tax', in relation to a prescribed accounting period, means the aggregate of the amount of credit for input tax and the amount of output tax which should have been stated on the return for the period: s 63(5). 'The true amount of VAT', in relation to a prescribed accounting period, means the amount of VAT which was due from the person concerned for that period or, as the case may be, the amount of the VAT credit (if any) to which he was entitled for that period: s 63(7). In relation to a prescribed accounting period, any reference in ss 59-69 (as amended) to credit for input tax includes a reference to any sum which, in a return for that period, is claimed as a deduction from VAT due: s 71(2).

In relation to any return which, in accordance with prescribed requirements, includes a single amount as the aggregate for the prescribed accounting period to which the return relates of the amount representing credit for input tax and any other amounts representing refunds or repayments of VAT to which there is an entitlement, references to the amount of credit for input tax have effect, so far as they would not so have effect by virtue of s 63(9), as references to the amount of that aggregate: s 63(6). In the case of a public body which is registered and to which s 33 (as amended) (see *PARA 304 ante*) applies, s 63 (as amended) has effect as if any reference: (1) to a VAT credit included a reference to a refund under s 33 (as amended); and (2) to credit for input tax included a reference to VAT chargeable on supplies, acquisitions or importations which were not for the purposes of any business carried on by the body: s 63(9). The tax refunded to a public body under s 33 (as amended) is not input tax within s 25 (see *PARA 216 ante*), since it is not tax on supplies for the purposes of a business carried on by the body. For the meaning of 'registered' see *PARAS 18 note 4, 64 note 2 ante*; and for the meaning of 'business' see *PARA 23 ante*.

Similarly, s 63 (as amended) has effect in relation to a body which is registered and to which s 33A (as added) (refunds of VAT to museums and galleries: see *PARA 305 ante*) applies as if any reference: (a) to a VAT credit included a reference to a refund under s 33A (as added); and (b) to credit for input tax included a reference to VAT chargeable on supplies, acquisitions or importations which were attributable to the provision by the body of free rights of admission to a museum or gallery that in relation to the body was a relevant museum or gallery for the purposes of s 33A (as added): s 63(9A) (added by the Finance Act 2001 s 98(1), (3)).

8 Value Added Tax Act 1994 s 63(2). See *Customs and Excise Comrs v Nomura Property Management Services Ltd* [1994] STC 461 (the taxpayer unsuccessfully sought to avoid a penalty under the predecessor to the Value Added Tax Act 1994 s 63, by contending that the errors in the return were so incredible as to render the return a nullity (the figures for the various boxes were transposed); it was held that there was no class of error which would invalidate a return, disapproving *Gwent County Council v Customs and Excise Comrs* (1991) VAT Decision 6153, [1991] STI 811).

9 Value Added Tax Act 1994 s 63(10)(a). In the case of appeals against a serious misdeclaration penalty (though not in default surcharge cases: see *PARA 332 post*), where the taxpayer is unaware of the error, it has been said that if a reasonable, conscientious, business person who knew all the facts of the case, and who was alive to and accepted the need to comply with one's responsibilities in regard to the rendering of VAT returns, would consider that the taxpayer, in acting as it did in the circumstances in which it found itself, had acted with due care in the preparation of its return it would have a reasonable excuse: *Appropriate Technology Ltd v Customs and Excise Comrs* [1991] VATTR 226, approved in *Frank Galliers Ltd v Customs and Excise Comrs* [1993] STC 284 as a useful, though not a comprehensive, test. If a trader innocently errs in a one-off case, in accounting for VAT in a field other than that in which he generally operates, he may claim reasonable excuse even if the material statutory provision would have been perfectly clear to a layman who had identified and read it: *Nor-Clean Ltd v Customs and Excise Comrs* [1991] VATTR 239. Where the taxpayer's excuse for acting with what appears, *prima facie*, to be a want of care, is the existence of pressures and problems, the question must be whether the taxpayer has acted with proper care in the context of such evidence as there is as to pressures and problems: *Frank Galliers Ltd v Customs and Excise Comrs* *supra* at 293; see also *Clean Car Co Ltd v Customs and Excise Comrs* [1991] VATTR 234. An insufficiency of funds to pay any VAT due is not a reasonable excuse: Value Added Tax Act 1994 s 71(1)(a). Nor, where reliance is placed on any other person to perform any task, is either the fact of that reliance or any dilatoriness or inaccuracy on the part of the person relied upon a reasonable excuse: s 71(1)(b). See *Customs and Excise Comrs v Salevon Ltd, Customs and Excise Comrs v Harris* [1989] STC 907 (where a trader relies on a professional adviser to perform the tasks imposed on him by statute as well as to advise him about his obligations, but the adviser fails in those duties, the trader is deprived of a defence of reasonable excuse by what is now the Value Added Tax Act 1994 s 71(1)(b)). See also Institute of Chartered Accountants in England and Wales Memorandum TR 836 *VAT: Levy of a Serious Misdeclaration Penalty following Advice from a Professional Adviser* [1991] STI 576 (where the law is ambiguous or there has been room for a genuine difference of opinion about its interpretation, which is subsequently clarified by statute, there may well be scope for a successful plea of reasonable excuse for a misdeclaration on a VAT return which was rendered before the law was clarified, on the basis that, at the time when the return was prepared, the relevant legislation was unclear or ambiguous (although the fact that the trader was relying on the advice of an independent tax adviser is irrelevant, since the reasonable excuse lies in the ambiguity, or

uncertainty of interpretation, of the relevant legal provision: see PARAS 8-9)). The Value Added Tax Act 1994 s 71(1)(b) does not impose more stringent requirements for the establishment of a reasonable excuse in cases where the taxpayer has relied on other persons than where no such reliance has been placed; it merely excludes the facts of delegation or culpable delay or inaccuracy of a third party from constituting a reasonable excuse: *Frank Galliers Ltd v Customs and Excise Comrs* supra. It is therefore open to the taxpayer to invite the court to go behind the inaccuracy etc of the adviser to investigate whether the reason why the adviser was inaccurate itself gives rise to a reasonable excuse. See, similarly, *Customs and Excise Comrs v Steptoe* [1992] STC 757, CA; *Nor-Clean Ltd v Customs and Excise Comrs* supra; *Walsh Bros (Tunnelling) Ltd v Customs and Excise Comrs* (1992) VAT Decision 7186, [1992] STI 486; *DJ Trimming Ltd v Customs and Excise Comrs* (1992) VAT Decision 7733, [1992] STI 789.

10 Value Added Tax Act 1994 s 63(10)(b). A considerable number of cases have come before the tribunal on whether there has been truly 'voluntary' disclosure; and on whether the disclosure takes place before the trader has reason to believe that inquiries were being made into his affairs in relation to VAT, not all of which appear to be fully reconcilable. In *Taunton Deane Borough Council v Customs and Excise Comrs* (1990) VAT Decision 5545 (unreported), it was held that a disclosure made under the shadow of an official review (eg in the course of a control visit) is not a voluntary disclosure. In *Moor Lodge Developments Ltd v Customs and Excise Comrs* (1992) VAT Decision 7285, [1992] STI 514, a disclosure made in respect of a misdeclaration by a company to an officer carrying out a control visit on a connected partnership was held to afford protection from a penalty; cf *FR Jenks (Overseas) Ltd v Customs and Excise Comrs* (1992) VAT Decision 8858 (unreported), following *Taunton Deane Borough Council v Customs and Excise Comrs* supra. For a case where the tribunal held that the Commissioners were estopped from imposing a misdeclaration penalty see *AB Gee of Ripley Ltd v Customs and Excise Comrs* [1991] VATTR 217.

11 Ie under the Value Added Tax Act 1994 s 60: see PARA 321 ante.

12 Ibid s 63(11).

## UPDATE

### **324-325 Penalty for misdeclaration or neglect resulting in value added tax loss, Repeated misdeclarations**

Value Added Tax Act 1994 ss 63, 64 replaced by the Finance Act 2007 Sch 24 (see INCOME TAXATION vol 23(1) (Reissue) PARA 1712A): Sch 24 para 29(d).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/325. Repeated misdeclarations.

### **325. Repeated misdeclarations.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> may serve a penalty liability notice on a person where there is a material inaccuracy<sup>2</sup> made in his value added tax return<sup>3</sup> in respect of any prescribed accounting period<sup>4</sup>. In any case where:

- 1002 (1) there is such a material inaccuracy<sup>5</sup>;
- 1003 (2) such a notice specifying a penalty period is served on the person concerned before the end of five consecutive prescribed accounting periods beginning with the period in respect of which there was the material inaccuracy<sup>6</sup>; and
- 1004 (3) the penalty period so specified is the period of eight consecutive prescribed accounting periods, beginning with that in which the date of the notice falls<sup>7</sup>,

then if there is a material inaccuracy in respect of any of the prescribed accounting periods falling within the penalty period specified in the notice, the person concerned is liable, except in relation to the first of those periods in respect of which there is a material inaccuracy, to a penalty equal to 15 per cent of the VAT for the prescribed accounting period in question which would have been lost<sup>8</sup> if the inaccuracy had not been discovered<sup>9</sup>.

In any case where:

- 1005 (a) a return has been made for a prescribed accounting period which understates a person's liability to VAT or overstates his entitlement to a VAT credit<sup>10</sup>; and
- 1006 (b) the VAT for that period which would have been lost had the inaccuracy not been discovered equals or exceeds the lesser of £500,000 and 10 per cent of the gross amount of tax for that period<sup>11</sup>,

the inaccuracy is regarded, subject to certain exceptions<sup>12</sup>, as material<sup>13</sup>. An inaccuracy is not, however, regarded as material if the person concerned satisfies the Commissioners or, on appeal, a VAT and duties tribunal that there is a reasonable excuse for the inaccuracy<sup>14</sup>. Nor is it regarded as material if:

- 1007 (i) he furnished the Commissioners with full information with respect to the inaccuracy at a time when he had no reason to believe that inquiries were being made by the Commissioners into his affairs, so far as they relate to VAT<sup>15</sup>; or
- 1008 (ii) by reason of conduct falling within head (i) above, the person concerned is convicted of an offence (whether under the Value Added Tax Act 1994 or otherwise)<sup>16</sup> or is assessed to a penalty either for dishonest evasion of VAT<sup>17</sup> or for misdeclaration or neglect<sup>18</sup> resulting in VAT loss<sup>19</sup>.

Where any of these exceptions requires any inaccuracy to be regarded as not material for the purposes of the serving of a penalty liability notice, any such notice served in respect of that inaccuracy is deemed not to have been served<sup>20</sup>.

- 1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.
- 2 As to what constitutes a material inaccuracy see the Value Added Tax Act 1994 s 64(1); and heads (a)-(b) in the text.
- 3 For the meaning of 'return' see PARA 115 note 13 ante.
- 4 See the Value Added Tax Act 1994 s 64(2); and heads (1)-(3) in the text. For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.
- 5 Ibid s 64(2)(a).
- 6 Ibid s 64(2)(b), (c).
- 7 Ibid s 64(2)(d).
- 8 For the meaning of 'the VAT which would have been lost' see ibid s 63(3) (applied by s 64(4)); and PARA 324 note 5 ante.
- 9 Ibid s 64(3). An appeal lies against the imposition of such a penalty: see s 83(n) (as amended); and PARA 346 post. As to the powers of the Commissioners and, on appeal, of the VAT and duties tribunal, to mitigate the penalty see PARA 329 post.
- 10 Ibid s 64(1)(a). For the meaning of 'VAT credit' see PARA 216 ante. In relation to a public body which is registered and to which s 33 (as amended) (see PARA 304 ante) applies, s 64 (as amended) applies as if any reference to a VAT credit included a reference to a refund under s 33 (as amended) and as if any reference to credit for input tax included a reference to the VAT chargeable on supplies, acquisitions and importations which were not for the purposes of any business carried on by the body: s 63(9); applied by s 64(4). The tax refunded to a public body under s 33 (as amended) is not input tax within s 25 (see PARA 216 ante), since it is not tax on supplies for the purposes of a business carried on by the body: see PARA 304 ante. For the meaning of 'registered' see PARAS 18 note 4, 64 note 2 ante; for the meaning of 'input tax' see PARAS 4, 215 ante; as to the meaning of 'supply' see PARA 27 ante; and for the meaning of 'business' see PARA 23 ante.
- 11 Ibid s 64(1)(b). For the meaning of 'the gross amount of tax' see s 63(5) (applied by s 64(4)); and PARA 324 note 7 ante.
- 12 See ibid s 64(5), (6) (as substituted); and the text and notes 14-19 infra.
- 13 Ibid s 64(1). As to the correction of errors see, however, s 63(8) (applied by s 64(4)); and PARA 324 note 5 ante.
- 14 Ibid s 64(5)(a). As to what is a 'reasonable excuse' see PARA 324 note 9 ante.
- 15 Ibid s 64(5)(b).
- 16 Ibid s 64(6)(a) (s 64(6) substituted by the Finance Act 1996 s 36(1)). As to criminal offences in relation to VAT see PARA 316 et seq ante.
- 17 Ie under the Value Added Tax Act 1994 s 60: see PARA 321 ante.
- 18 Ie under ibid s 63 (as amended): see PARA 324 ante. An inaccuracy by reason of which a person has been assessed to a penalty under s 63 (as amended) is not, however, prevented from being regarded: (1) as a material inaccuracy in respect of which the Commissioners may serve a penalty liability notice under s 64(2); or (2) as a material inaccuracy for the purposes of s 64(3) by reference to which any prescribed accounting period falling within the penalty period is to be treated as the first prescribed accounting period so falling in respect of which there is a material inaccuracy: s 64(6A) (added by the Finance Act 1996 s 36(1)).
- 19 Value Added Tax Act 1994 s 64(6)(b) (as substituted: see note 16 supra).
- 20 Ibid s 64(7) (substituted by the Finance Act 1996 s 36(1)).

## UPDATE

### **324-325 Penalty for misdeclaration or neglect resulting in value added tax loss, Repeated misdeclarations**

Value Added Tax Act 1994 ss 63, 64 replaced by the Finance Act 2007 Sch 24 (see INCOME TAXATION vol 23(1) (Reissue) PARA 1712A): Sch 24 para 29(d).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/326. Inaccuracies in EC sales statements.

### **326. Inaccuracies in EC sales statements.**

A person is liable to a penalty of £100 in respect of an EC sales statement<sup>1</sup> where:

- 1009 (1) such a statement containing a material inaccuracy<sup>2</sup> has been submitted by him to the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup>;
- 1010 (2) within six months of discovering the inaccuracy, the Commissioners have issued him with a written warning identifying that statement and stating that future inaccuracies might result in the service of a notice for these purposes<sup>4</sup>;
- 1011 (3) another EC sales statement containing a material inaccuracy ('the second inaccurate statement') has been submitted by that person to the Commissioners<sup>5</sup>;
- 1012 (4) its submission date<sup>6</sup> fell within the period of two years beginning with the day after the warning was issued<sup>7</sup>;
- 1013 (5) within six months of discovering the inaccuracy in the second inaccurate statement, the Commissioners have served that person with a notice identifying that statement and stating that future inaccuracies will attract a penalty under these provisions<sup>8</sup>;
- 1014 (6) yet another EC sales statement containing a material inaccuracy is submitted by that person to the Commissioners<sup>9</sup>; and
- 1015 (7) the submission date for that further statement is not more than two years after the service of the notice or the date on which any previous statement attracting a penalty was submitted by that person to the Commissioners<sup>10</sup>.

The penalty is incurred in respect of the statement falling within head (6) above<sup>11</sup>.

Subject to certain exceptions<sup>12</sup>, an EC sales statement is regarded as containing a material inaccuracy if, having regard to the matters required to be included in the statement, the inclusion or omission of any information from the statement is misleading in any material respect<sup>13</sup>. An inaccuracy contained in an EC sales statement is not, however, regarded as material if:

- 1016 (a) the person who submitted it satisfies the Commissioners or, on appeal, a VAT and duties tribunal that there is a reasonable excuse<sup>14</sup> for the inaccuracy<sup>15</sup>; or
- 1017 (b) he furnished the Commissioners with full information with respect to the inaccuracy at a time when he had no reason to believe that inquiries were being made by them into his affairs<sup>16</sup>.

Furthermore where, by reason of the submission of a statement containing a material inaccuracy by any person, that person is convicted of an offence (whether under the Value Added Tax Act 1994 or otherwise)<sup>17</sup>, the inaccuracy to which the conviction relates is regarded as not being material<sup>18</sup>.

Where the only statement identified in a warning or notice served for the purposes of head (2) or head (5) above is one which is regarded<sup>19</sup> as containing no material inaccuracies, that warning or notice is deemed not to have been issued or served for those purposes<sup>20</sup>.

1 'EC sales statement' means any statement which is required to be submitted to the Commissioners for Her Majesty's Revenue and Customs in accordance with regulations under the Value Added Tax Act 1994 s 58, Sch 11 para 2(3) (see PARA 245 ante): s 65(6). See the Value Added Tax Regulations 1995, SI 1995/2518, Pt IV (regs

21-23) (as amended); and PARA 284 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

2 As to when a statement contains a material inaccuracy see the text and notes 13-18 infra.

3 Value Added Tax Act 1994 s 65(1)(a).

4 Ibid s 65(1)(b).

5 Ibid s 65(1)(c).

6 'Submission date', in relation to an EC sales statement, means whichever is the earlier of the last day for the submission of the statement to the Commissioners in accordance with the regulations (see note 1 supra) and the day on which it was in fact submitted to them: *ibid* s 65(6).

7 Ibid s 65(1)(d).

8 Ibid s 65(1)(e).

9 Ibid s 65(1)(f).

10 Ibid s 65(1)(g).

11 Ibid s 65(1). An appeal lies against the imposition of such a penalty: see s 83(n) (as amended); and PARA 346 post.

12 See the text and notes 14-18 infra.

13 Value Added Tax Act 1994 s 65(2).

14 As to what constitutes a reasonable excuse see PARA 324 note 9 ante.

15 Value Added Tax Act 1994 s 65(3)(a).

16 Ibid s 65(3)(b).

17 As to criminal offences in connection with VAT see PARA 316 et seq ante.

18 Value Added Tax Act 1994 s 65(4).

19 Ie whether by virtue of *ibid* s 65(3) or (4) or otherwise: s 65(5).

20 Ibid s 65(5).

## **UPDATE**

### **326 Inaccuracies in EC sales statements**

TEXT AND NOTE 1--The Value Added Tax Act 1994 s 65 also applies in relation to a statement which is required to be submitted to the Commissioners in accordance with regulations under Sch 11 para 2(3A) (see PARA 245) as it applies in relation to an EC sales statement: s 65(7) (added by Finance Act 2006 s 19(3)).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/327. Failure to submit an EC sales statement.

### **327. Failure to submit an EC sales statement.**

If, by the last day on which a person is required<sup>1</sup> to submit an EC sales statement<sup>2</sup> for any prescribed period<sup>3</sup> to the Commissioners for Her Majesty's Revenue and Customs, they have not received it, that person is regarded as being in default in relation to that statement until it is submitted<sup>4</sup>. Where any person is in default, the Commissioners may serve notice on him stating:

- 1018 (1) that he is in default in relation to the statement specified in the notice<sup>5</sup>;
- 1019 (2) that, subject to the liability mentioned in head (4) below, no action will be taken if he remedies the default before the end of the period of 14 days beginning with the day after the service of the notice<sup>6</sup>;
- 1020 (3) that if the default is not so remedied, he will become liable in respect of his default to penalties calculated on a daily basis from the end of that period<sup>7</sup>; and
- 1021 (4) that he will become liable, without any further notices being served under these provisions, to penalties if he commits any more defaults before a period of 12 months has elapsed without his being in default<sup>8</sup>.

Where a person has been served with such a notice, he becomes liable:

- 1022 (a) to a penalty in respect of the statement to which the notice relates, if that statement is not submitted before the end of the period of 14 days beginning with the day after the service of the notice<sup>9</sup>; and
- 1023 (b) whether or not that statement is so submitted, to a penalty in respect of any EC sales statement the last day for the submission of which is after the service and before the expiry of the notice and in relation to which he is in default<sup>10</sup>.

A notice so served on any person continues in force until the end of the period of 12 months beginning with the day after the service of the notice<sup>11</sup>. Where, however, at any time in that period of 12 months that person is in default in relation to any EC sales statement other than one in relation to which he was in default when the notice was served, the notice continues in force until a period of 12 months has elapsed without that person becoming liable to a penalty in respect of any EC sales statement<sup>12</sup>.

The amount of any penalty to which a person who has been served with such a notice is liable is whichever is the greater of £50 and a daily penalty of either £5 or the relevant amount<sup>13</sup> for every day the default continues, up to a maximum of 100 days<sup>14</sup>. In the case of a liability in respect of the statement to which the notice relates, the daily penalty of £5 applies for every day the default continued after the end of the period of 14 days beginning with the day after the service of the notice, up to that 100-day maximum<sup>15</sup>. In the case of a liability in respect of any other statement, the daily penalty of the relevant amount applies for every day for which the default continues up to that 100-day maximum<sup>16</sup>.

If a person who would otherwise be liable to a penalty under these provisions satisfies the Commissioners or, on appeal, the VAT and duties tribunal that an EC sales statement was submitted at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or that there is a reasonable excuse<sup>17</sup> for such a statement not having been dispatched, he is treated<sup>18</sup> as not having been in default in relation to that statement and is not liable to any such penalty in



respect of that statement<sup>19</sup>. Any notice served<sup>20</sup> exclusively in relation to the failure to submit that statement then has no effect for these purposes<sup>21</sup>.

1     Ie in accordance with regulations under the Value Added Tax Act 1994: s 66(1). See the Value Added Tax Regulations 1995, SI 1995/2518, Pt IV (regs 21-23) (as amended); and PARA 284 ante.

2     An 'EC sales statement' means any statement which is required to be submitted to the Commissioners for Her Majesty's Revenue and Customs in accordance with regulations under the Value Added Tax Act 1994 s 58, Sch 11 para 2(3) (see PARA 245 ante): s 66(9). As to the relevant regulations see note 1 supra. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

3     For the meaning of 'prescribed' see PARA 16 note 2 ante. Generally speaking, an EC sales statement must be submitted within 42 days after the end of each quarter: see the Value Added Tax Regulations 1995, SI 1995/2518, reg 22(1) (as amended); and PARA 284 ante.

4     Value Added Tax Act 1994 s 66(1).

5     Ibid s 66(2)(a).

6     Ibid s 66(2)(b).

7     Ibid s 66(2)(c).

8     Ibid s 66(2)(d).

9     Ibid s 66(3)(a).

10    Ibid s 66(3)(b). An appeal lies against the imposition of any such penalty: see s 83(n) (as amended); and PARA 346 post.

11    Ibid s 66(4)(a).

12    Ibid s 66(4)(b).

13    'The relevant amount', in relation to a person served with a notice under ibid s 66(2), means: (1) £5 where, that person not having been liable to a penalty in respect of the statement to which the notice relates, the statement in question is the first statement in respect of which that person has become liable to a penalty while the notice has been in force; (2) £10 where the statement in question is the second statement in respect of which he has become so liable while the notice has been in force, counting the statement to which the notice relates where he has become liable in respect of that statement; and (3) £15 in any other case: s 66(6). If it appears to the Treasury that there has been a change in the value of money since 1 January 1993 or, as the case may be, the last occasion when the sums specified in relation to daily penalties were varied, the Treasury may by order substitute for the sums for the time being specified such other sums as appear to it to be justified by the change; but such an order is not to apply to any default in relation to a statement the last day for the submission of which was before the order comes into force: s 66(8). At the date at which this volume states the law, no such order had been made. As to the making of orders generally see PARA 14 ante.

14    See ibid s 66(5).

15    See ibid s 66(5)(a).

16    See ibid s 66(5)(b).

17    As to what constitutes a reasonable excuse see PARA 324 note 9 ante.

18    Ie for these purposes and for the purposes of the Value Added Tax Act 1994 ss 59-65 (as amended) (see PARAS 321 et seq ante, 332 post), ss 67-71 (as amended) (see PARA 328 et seq post), s 73 (as amended) (see PARAS 294, 299 ante), s 75 (see PARAS 295, 299 ante) and s 76 (as amended) (see PARA 298 ante): s 66(7).

19    Ibid s 66(7). The penalty imposed on the taxpayer under this provision will be reduced to the date on which delivery of the statement would have been expected: see *Maguire (t/a Skian Mhor) v Customs and Excise Comrs* [2004] V & DR 288.

20    Ie under the Value Added Tax Act 1994 s 66(2): see heads (1)-(4) in the text.

21    Ibid s 66(7).

## **UPDATE**

### **327 Failure to submit an EC sales statement**

TEXT AND NOTE 2--The Value Added Tax Act 1994 s 66 also applies in relation to a statement which is required to be submitted to the Commissioners in accordance with regulations under Sch 11 para 2(3A) (see PARA 245) as it applies in relation to an EC sales statement: s 66(10) (added by Finance Act 2006 s 19(4)).

NOTE 18--Also for the purposes of the Finance Act 2007 Sch 24 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1712A): Value Added Tax Act 1994 s 66(7) (amended by SI 2009/571).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/328. Failure to notify and unauthorised issue of invoices.

### 328. Failure to notify and unauthorised issue of invoices.

In any case where a person fails to comply with any specified notification requirements relating to registration<sup>1</sup> or with a requirement of regulations relating to the acquisition of goods subject to a duty of excise or a new means of transport<sup>2</sup> from another member state<sup>3</sup>, he is liable, subject to certain exceptions<sup>4</sup>, to a penalty equal to the specified percentage<sup>5</sup> of the relevant value added tax<sup>6</sup> or, if greater (or if the circumstances are such that there is no relevant VAT), to a penalty of £50<sup>7</sup>. In addition, if an unauthorised person<sup>8</sup> issues one or more invoices<sup>9</sup> showing an amount as being VAT or as including an amount attributable to VAT, he too is liable, subject to the same exceptions, to such a penalty<sup>10</sup>.

Conduct falling within this provision does not give rise to liability to a penalty if the person concerned satisfies the Commissioners for Her Majesty's Revenue and Customs or, on appeal, a VAT and duties tribunal that there is a reasonable excuse<sup>11</sup> for his conduct<sup>12</sup>. Nor does conduct give rise to such liability if, by reason of that conduct, a person is convicted of an offence (whether under the Value Added Tax Act 1994 or otherwise)<sup>13</sup> or is assessed to a penalty<sup>14</sup> for dishonest evasion of VAT<sup>15</sup>.

1    Ie any of the Value Added Tax Act 1994 s 3(2), Sch 1 paras 5-7 (see PARA 64 ante), Sch 1 para 14(2), (3) (see PARA 66 ante), Sch 2 para 3 (see PARA 69 ante), Sch 3 paras 3, 8(2) (see PARA 72 ante) or Sch 3A paras 3, 4, 7(2), (3) (as added) (see PARAS 65-66 ante): s 67(1)(a) (amended by the Finance Act 1996 s 37(1); and the Finance Act 2000 s 136(2)(a)). See *Customs and Excise Comrs v Shingleton* [1988] STC 190.

2    For the meaning of 'new means of transport' see PARA 19 note 7 ante.

3    Ie regulations under the Value Added Tax Act 1994 s 58, Sch 11 para 2(4) (see PARA 245 ante): s 67(1)(b). See the Value Added Tax Regulations 1995, SI 1995/2518, regs 36, 148; and PARA 295 ante. For the meaning of 'another member state' see PARA 4 note 15 ante; and as to the acquisition of goods from other member states see PARA 19 ante.

4    See the Value Added Tax Act 1994 s 67(8), (9); and the text and notes 11-15 infra.

5    The 'specified percentage' is: (1) where the relevant VAT is given by *ibid* s 67(3)(a) (as amended) or s 67(3)(b) (as amended) (see note 6 heads (1)-(2) infra), 5% if the period referred to therein does not exceed nine months and 10% if that period exceeds nine months but does not exceed 18 months; (2) where the relevant VAT is given by s 67(3)(c) (see note 6 head (3) infra), 5% if the failure in question did not continue for more than three months and 10% if it continued for more than three months but did not continue for more than six months; and (3) 15% in any other case: s 67(4) (amended by the Finance Act 1995 s 32(1), (3), (4)). The VAT and duties tribunal has no power to mitigate the penalty: *Rhodes v Customs and Excise Comrs* [1986] VATTR 72. For the meaning of 'relevant VAT' see note 6 infra.

6    'Relevant VAT' means, in relation to a person's failure to comply with: (1) the Value Added Tax Act 1994 Sch 1 paras 5, 6 or 7, Sch 2 para 3, Sch 3 para 3 or Sch 3A paras 3, 4 (as added), the VAT, if any, for which he is liable for the period beginning on the date with effect from which he is required to be registered in accordance with the relevant provision and ending on the date on which the Commissioners for Her Majesty's Revenue and Customs received notification of, or otherwise became fully aware of, his liability to be registered (s 67(3)(a)) (amended by the Finance Act 1996 s 37(1)(b); and the Finance Act 2000 s 136(2)(b)); (2) the Value Added Tax Act 1994 Sch 1 para 14(2), (3), Sch 3 para 8(2) or Sch 3A para 7(2), (3) (as added), the VAT, if any, for which, but for any exemption from registration, he would be liable for the period beginning on the date of the change or alteration referred to in that provision and ending on the date on which the Commissioners received notification of, or otherwise became fully aware of, that change or alteration (s 67(3)(b)); and (3) a requirement of regulations under Sch 11 para 2(4), the VAT on the acquisition to which the failure relates (s 67(3)(c)). In relation to any person who became liable to be registered by virtue of Sch 1 para 1(2) (as amended) (see PARA 64 ante) before 1 January 1996 but who had not notified the Commissioners of the liability before that date, s 67 (as amended) has effect as if in s 67(3)(a) (as amended) for the words 'the date with effect from which he is, in accordance with that paragraph (ie 'the relevant provision': see head (1) supra), required to be registered' there were substituted '1 January 1996': Finance Act 1996 s 37(2)(b), (3). The 'VAT for which a person is liable'

at the time when the Commissioners become aware of his liability to register includes the VAT on supplies made before that time, but which the person would only have been obliged to account for and pay at a later time had he been registered: *Corthine v Customs and Excise Comrs* [1988] VATTR 90. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to the Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

Where the amount of VAT which would otherwise be treated, for the purposes of the Value Added Tax Act 1994 s 67(1) (as amended) as the relevant VAT in relation to a failure mentioned in s 67(3)(a) (as amended) includes VAT on the acquisition of goods from another member state, and the Commissioners are satisfied that VAT has been paid under the law of another member state on the supply in pursuance of which those goods were acquired, then, in the determination of the amount of the relevant VAT in relation to that failure, an allowance is made for the VAT paid under the law of that member state: s 67(5). The amount of the allowance must not exceed the amount of the VAT due on the acquisition but is otherwise equal to the amount of VAT which the Commissioners are satisfied has been paid on that supply under the law of that member state: s 67(5). Similarly, where the amount of VAT which would otherwise be treated for those purposes as the relevant amount in relation to such a failure includes VAT chargeable by virtue of s 7(4) (see PARA 48 ante) on any supply, and the Commissioners are satisfied that VAT has been paid under the law of another member state on that supply, an allowance is made for the VAT paid under the law of the other member state: s 67(6). The amount of that allowance must not exceed the amount of VAT chargeable by virtue of s 7(4) on that supply but is otherwise equal to the amount of VAT which the Commissioners are satisfied has been paid on that supply under the law of that other member state: s 67(6). For the meaning of 'another member state' see PARA 4 note 15 ante; and as to references to the law of another member state see PARA 17 ante.

7 Ibid s 67(1). An appeal lies against the imposition of such a penalty: see s 83(n) (as amended); and PARA 346 post. As to the powers of the Commissioners and, on appeal, of the VAT and duties tribunal to mitigate the penalty see PARA 329 post. If it appears to the Treasury that there has been a change in the value of money since 25 July 1985 or, as the case may be, the last occasion when the power conferred by this provision was exercised, the Treasury may by order substitute for the sum for the time being specified in s 67(1) such other sum as appears to it to be justified by the change: s 67(10). Such an order does not apply in relation to a failure to comply which ended on or before the date on which the order comes into force: s 67(11). At the date at which this volume states the law, no such order had been made. As to the making of orders generally see PARA 14 ante.

8 An 'unauthorised person' means anyone other than: (1) a person who is registered for VAT (see PARA 64 et seq ante); (2) a body corporate treated for the purposes of ibid s 43 (as amended) as a member of a group (see PARAS 75, 205 ante); (3) a person treated as a taxable person under regulations made under s 46(4) (see PARA 79 ante); (4) a person authorised to issue an invoice under regulations made under Sch 11 para 2(12) (see PARAS 30, 245 ante); or (5) a person acting on behalf of the Crown: s 67(2). As to the meaning of 'invoice' see PARA 17 note 9 ante.

9 Ibid s 67 (as amended) has effect in relation to any invoice which: (1) for the purposes of any provision made under s 54(3) (flat-rate scheme for farmers: see PARA 88 et seq ante) shows an amount as included in the consideration for any supply; and (2) either fails to comply with the requirements of any regulations made under s 54 or is issued by a person who is not for the time being authorised to do so for the purposes of s 54, as if the person issuing the invoice were an unauthorised person and that amount were shown on the invoice as an amount attributable to VAT: s 67(7).

10 See ibid s 67(1)(c). In this case, the specified percentage is 15% (s 67(4)(c) (as amended: see note 5 supra)); and the relevant VAT is the amount which is, or the aggregate of the amounts which are, shown on the invoice or invoices as VAT, or to be taken as representing VAT (s 67(3)(d)).

11 As to what constitutes a reasonable excuse see PARA 324 note 9 ante. See also *Neal v Customs and Excise Comrs* [1988] STC 131 (a distinction is to be drawn between basic ignorance of the primary law governing VAT, which cannot afford a reasonable excuse, and ignorance of aspects of law which less directly impinge on such liability, which might); *Customs and Excise Comrs v Salevon Ltd*, *Customs and Excise Comrs v Harris* [1989] STC 907; *Parkinson v Customs and Excise Comrs* [1986] VATTR 126; *Zaveri v Customs and Excise Comrs* [1986] VATTR 133; *Selwyn v Customs and Excise Comrs* [1986] VATTR 142 (cf *Tomkins (t/a Options) v Customs and Excise Comrs* (1994) VAT Decision 11738, [1994] STI 540); *Electric Tool Repair Ltd v Customs and Excise Comrs* [1986] VATTR 257; *Hutchings v Customs and Excise Comrs* [1987] VATTR 58; *Jenkinson v Customs and Excise Comrs* [1988] VATTR 45; *George v Customs and Excise Comrs* [1991] VATTR 313; *Chapman v Customs and Excise Comrs* [1992] VATTR 402.

12 Value Added Tax Act 1994 s 67(8).

13 As to criminal offences in relation to VAT see PARA 316 et seq ante.

14 Ie a penalty under the Value Added Tax Act 1994 s 60: see PARA 321 ante.

15 Ibid s 67(9).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/329. Mitigation of penalties.

### 329. Mitigation of penalties.

Where a person is liable to a penalty in respect of dishonest evasion of value added tax<sup>1</sup>, misdeclaration or neglect resulting in VAT loss<sup>2</sup>, repeated misdeclarations<sup>3</sup>, failure to notify<sup>4</sup>, unauthorised issue of invoices<sup>5</sup>, breach of record-keeping requirements in relation to transactions in gold<sup>6</sup> or failure to notify the use of a notifiable scheme<sup>7</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>8</sup> may reduce the penalty to such amount, including nil, as they think proper<sup>9</sup>. A VAT and duties tribunal has the same power on an appeal<sup>10</sup> and may also, on an appeal relating to a penalty so reduced by the Commissioners, cancel the whole or any part of the reduction made by the Commissioners<sup>11</sup>.

In exercising these powers, neither the Commissioners nor any tribunal may take into account any of the following matters<sup>12</sup>:

- 1024 (1) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;
- 1025 (2) the fact that there has, in the case in question or in that case taken with any other cases, been no, or no significant, loss of VAT; or
- 1026 (3) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith<sup>13</sup>.

1    Ie under the Value Added Tax Act 1994 s 60: see PARA 321 ante.

2    Ie under ibid s 63 (as amended): see PARA 324 ante.

3    Ie under ibid s 64 (as amended): see PARA 325 ante.

4    Ie under ibid s 67 (as amended): see s 67(1)(a), (b) (as amended); and PARA 328 ante.

5    Ie under ibid s 67 (as amended): see s 67(1)(c); and PARA 328 ante.

6    Ie under ibid s 69A (as added): see PARA 331 post.

7    Ie under ibid s 58A, Sch 11A para 10 (as added): see PARA 292 ante.

8    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

9    Value Added Tax Act 1994 s 70(1) (amended by the Finance Act 2000 s 137(1), (3); and the Finance Act 2004 s 19(1), Sch 2 para 3).

10   See the Value Added Tax Act 1994 s 70(1) (as amended: see note 9 supra).

11   Ibid s 70(2). See also *James Ashworth Waterfoot (Successors) Ltd v Customs and Excise Comrs* [1996] V & DR 66 (the tribunal's power to increase penalties under the Value Added Tax Act 1994 s 70(2) should be exercised sparingly).

12   Ibid s 70(3).

13   Ibid s 70(4).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/330. Breaches of walking possession agreements.

### 330. Breaches of walking possession agreements.

Where a distress is authorised to be levied<sup>1</sup> on the goods and chattels of a person (a 'person in default') who has refused or neglected to pay any value added tax due or any amount recoverable as if it were VAT due, the person levying the distress and the person in default may enter into a walking possession agreement<sup>2</sup>. A 'walking possession agreement' means an agreement under which, in consideration of the property distrained upon being allowed to remain in the custody of the person in default and of the delaying of its sale, the person in default acknowledges that the property specified in the agreement is under distraint and held in walking possession; and undertakes that, except with the consent of the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> and subject to such conditions as they may impose, he will not remove or allow the removal of any of the specified property from the premises<sup>4</sup>. If the person in default is in breach of the undertaking contained in a walking possession agreement, he is liable to a penalty equal to half of the VAT or to half of the amount which was recoverable as if it were VAT<sup>5</sup>. He is not, however, liable to such a penalty if he satisfies the Commissioners or, on appeal, a VAT and duties tribunal that there is a reasonable excuse<sup>6</sup> for the breach in question<sup>7</sup>.

1    In accordance with regulations under the Finance Act 1997 s 51 (as amended) (enforcement by distress: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1139).

2    See the Value Added Tax Act 1994 s 68(1) (amended by the Finance Act 1997 s 53(7), (9)).

3    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

4    Value Added Tax Act 1994 s 68(2).

5    Ibid s 68(3). An appeal lies against the imposition of a penalty under s 68 (as amended): see s 83(n) (as amended); and PARA 346 post.

6    For the meaning of 'reasonable excuse' see PARA 324 note 9 ante.

7    Value Added Tax Act 1994 s 68(4). Section 68 (as amended) does not extend to Scotland: s 68(5).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/331. Breaches of regulatory provisions.

### **331. Breaches of regulatory provisions.**

If any person fails to comply with any one of a number of regulatory requirements<sup>1</sup>, he is liable, subject to certain conditions set out below, to a penalty equal to the prescribed rate<sup>2</sup> multiplied by the number of days for which the failure continues (up to a maximum of 100) or, if greater, to a penalty of £50<sup>3</sup>.

If any person fails to comply with a requirement to preserve records<sup>4</sup> he is liable, subject to certain conditions set out below, to a penalty of £500<sup>5</sup>.

A failure by any person to comply with any regulatory requirement or to preserve records does not give rise to liability to a penalty under these provisions if the person concerned satisfies the Commissioners for Her Majesty's Revenue and Customs (or, on appeal, a VAT and duties tribunal) that there is a reasonable excuse for the failure<sup>6</sup>. Moreover if, by reason of a failure to comply with regulatory requirements or to preserve records, a person is convicted of an offence (whether under the Value Added Tax Act 1994 or otherwise), or is assessed to a default surcharge<sup>7</sup> or is assessed to a penalty for dishonest evasion of VAT<sup>8</sup> or for misdeclaration or neglect resulting in VAT loss<sup>9</sup>, that conduct does not also give rise to liability to a penalty under these provisions<sup>10</sup>.

1     le a requirement imposed under: (1) the Value Added Tax Act 1994 s 3(2), Sch 1 para 11 (notification of end of liability or entitlement to be registered: see PARA 80 ante), Sch 1 para 12 (notification that the registered person has ceased to make supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom, or has made or formed the intention of making taxable supplies: see PARAS 67, 81 ante), Sch 2 para 5, Sch 3 para 5 (notification of matters affecting continuance of registration: see PARAS 84, 86 ante) or Sch 3A para 5 (as added) (notification of end of liability: see PARA 65 ante); (2) any regulations made under s 48 (as amended) (see PARA 71 ante) requiring a VAT representative, for the purposes of registration, to notify the Commissioners for Her Majesty's Revenue and Customs that his appointment has taken effect or has ceased to have effect (see the Value Added Tax Regulations 1995, SI 1995/2518, reg 10 (as amended); and PARA 71 ante); (3) the Value Added Tax Act 1994 s 58, Sch 11 para 6(1) (duty to keep records: see PARA 238 ante) or Sch 11 para 7 (as amended) (furnishing of information and production of documents: see PARAS 64 note 8, 243 ante); (4) any regulations or rules made under the Value Added Tax Act 1994, other than rules made under s 81(2), Sch 12 para 9 (as amended) (rules of procedure before VAT and duties tribunals: see PARA 349 post); (5) any order made by the Treasury under the Value Added Tax Act 1994; (6) any regulations made under the European Communities Act 1972 and relating to VAT; or (7) under the Value Added Tax Act 1994 s 18A (as added) in the form of a condition imposed by the Commissioners under s 18A(1) or (6) (as added) (see PARA 147 ante): s 69(1) (amended by the Finance Act 1996 ss 26(1), 35(6), (8), Sch 3 para 9; and the Finance Act 2000 s 136(3)).

For the meaning of 'United Kingdom' see PARA 4 note 3 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

2     In relation to a failure to comply with any regulatory requirement, the 'prescribed rate' is determined by reference to the number of occasions in the period of two years preceding the beginning of the failure in question on which the person concerned has previously failed to comply with that requirement: Value Added Tax Act 1994 s 69(3). The rate is: (1) £5 if there has been no such previous occasion in that period (s 69(3)(a)); (2) £10 if there has been only one such occasion in that period (s 69(3)(b)); and (3) £15 in any other case (s 69(3)(c)). However, for the purposes of s 69(3): (a) a failure to comply with any regulatory requirement is disregarded if, as a result of the failure, the person concerned became liable for a surcharge under s 59 (as amended) (see PARA 332 post) or s 59A (as added) (see PARA 333 post); (b) a continuing failure to comply with any such requirement is regarded as one occasion of failure occurring on the date on which the failure began; (c) if the same omission gives rise to a failure to comply with more than one such requirement, it is regarded as the occasion of only one failure; and (d) in relation to a failure to comply with a requirement imposed by regulations as to the furnishing of a return or as to the payment of VAT, a previous failure to comply with such a requirement as to either of those matters is regarded as a previous failure to comply with the requirement in question: s 69(4) (amended by the Finance Act 1996 s 35(1), (6)). If it appears to the Treasury that there has



been a change in the value of money since 25 July 1985, or since the last occasion when this power was exercised, it may by order substitute for the sums for the time being specified in the Value Added Tax Act 1994 s 69(2), (3)(a)-(c) such other sums as appear to it to be justified by the change: s 69(7). Such an order does not, however, apply to a failure which began before the date on which the order comes into force: s 69(7). At the date at which this volume states the law, no such order had been made.

3 Ibid s 69(1) (as amended: see note 1 supra). In addition, where the failure referred to in s 69(1) (as amended) consists in: (1) not paying the VAT due in respect of any period within the time required by regulations under s 25(1) (see PARA 216 ante); or (2) not furnishing a return in respect of any period within the time required by regulations under Sch 11 para 2(1) (as amended) (see PARA 245 ante), the prescribed rate is the greater of that which is appropriate under s 69(3)(a), (b) or (c) (see note 2 supra) and an amount equal to one-sixth, one-third or one-half of 1% of the VAT due in respect of that period (the appropriate fraction being determined according to whether s 69(3)(a), (b) or (c) is applicable): s 69(5). For the purposes of s 69(5), the VAT due is: (a) if the person has furnished a return, the VAT shown in the return as that for which he is accountable in respect of the period in question; or (b) in any other case, such VAT as has been assessed for that period and notified to him under s 73(1) (see PARA 294 ante): s 69(6). However, where a person is liable for a penalty under s 69 (as amended) for a failure to comply with a requirement of a kind described in s 69(1)(c)-(f) (see note 1 heads (3)-(6) supra), no assessment may be made of the amount due in respect of the penalty unless within the preceding two years the Commissioners have issued him with a written warning of the consequences of a continuing failure to comply with the relevant requirement: see s 76(2); and PARA 298 ante.

4 Ie a requirement imposed under ibid Sch 11 para 6(3): see PARA 238 ante.

5 Ibid s 69(2). However, these provisions do not apply where a person fails to comply with a requirement of regulations under the Finance Act 1999 s 13(5)(a) or (b) (duties to keep records or provide information in relation to gold: see PARA 217 ante): Value Added Tax Act 1994 s 69A(1) (s 69A added by the Finance Act 2000 s 137(1), (2)). Instead, a person who fails to comply with any such requirement is liable to a penalty not exceeding 17.5% of the value of the transactions to which the failure relates: Value Added Tax Act 1994 s 69A(2) (as so added). For the purposes of assessing the amount of any such penalty, the value of the transactions to which the failure relates is to be determined by the Commissioners to the best of their judgement and notified by them to the person liable: s 69A(3) (as so added). No assessment of a penalty under s 69A (as added) may be made more than two years after evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment comes to their knowledge: s 69A(4) (as so added). The reference in s 69A(4) (as added) to facts sufficient to justify the making of the assessment is to facts sufficient: (1) to indicate that there had been a failure to comply with any such requirement as is referred to in s 69A(1) (as added); and (2) to determine the value of the transactions to which the failure relates: s 69A(5) (as so added). A failure by any person to comply with any such requirement as is mentioned in s 69A(1) (as added) does not give rise to a liability to a penalty under s 69A (as added) if the person concerned satisfies the Commissioners or, on appeal, a tribunal, that there is a reasonable excuse for the failure: s 69A(6) (as so added). Where by reason of conduct falling within s 69A(1) (as added) a person is assessed to a penalty under s 60 (see PARA 321 ante), or is convicted of an offence (whether under the Value Added Tax Act 1994 or otherwise), that conduct does not also give rise to a penalty under s 69A (as added): s 69A(7) (as so added).

6 Ibid s 69(8). A failure in respect of which the Commissioners or tribunal have or has been so satisfied is disregarded for the purposes of s 69(3) (see note 2 supra): s 69(8). For the meaning of 'reasonable excuse' see PARA 324 note 9 ante.

7 Ie under ibid s 59 (as amended) (see PARA 332 post) or s 59A (as added) (see PARA 333 post): s 69(9) (amended by the Finance Act 1996 s 35(1), (6)).

8 Ie under the Value Added Tax Act 1994 s 60: see PARA 321 ante.

9 Ie under ibid s 63 (as amended): see PARA 324 ante.

10 Ibid s 69(9) (as amended: see note 7 supra).

## UPDATE

### 331 Breaches of regulatory provisions

TEXT AND NOTES--If any person fails to comply with a requirement imposed under the Value Added Tax Act 1994 Sch 11 para 6A(1) (see PARA 238), the person is liable to a penalty of an amount equal to £200 multiplied by the number of days on which the failure continues (up to a maximum of 30 days): s 69B(1), (2) (s 69B added by Finance Act 2006 s 21(2)). If any person fails to comply with a requirement to preserve records

imposed under the Value Added Tax Act 1994 Sch 11 para 6A(6), he is liable to a penalty of £500: s 69B(3). If it appears to the Treasury that there has been a change in the value of money since 19 July 2006 (the day on which the Finance Act 2006 was passed) or, if it is later, the last occasion when this power was exercised, they may by order substitute for the sums for the time being specified above such other sums as appear to them to be justified by the change; but such an order does not apply to any failure which began before the date on which the order comes into force: Value Added Tax Act 1994 s 69B(4), (5).

A failure by any person to comply with any requirement mentioned in s 69B(1), (3) above does not give rise to a liability to such a penalty; if the person concerned satisfies the Commissioners or, on a appeal, a VAT and duties tribunal, that there is a reasonable excuse for the failure: s 69B(6).

If, by reason of conduct falling within s 69B(1), (3), a person is assessed to a penalty under s 60 (see PARA 321) or under the Finance Act 2007 Sch 24 (see INCOME TAXATION vol 23(1) (Reissue) PARA 1712A) or is convicted of an offence (whether under the Value Added Tax Act 1994 or otherwise), that conduct does not also give rise to a penalty under s 69B: s 69B(7) (amended by SI 2009/571).

NOTE 1--Also, head (8) under the Value Added Tax Act 1994 Sch 11 para 2(3B) (see PARA 245): s 69(1) (amended by Finance Act 2006 s 19(5)).

NOTES 5, 8--The references are also to a penalty under the Finance Act 2007 Sch 24: Value Added Tax Act 1994 ss 69A(7), 69(9) (amended by SI 2009/571).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/6. OFFENCES AND PENALTIES/(2) CIVIL PENALTIES/332. The default surcharge.

### **332. The default surcharge.**

If, by the last day on which a taxable person<sup>1</sup> is required<sup>2</sup> to furnish a return<sup>3</sup> for a prescribed accounting period<sup>4</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup> have not received that return, or the Commissioners have received that return but have not received the amount of value added tax shown on the return as payable by him in respect of that period, the taxable person is regarded as being in default in respect of that period for the purposes of the default surcharge provisions<sup>6</sup>. A person is not, however, to be regarded as being in default in respect of any prescribed accounting period for these purposes if that period is one in respect of which he is required by virtue of any order under the statutory provisions relating to payments on account<sup>7</sup> to make any payment on account of VAT<sup>8</sup>.

Once a taxable person is in default in respect of a prescribed accounting period, the Commissioners may serve notice on him (a 'surcharge liability notice'), specifying as a surcharge period a period ending on the first anniversary of the last day of the prescribed accounting period the default for which led to the service of the notice, and beginning, in general<sup>9</sup>, on the date of the notice<sup>10</sup>. If a taxable person on whom a surcharge liability notice has been served is in default in respect of a prescribed accounting period ending within the surcharge period which is specified in (or extended by<sup>11</sup>) the notice, and he has outstanding VAT<sup>12</sup> for the prescribed accounting period in which he is in default, he is liable, subject to certain conditions set out below, to a surcharge equal to whichever is the greater of the specified percentage<sup>13</sup> of his outstanding VAT for that prescribed accounting period and £30<sup>14</sup>.

A person is not liable to a surcharge, and is treated as not having been in default in respect of the prescribed accounting period in question, if he satisfies the Commissioners (or, on appeal, a VAT and duties tribunal) that, in the case of a default which is material to the surcharge<sup>15</sup> the return or, as the case may be, the VAT shown on the return, was dispatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or that there is a reasonable excuse<sup>16</sup> for the return or VAT not having been so dispatched<sup>17</sup>. In such a case, any surcharge liability notice the service of which depended on that default is deemed not to have been served<sup>18</sup>. In addition, in any case where the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct constituting a breach of a regulatory provision<sup>19</sup> and by reason of that conduct the person concerned is assessed to a penalty<sup>20</sup>, the default is left out of account for the purposes of the default surcharge provisions<sup>21</sup> relating to the service of a default surcharge notice and to the computation and imposition of surcharges<sup>22</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 In accordance with regulations under the Value Added Tax Act 1994: see the Value Added Tax Regulations 1995, SI 1995/2518, reg 25 (as amended); and PARA 247 ante.

3 For the meaning of 'return' see PARA 115 note 13 ante.

4 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

5 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

6 Value Added Tax Act 1994 s 59(1). Section 59(1) is subject to s 59(1A) (as added: see note 8 infra): s 59(1) (amended by the Finance Act 1996 s 35(3)). The mere fact of being in default does not lead to the imposition of surcharge; the surcharge arises when, after a surcharge liability notice has been issued, the taxable person is

similarly in default within the period specified. The liability to a surcharge is not a liability to VAT; and does not, therefore, pass to a successor to the trader's VAT registration, under the Value Added Tax Regulations 1995, SI 1996/2518, reg 6 (as amended) (see PARA 83 ante): *Greenline Transport (North Wales) Ltd v Customs and Excise Comrs* (1991) VAT Decision 5756, [1991] STI 429.

7     le under the Value Added Tax Act 1994 s 28 (as amended): see PARA 252 ante.

8     Ibid s 59(1A) (added by the Finance Act 1996 s 35(1), (3)).

9     If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice is to be expressed as a continuation of the existing surcharge period and accordingly that existing period and its extension are regarded as a single surcharge period for the purposes of the default surcharge provisions: Value Added Tax Act 1994 s 59(3). If a taxable person does not receive the original surcharge liability notice, any subsequent notice under s 59(3) which purports to extend the original surcharge liability period is invalid: *Dow Engineering v Customs and Excise Comrs* (1991) VAT Decision 5771, [1991] STI 459; *Eidographics Ltd v Customs and Excise Comrs* [1991] VATTR 449; *Dow Chemical Co Ltd v Customs and Excise Comrs* (1996) VAT Decision 13954, [1996] STI 894. This may no longer be true, since the Commissioners have amended the wording on surcharge liability notices, so that 'extension' notices also specify a new surcharge period, in the event that the earlier notice was defective or did not reach the taxpayer: see *Goldfinch Transport Ltd v Customs and Excise Comrs* [1996] V & DR 484.

10    See the Value Added Tax Act 1994 s 59(2).

11    As to the extension of the period see note 9 supra.

12    For these purposes, a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required to make a return for that period; and this reference to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day: Value Added Tax Act 1994 s 59(6). For these purposes, references to a thing's being done by any day include references to its being done on that day: s 59(11) (added by the Finance Act 1996 s 35(1), (4)). There is no 'outstanding VAT' for this purpose where the taxpayer's credit on his VAT account exceeds the amount of VAT due (whether under returns or assessments): *Bruce v Customs and Excise Comrs* (2000) VAT Decision 16660, [2000] STI 1379.

13    The specified percentage is determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that in relation to: (1) the first such period, the specified percentage is 2%; (2) the second such period, the specified percentage is 5%; (3) the third such period, the specified percentage is 10%; and (4) each such period after the third, the specified percentage is 15%: Value Added Tax Act 1994 s 59(5). If there is no outstanding VAT for a period, and the Commissioners decide to exercise their discretion not to assess in the minimum amount of £30, this does not affect (ie reduce) the specified percentage for the next default: *GB Techniques Ltd v Customs and Excise Comrs* [1988] VATTR 95.

14    Value Added Tax Act 1994 s 59(4).

15    A default is material to a surcharge if: (1) it is the default which, by virtue of ibid s 59(4), gives rise to the surcharge; or (2) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice: s 59(8). The effect of this is that a taxable person cannot complain about the service of a surcharge liability notice simpliciter; rather, he has to await the imposition of a surcharge, when he may raise the question of whether he is properly to be treated as in default, either in relation to the original alleged default or in relation to the default in respect of which he has been made liable to a surcharge. An appeal lies to a VAT and duties tribunal against any liability to a surcharge under s 59 (as amended): see s 83(n) (as amended); and PARA 346 post.

16    For the meaning of 'reasonable excuse' see PARAS 324 note 9, 328 note 11 ante. The non-receipt of a surcharge liability notice in relation to an earlier default does not constitute a reasonable excuse for default in relation to a later return: *Customs and Excise Comrs v Medway Draughting and Technical Services Ltd, Customs and Excise Comrs v Adplates Offset Ltd* [1989] STC 346 at 353. In *Customs and Excise Comrs v Salevon Ltd, Customs and Excise Comrs v Harris* [1989] STC 907, a company suffered cash-flow problems through the dishonesty of its company secretary; its subsequent failure to pay its VAT on time constituted a reasonable excuse, notwithstanding the Value Added Tax Act 1994 s 71, since it was the dishonesty of the secretary rather than the shortage of funds which caused the company to fall into arrears in the payment of its tax. In *First Continental Ltd v Customs and Excise Comrs* (1996) VAT Decision 14057, [1996] STI 1101, a company which had taken reasonable precautions before buying a business to ensure it enjoyed a turnover sufficient to meet its obligations to the bank etc was held to have a reasonable excuse for defaulting in seven successive periods

when it transpired that potential turnover had been misrepresented by the vendors. Cf *Alpha Numeric Ltd v Customs and Excise Comrs* (1991) VAT Decision 5519, [1991] STI 98 (company held not to have a reasonable excuse, where it failed to pay because the managing director had been assured by the finance director (who subsequently resigned) that payment had already been effected); and *Profile Security Services Ltd v Customs and Excise Comrs* [1996] STC 808 (the words 'any other person' in what is now the Value Added Tax Act 1994 s 71(1) bear their usual wide meaning, with the result that s 71(1) excludes reliance on a trusted employee as much as reliance on a third party). The mere loss of money by theft, in circumstances where the trader remained able to meet its VAT liabilities, did not amount to a reasonable excuse for non-payment: *Caddies-Wainwright Ltd v Customs and Excise Comrs* (1991) VAT Decision 5657, [1991] STI 228. Where a trader is owed money, wrongly assessed by the Inland Revenue which has not been repaid, the lack of funds can constitute a reasonable excuse (even where the trader is on the cash accounting scheme: see PARA 249 ante) (*Keogh v Customs and Excise Comrs* (1993) VAT Decision 10710, [1993] STI 1206); but it is no excuse that another company in the same ownership (but not the same VAT group) has not received a repayment from the Commissioners (*Artful Dodger (Kilmarnock) Ltd v Lord Advocate* [1993] STC 330). In *Customs and Excise Comrs v Steptoe* [1992] STC 757, CA, it was held that whilst the mere insufficiency of funds would not constitute a reasonable excuse, the underlying cause would, if even the exercise of reasonable foresight and due diligence and a proper regard to the fact that tax would become due on a particular date, would not have avoided the insufficiency of funds which led to the non-payment. The delivery to the Commissioners of a cheque which was dishonoured on presentation was not payment for the purposes of VAT; and the fact that the cheque was presented unexpectedly early was not a reasonable excuse: *Customs and Excise Comrs v Palco Industry Co Ltd* [1990] STC 594. In *Barney & Freeman v Customs and Excise Comrs* [1990] VATTR 19, it was held that if the Commissioners gave an unclear direction to a trader (relating to the use of credit transfers for the payment of VAT) and subsequently appeared to confirm a particular interpretation of the direction by not imposing a surcharge when the trader adopted a course of action based on that interpretation, they could not subsequently impose a surcharge for the trader's continuing application of that interpretation. See also *HPAS Ltd v Customs and Excise Comrs* (2002) VAT Decision 17624, [2002] STI 1310 (premises of business and directors raided, directors arrested, business overdraft facilities withdrawn and capacity to draw against uncleared credits reduced, within six-week period, from £500,000 to nil; reasonable excuse for non-payment for nine consecutive return periods).

17 Value Added Tax Act 1994 s 59(7).

18 Ibid s 59(7). If the surcharge liability notice is to be disregarded, no surcharge may be imposed in relation to any default which falls within the period previously specified by the notice: *Montreux Fabrics v Customs and Excise Comrs* [1988] VATTR 71. The Interpretation Act 1978 s 7 (see STATUTES vol 44(1) (Reissue) PARA 1388) does not apply to deem surcharge liability notices to be served at the time when they would have been delivered in the ordinary course of the post, since the scheme of the Value Added Tax Act 1994 is that taxpayers should be given notice of their liability to surcharge: *Customs and Excise Comrs v Medway Draughting and Technical Services Ltd, Customs and Excise Comrs v Adplates Offset Ltd* [1989] STC 346.

19 Ie conduct falling within the Value Added Tax Act 1994 s 69(1) (as amended): see PARA 331 ante.

20 Ie under ibid s 69 (as amended): see PARA 331 ante.

21 Ie ibid s 59(2)-(5): see the text and notes 9-14 supra.

22 Ibid s 59(9). If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction is to be left out of account for the purposes of s 59(2)-(5): s 59(10).

## UPDATE

### 332 The default surcharge

NOTE 6--For an instructive case where a default arose because funds due to the taxpayer remained unpaid by the Commissioners see *Revenue and Customs Comrs v Marsh* (2007) VAT Decision 20091, [2007] STI 1701.

NOTE 15--See *Aardvark Excavations Ltd v Revenue and Customs Comrs* (2007) VAT Decision 20468, [2008] SWTI 488.

NOTE 16--*Palco*, cited, followed in *Stonewood Electronics Ltd v HMRC Comrs* (2006) VAT Decision 19512, [2006] STI 1425 (Commissioners acceded to request to delay presentation of cheque received on time and could have been presented immediately: no default surcharge due).



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### **333. The default surcharge in respect of payments on account.**

A taxable person<sup>1</sup> is regarded as in default in respect of any prescribed accounting period<sup>2</sup> if the period is one in which he is required<sup>3</sup> to make any payment on account of value added tax and either: (1) a payment which he is so required to make in respect of that period has not been received in full by the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> by the day on which it became due<sup>5</sup>; or (2) he would, but for the statutory provision relating to payments on account<sup>6</sup>, be in default in respect of that period for the purposes of the default surcharge provisions<sup>7</sup>.

Where a taxable person is in default in respect of a prescribed accounting period, the Commissioners may serve notice on him (a 'surcharge liability notice') specifying as a surcharge period for these purposes a period which begins, in general<sup>8</sup>, on the date of the notice and ends on the first anniversary of the last day of the prescribed accounting period the default for which led to the service of the notice<sup>9</sup>. If a taxable person on whom a surcharge liability notice has been served is in default in respect of a prescribed accounting period ending within the surcharge period specified in, or extended by<sup>10</sup>, that notice, and the aggregate value of his defaults<sup>11</sup> in respect of that prescribed accounting period is more than nil, that person is liable to a surcharge equal to whichever is the greater of £30 and the specified percentage<sup>12</sup> of the aggregate value of his defaults in respect of that prescribed accounting period<sup>13</sup>.

If a person who would otherwise be liable to a surcharge under these provisions satisfies the Commissioners or, on appeal, a VAT and duties tribunal:

- 1027 (a) in the case of a default that is material for the purposes of the surcharge<sup>14</sup> and falls within head (1) above, that the payment on account of VAT was dispatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners by the day on which it became due, or that there is a reasonable excuse<sup>15</sup> for the payment not having been so dispatched; or
- 1028 (b) in the case of a default that is material for the purposes of the surcharge and falls within head (2) above, that the specified condition<sup>16</sup> is satisfied as respects the default,

he is not liable to the surcharge and is treated<sup>17</sup> as not having been in default in respect of the prescribed accounting period in question and, accordingly, any surcharge liability notice the service of which depended upon that default is deemed not to have been served<sup>18</sup>. In addition, in any case where the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct constituting a breach of a regulatory provision<sup>19</sup> and by reason of that conduct the person concerned is assessed to a penalty<sup>20</sup>, the default is left out of account for the purposes of the default surcharge provisions<sup>21</sup> relating to the service of a default surcharge notice in respect of payments on account and to the computation and imposition of surcharges<sup>22</sup>.

Where a prescribed accounting period ending on or after 29 April 1996 in respect of which a taxable person is liable<sup>23</sup> to make any payment on account of VAT (a 'section 28 accounting period')<sup>24</sup> ends within a surcharge period begun or extended by the service on a taxable person<sup>25</sup> of a surcharge liability notice under the general default surcharge provisions<sup>26</sup>, the above provisions have effect as if that accounting period were deemed to be a period ending

within a surcharge period begun or extended by a notice served under them but as if any question: (i) whether a surcharge period was begun or extended by the notice; or (ii) whether the taxable person was in default in respect of any prescribed accounting period which was not a section 28 accounting period but ended within the surcharge period begun or extended by that notice, were to be determined as it would be determined for the purposes of the general default surcharge provisions<sup>27</sup>.

1 For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

2 For the meaning of 'prescribed accounting period' see PARA 216 note 6 ante.

3 le by virtue of an order under the Value Added Tax Act 1994 s 28 (as amended); see PARA 252 ante.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

5 For these purposes, the Commissioners are taken not to receive a payment by the day on which it becomes due unless it is made in such a manner as secures, in a case where the payment is made otherwise than in cash, that, by the last day for the payment of that amount, all the transactions can be completed before the whole amount of the payment becomes available to the Commissioners: Value Added Tax Act 1994 s 59A(12) (s 59A added by the Finance Act 1996 s 35(1), (2)). References to a thing's being done by any day include references to its being done on that day: Value Added Tax Act 1994 s 59A(14) (as so added).

6 le but for ibid s 59(1A) (as added): see PARA 332 ante.

7 Ibid s 59A(1) (as added: see note 5 supra). The default surcharge provisions referred to in the text are the provisions of s 59 (as amended): see PARA 332 ante. In determining for these purposes whether any person would, but for s 59(1A) (as added) (see PARA 332 ante), be in default in respect of any period for the purposes of s 59 (as amended), s 59A(12) (as added) is deemed to apply for the purposes of s 59 (as amended) as it applies for the purposes of s 59A (as added): s 59A(13) (as added: see note 5 supra). The liability to a surcharge is not a liability to VAT; and does not, therefore, pass to a successor to the trader's VAT registration: see *Greenline Transport (North Wales) Ltd v Customs and Excise Comrs* (1991) VAT Decision 5756, [1991] STI 429.

8 If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice is to be expressed as a continuation of the existing surcharge period and, accordingly, the existing period and its extension are regarded as a single surcharge period: Value Added Tax Act 1994 s 59A(3) (as added: see note 5 supra).

9 See ibid s 59A(2) (as added: see note 5 supra).

10 See note 8 supra.

11 For these purposes, the aggregate value of a person's defaults in respect of a prescribed accounting period is calculated as follows: (1) where the whole or any part of a payment in respect of that period on account of VAT was not received by the Commissioners by the day on which it became due, an amount equal to that payment or, as the case may be, to that part of it is taken to be the value of the default relating to that payment; (2) if there is more than one default with a value given by head (1) supra, those values are aggregated; (3) the total given by head (2) supra, or, where there is only one default, the value of the default under head (1) supra, is taken to be the value for that period of that person's defaults on payments on account; (4) the value of any default by that person which is a default falling within head (2) in the text is taken to be equal to the amount of any outstanding VAT less the amount of unpaid payments on account; and (5) the aggregate value of a person's defaults in respect of that period is taken to be the aggregate of (a) the value for that period of that person's defaults (if any) on payments on account; and (b) the value of any default of his in respect of that period that falls within head (2) in the text: Value Added Tax Act 1994 s 59A(6) (as added: see note 5 supra). In the application of s 59A(6) (as added) for the calculation of the aggregate value of a person's defaults in respect of a prescribed accounting period: (i) the amount of outstanding VAT referred to in head (4) supra is the amount, if any, which would be the amount of that person's outstanding VAT for that period for the purposes of s 59(4) (see PARA 332 ante); and (ii) the amount of unpaid payments on account so referred to is the amount, if any, equal to so much of any payments on account of VAT (being payments in respect of that period) as has not been received by the Commissioners by the last day on which that person is required, as mentioned in s 59(1) (as amended) (see PARA 332 ante) to make a return for that period: s 59A(7) (as added: see note 5 supra).

12 The specified percentage is determined in relation to a prescribed accounting period by reference to the number of such periods during the surcharge period which are periods in respect of which the taxable person is



in default and in respect of which the value of his defaults is more than nil, so that the specified percentage is, in relation to: (1) the first such prescribed accounting period, 2%; (2) the second such period, 5%; (3) the third such period, 10%; and (4) each such period after the third, 15%: *ibid* s 59A(5) (as added: see note 5 *supra*). If there is no such amount and the Commissioners decide to exercise their discretion not to assess in the minimum amount of £30 (see PARA 298 *ante*) this does not affect (ie reduce) the specified percentage for the next default: see *GB Techniques Ltd v Customs and Excise Comrs* [1988] VATTR 95.

13 Value Added Tax Act 1994 s 59A(4) (as added: see note 5 *supra*).

14 For these purposes, a default is material to a surcharge if: (1) it is the default which, by virtue of *ibid* s 59A(4) (as added), gives rise to the surcharge; or (2) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice: s 59A(9) (as added: see note 5 *supra*).

15 For the meaning of 'reasonable excuse' see PARA 324 note 9 *ante*.

16 *Ie* the condition specified in the Value Added Tax Act 1994 s 59(7)(a) or (b): see PARA 332 *ante*.

17 *Ie* for the purposes of *ibid* s 59A(1)-(7) (as added): see the text and notes 1-13 *supra*.

18 *Ibid* s 59A(8) (as added: see note 5 *supra*). If the surcharge liability notice is to be disregarded, no surcharge may be imposed in relation to any default which falls within the period previously specified by the notice: *Montreux Fabrics v Customs and Excise Comrs* [1988] VATTR 71. The Interpretation Act 1978 s 7 (see STATUTES vol 44(1) (Reissue) PARA 1388) does not apply to deem surcharge liability notices to be served at the time when they would have been delivered in the ordinary course of the post, since the scheme of the Value Added Tax Act 1994 is that taxpayers should be given notice of their liability to surcharge: *Customs and Excise Comrs v Medway Draughting and Technical Services Limited, Customs and Excise Comrs v Adplates Offset Limited* [1989] STC 346.

19 *Ie* conduct falling within the Value Added Tax Act 1994 s 69(1) (as amended): see PARA 331 *ante*.

20 *Ie* under *ibid* s 69 (as amended): see PARA 331 *ante*.

21 *Ie* *ibid* s 59A(2)-(5) (as added): see the text and notes 8-13 *supra*.

22 *Ibid* s 59A(10) (as added: see note 5 *supra*). If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction is to be left out of account for the purposes of s 59A(2)-(5) (as added) (see the text and notes 8-13 *supra*): s 59A(11) (as added: see note 5 *supra*).

23 *Ie* by virtue of an order under *ibid* s 28 (as amended): see PARA 252 *ante*.

24 See *ibid* s 59B(4) (s 59B added by the Finance Act 1996 s 35(1), (5)).

25 *Ie* whether before or after the coming into force of the Value Added Tax Act 1994 s 59A (as added): s 59B(1)(a) (as added: see note 24 *supra*).

26 *Ie* under *ibid* s 59 (as amended): see PARA 332 *ante*.

27 *Ibid* s 59B(1)(a), (2) (as added: see note 24 *supra*).

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ENFORCEMENT AND ANCILLARY POWERS/334. Powers of entry.

## **7. ENFORCEMENT AND ANCILLARY POWERS**

### **334. Powers of entry.**

For the purpose of exercising any powers<sup>1</sup> under the Value Added Tax Act 1994, an authorised person<sup>2</sup> may at any reasonable time enter premises used in connection with the carrying on of a business<sup>3</sup>.

1 Eg for the taking of samples: see PARA 336 post.

2 For the meaning of 'authorised person' see PARA 91 note 6 ante.

3 Value Added Tax Act 1994 s 58, Sch 11 para 10(1). For the meaning of 'business' see PARA 23 ante.

### **UPDATE**

#### **334 Powers of entry**

TEXT AND NOTES--Value Added Tax Act 1994 Sch 11 para 10(1) repealed: Finance Act 2008 Sch 36 para 87.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/7. ENFORCEMENT AND ANCILLARY POWERS/335. Power of inspection.

### **335. Power of inspection.**

Where an authorised person<sup>1</sup> has reasonable cause to believe that any premises are used in connection with the supply of goods under taxable supplies<sup>2</sup>, with the acquisition of goods under taxable acquisitions from other member states<sup>3</sup>, or with certain supplies of or relating to investment gold<sup>4</sup>, and that goods to be so supplied or acquired are on those premises, or that any premises are used as a fiscal warehouse<sup>5</sup>, he may at any reasonable time enter and inspect those premises and inspect any goods found on them<sup>6</sup>.

1 For the meaning of 'authorised person' see PARA 91 note 6 ante.

2 For the meaning of 'taxable supply' see PARA 18 note 3 ante.

3 As to taxable acquisitions of goods from other member states see PARA 19 ante.

4 The supplies of a description falling within the Value Added Tax Act 1994 Sch 9 Pt II Group 15 items 1, 2 (as added) (see PARA 164 ante): Value Added Tax Regulations 1995, SI 1995/2518, reg 31C (added by SI 1999/3114).

5 For the meaning of 'fiscal warehouse' see PARA 147 ante.

6 Value Added Tax Act 1994 s 58, Sch 11 para 10(2) (amended by the Finance Act 1996 s 26(1), Sch 3 para 17); Value Added Tax Regulations 1995, SI 1995/2518, reg 31C (as added: see note 4 supra).

### **UPDATE**

### **335 Power of inspection**

TEXT AND NOTES--This power of inspection includes, in particular, power to mark the goods, or anything containing the goods, for the purpose of indicating that they have been inspected, and power to record any information (which may be obtained by electronic or other means) relating to the goods that have been inspected: Value Added Tax Act 1994 Sch 11 para 10(2A) (added by Finance Act 2006 s 20). This provision is repealed from a date to be appointed: Finance Act 2008 s 87.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/7. ENFORCEMENT AND ANCILLARY POWERS/336. Power to take samples.

### **336. Power to take samples.**

If it appears to an authorised person<sup>1</sup> necessary for the protection of the revenue against mistake or fraud, he may at any time take, from the goods in the possession of any person who supplies goods, or acquires goods from another member state<sup>2</sup>, or in the possession of a fiscal warehousekeeper<sup>3</sup>, such samples as the authorised person may require with a view to determining how the goods or the materials of which they are made ought to be, or to have been, treated for the purposes of value added tax<sup>4</sup>. Any sample taken under this provision is to be disposed of and accounted for in such manner as the Commissioners for Her Majesty's Revenue and Customs may direct<sup>5</sup>. Where a sample is taken from the goods in any person's possession and is not returned to him within a reasonable time and in good condition, the Commissioners must pay him by way of compensation a sum equal to the cost of the sample to him or such larger sum as they may determine<sup>6</sup>.

1 For the meaning of 'authorised person' see PARA 91 note 6 ante.

2 As to taxable acquisitions of goods from other member states see PARA 19 ante; and for the meaning of 'another member state' see PARA 4 note 15 ante.

3 For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante.

4 Value Added Tax Act 1994 s 58, Sch 11 para 8(1) (amended by the Finance Act 1996 s 26(1), Sch 3 para 16).

5 Value Added Tax Act 1994 Sch 11 para 8(2). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 Ibid Sch 11 para 8(3).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/7.  
ENFORCEMENT AND ANCILLARY POWERS/337. Power of search.

### 337. Power of search.

If a justice of the peace is satisfied on information on oath that there is reasonable ground for suspecting that a fraud offence<sup>1</sup> which appears to be of a serious nature is being, has been, or is about to be, committed on any premises, or that evidence of the commission of such an offence is to be found there, he may issue a warrant in writing authorising (subject to certain conditions set out below) any authorised person<sup>2</sup> to enter those premises, if necessary by force, at any time within one month from the time of the issue of the warrant and to search them<sup>3</sup>. Any person who enters the premises under the authority of the warrant may:

- 1029 (1) take with him such other persons as appear to him to be necessary<sup>4</sup>;
- 1030 (2) seize and remove any documents<sup>5</sup> or other things whatsoever found on the premises which he has reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of a fraud offence which appears to him to be of a serious nature<sup>6</sup>; and
- 1031 (3) search or cause to be searched any person found on the premises whom he has reasonable cause to believe to be in possession of any such documents or other things<sup>7</sup>.

The powers conferred by such a warrant are not, however, exercisable:

- 1032 (a) by more than such number of authorised persons as may be specified in the warrant<sup>8</sup>; nor
- 1033 (b) outside such times of day as may be so specified<sup>9</sup>; nor
- 1034 (c) (if the warrant so provides) otherwise than in the presence of a constable in uniform<sup>10</sup>.

1 A 'fraud offence' means an offence under any provision of the Value Added Tax Act 1994 s 72(1)-(8) (see PARAS 316-320 ante): s 58, Sch 11 para 10(4).

2 For the meaning of 'authorised person' see PARA 91 note 6 ante.

3 Value Added Tax Act 1994 Sch 11 para 10(3). An authorised person seeking to exercise the powers conferred by such a warrant or, if there is more than one such authorised person, that one of them who is in charge of the search, must provide a copy of the warrant indorsed with his name to the occupier of the premises concerned, if he is present at the time the search is to begin: Sch 11 para 10(6)(a). If at that time the occupier is not present but a person who appears to the authorised person to be in charge of the premises is present, the copy must be supplied to that person: Sch 11 para 10(6)(b). If neither Sch 11 para 10(6)(a) or (b) applies, the copy must be left in a prominent place on the premises: Sch 11 para 10(6)(c). See also *R (on the application of Paul Da Costa & Co (a firm) v Thames Magistrates' Court* [2002] EWHC 40 (Admin), [2002] STC 267.

4 Value Added Tax Act 1994 Sch 11 para 10(3)(a).

5 For the meaning of 'document' see PARA 17 note 9 ante.

6 Value Added Tax Act 1994 Sch 11 para 10(3)(b). Although a customs officer is not entitled to seize legally privileged material under a search warrant issued under the Value Added Tax Act 1994 Sch 11 para 10(3), if he did so inadvertently, the search warrant would not be rendered unlawful: *R v Customs and Excise Comrs, ex p Popely* [1999] STC 1016.

7 Value Added Tax Act 1994 Sch 11 para 10(3)(c). No woman or girl may be searched except by a woman: Sch 11 para 10(3).

While an Order in Council under the Isle of Man Act 1979 s 6 (as amended) is in force (see PARA 8 ante), the Value Added Tax Act 1994 Sch 11 para 10(3) has effect as if the references to an offence in connection with the tax included references to an offence in connection with the tax charged under the Act of Tynwald: Isle of Man Act 1979 s 6(4)(b) (amended by the Value Added Tax Act 1983 s 50(1), Sch 9 para 3; and by the Value Added Tax Act 1994 s 100, Sch 14 para 7(2)).

8 Value Added Tax Act 1994 Sch 11 para 10(5)(a). See *Singh v HM Advocate* [2001] STC 790, 2001 SCCR 348 (execution of search warrant in relation to number of authorised persons involved unlawful as requirements of the Value Added Tax Act 1994 Sch 11 para 10(5)(a) not complied with).

9 Value Added Tax Act 1994 Sch 11 para 10(5)(b).

10 Ibid Sch 11 para 10(5)(c).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/7.  
ENFORCEMENT AND ANCILLARY POWERS/338. Order for access to recorded information.

### **338. Order for access to recorded information.**

If a justice of the peace is satisfied, on an application by an authorised person<sup>1</sup>, that there are reasonable grounds for believing that an offence in connection with value added tax is being, has been, or is about to be, committed, and that any recorded information<sup>2</sup> which may be required as evidence for the purpose of any proceedings in respect of such an offence is in the possession of any person, he may make an order<sup>3</sup> that the person who appears to the justice to be in possession of the recorded information to which the application relates must:

- 1035 (1) give an authorised person access<sup>4</sup> to it; and
- 1036 (2) permit an authorised person to remove and take away any of it which he reasonably considers necessary,

not later than the end of the period of seven days (beginning on the date of the order) or of such longer period as the order may specify<sup>5</sup>.

1 For the meaning of 'authorised person' see PARA 91 note 6 ante.

2 ie including any document of any nature whatsoever: Value Added Tax Act 1994 s 58, Sch 11 para 11(1) (b). For the meaning of 'document' see PARA 17 note 9 ante.

3 Ibid Sch 11 para 11(1). This provision is without prejudice to Sch 11 para 7 (furnishing of information and production of documents: see PARA 243 ante) and Sch 11 para 10 (entry and search of premises and persons: see PARAS 334-335, 337 ante): Sch 11 para 11(5). The test is whether there are reasonable grounds for belief that an offence has been, is being or is about to be committed; and mere suspicion is not enough. Furthermore, the magistrate must satisfy himself, before making the order, that there are reasonable grounds for that belief and may not simply accept the statement of belief made by the applicant: *R v Epsom Justices, ex p Bell* [1989] STC 169, DC. Applications should be made inter partes wherever possible and should ordinarily therefore be made on notice, not only to those from whom access is sought but also to those who are obviously likely to be affected by the order: *R v City of London Magistrates Court, ex p Asif* [1996] STC 611, DC. Applications under this provision are not 'criminal proceedings' for the purposes of awarding costs under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 2064): *Customs and Excise Comrs v City of London Magistrates' Court* [2000] 4 All ER 763, [2000] STC 447.

4 If an order is made requiring a person to give an authorised person access to recorded information he must also permit the authorised person to take copies of it or to make extracts from it: Value Added Tax Act 1994 Sch 11 para 11(3). Where the recorded information consists of information stored in any electronic form, the order has effect as an order to produce the information in a form in which it is visible and legible or from which it can readily be produced in a visible and legible form and, if the authorised person wishes to remove it, in a form in which it can be removed: Sch 11 para 11(4) (amended by the Criminal Justice and Police Act 2001 s 70, Sch 2 Pt 2 para 13(1), (2)(f)).

5 Value Added Tax Act 1994 Sch 11 para 11(2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/7.  
ENFORCEMENT AND ANCILLARY POWERS/339. Procedure when documents are removed.

### **339. Procedure when documents are removed.**

An authorised person<sup>1</sup> who removes anything in the exercise of a power conferred<sup>2</sup> on him, must, if so requested by a person showing himself to be the occupier of premises from which it was removed, or to have had custody or control of it immediately before the removal, provide that person with a record of what he removed<sup>3</sup> within a reasonable time from the making of the request<sup>4</sup>.

If a request for permission to be granted access to anything which has been removed by an authorised person, and is retained by the Commissioners for Her Majesty's Revenue and Customs<sup>5</sup> for the purposes of investigating an offence, is made to the officer in overall charge of the investigation<sup>6</sup> by a person who had custody or control of the thing immediately before it was so removed or by someone acting on behalf of such a person, the officer must allow the person who made the request access to it under the supervision of an authorised person<sup>7</sup>.

There is no duty to grant access to, or to supply a photograph or copy of, anything if the officer in overall charge of the investigation for the purposes of which it was removed has reasonable grounds for believing that to do so would prejudice that investigation, the investigation of an offence other than the offence for the purposes of the investigation of which the thing was removed or any criminal proceedings which may be brought as a result either of the investigation of which he is in charge or of any investigation of another offence<sup>8</sup>.

If a magistrates' court<sup>9</sup> is satisfied, on an application<sup>10</sup> made by way of complaint, that a person has failed to comply with a requirement imposed by the above provisions, it may order that person to comply with the requirement within such time and in such manner as may be specified in the order<sup>11</sup>.

1 For the meaning of 'authorised person' see PARA 91 note 6 ante.

2 I.e. by or under the Value Added Tax Act 1994 s 58, Sch 11 para 10 (see PARAS 334-335, 337 ante) or Sch 11 para 11 (see PARA 338 ante): Sch 11 para 12(1).

3 Ibid Sch 11 para 12(1).

4 Ibid Sch 11 para 12(2).

5 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

6 For these purposes, any reference to the officer in overall charge of the investigation is a reference to the person whose name and address are indorsed on the warrant or order concerned as being the officer so in charge: Value Added Tax Act 1994 Sch 11 para 12(8).

7 Ibid Sch 11 para 12(3). Similarly, if a request for a photograph or copy of any such thing is made to the officer in overall charge of the investigation by such a person, the officer must allow the person who makes the request access to it under the supervision of an authorised person for the purpose of photographing it or copying it, or must photograph or copy it, or cause it to be photographed or copied; and that photograph or copy must be supplied to the person who made the request within a reasonable time from the making of the request: Sch 11 para 12(4), (5), (6).

8 Ibid Sch 11 para 12(7).

9 I.e. the 'appropriate judicial authority': ibid Sch 11 para 13(3)(a).



10 An application must be made, in the case of a failure to comply with any of the requirements imposed by *ibid* Sch 11 para 12(1), (2), by the occupier of the premises from which the thing in question was removed or by the person who had custody or control of it immediately before it was so removed, and, in any other case, by the person who had such custody or control: Sch 11 para 13(2).

11 *Ibid* Sch 11 para 13(1), (4).

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ENFORCEMENT AND ANCILLARY POWERS/340. Service of notices.

### **340. Service of notices.**

Any notice, notification, requirement or demand to be served on, given to, or made of any person for any of the purposes of the Value Added Tax Act 1994 may be served, given, or made by sending it by post in a letter addressed to that person or his VAT representative<sup>1</sup> at his (or his representative's) last or usual residence or place of business<sup>2</sup>.

<sup>1</sup> As to VAT representatives see the Value Added Tax Act 1994 s 48; and PARA 71 ante.

<sup>2</sup> Ibid s 98. By the Interpretation Act 1978 s 7, where an Act authorises or requires any document to be served by post, then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post: see STATUTES vol 44(1) (Reissue) PARA 1388. For a VAT case in which it was held that the statutory provision (the Value Added Tax Act 1994 s 59 (as amended) (default surcharges: see PARA 283 ante)) did provide to the contrary, thereby excluding the application of the Interpretation Act 1978 s 7 see *Customs and Excise Comrs v Medway Draughting and Technical Services Ltd*, *Customs and Excise Comrs v Adplates Offset Ltd* [1989] STC 346. In the particular context of the provision for transfers of going concerns, written notification of an election to waive exemption has been held to be given on the date of posting: *Chalegrove Properties Ltd v Customs and Excise Comrs* (2001) VAT Decision 17151, [2001] STI 1065.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/7. ENFORCEMENT AND ANCILLARY POWERS/341. Disclosure of information for statistical purposes.

### **341. Disclosure of information for statistical purposes.**

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup>, or an authorised officer of the Commissioners, may disclose certain particulars to an authorised officer of the Department of Trade and Industry or the Office for National Statistics for the purpose of the compilation or maintenance by that department or office of a central register of businesses<sup>2</sup> or for the purpose of any statistical survey conducted or to be conducted by that department or office<sup>3</sup>. The particulars which may be so disclosed are:

- 1037 (1) numbers allocated by the Commissioners on the registration of persons under the Value Added Tax Act 1994<sup>4</sup> and reference numbers for members of a group<sup>5</sup>;
- 1038 (2) names, trading styles and addresses of persons so registered or of members of groups and status and trade classifications of businesses<sup>6</sup>; and
- 1039 (3) actual or estimated value of supplies<sup>7</sup>,

in each case obtained or recorded by the Commissioners in pursuance of the Value Added Tax Act 1994<sup>8</sup>.

No information so obtained by an officer of the department or office mentioned above may be disclosed except to an officer of a government department<sup>9</sup> for the purpose for which the information was obtained, or for a like purpose<sup>10</sup>, although this does not prevent the disclosure:

- 1040 (a) of any information in the form of a summary so framed as not to enable particulars to be identified as particulars relating to a particular person or to the business carried on by a particular person<sup>11</sup>; or
- 1041 (b) with the consent of any person, of any information enabling particulars to be identified as particulars relating only to him or to a business carried on by him<sup>12</sup>.

If any person who has obtained any information by virtue of these provisions discloses it in contravention of the above prohibition, he is liable on summary conviction to a fine not exceeding the statutory maximum and on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine of any amount, or to both<sup>13</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners for Customs and Excise see PARA 13 ante.

2 For the meaning of 'business' see PARA 23 ante.

3 Value Added Tax Act 1994 s 91(1) (s 91(1), (2), (5) amended by the Transfer of Functions (Registration and Statistics) Order 1996, SI 1996/273, art 5(1), Sch 2 para 27). For these purposes, references to the Department of Trade and Industry or the Office for National Statistics include references to any Northern Ireland department carrying out similar functions: Value Added Tax Act 1994 s 91(5) (as so amended).

4 As to registration see PARA 64 et seq ante.

5 Value Added Tax Act 1994 s 91(1)(a). As to group registration of bodies corporate see PARA 75 ante.

6 Ibid s 91(1)(b).

- 7 Ibid s 91(1)(c). As to the meaning of 'supply' see PARA 27 ante.
- 8 Ibid s 91(1) (as amended: see note 3 supra).
- 9 le including a Northern Ireland department: ibid s 91(2).
- 10 Ibid s 91(2) (as amended: see note 3 supra).
- 11 Ibid s 91(3)(a).
- 12 Ibid s 91(3)(b).
- 13 Ibid s 91(4). As to the statutory maximum see PARA 317 note 3 ante.

## **UPDATE**

### **341 Disclosure of information for statistical purposes**

TEXT AND NOTE 3--References to the Office for National Statistics are now to the Statistics Board: 1994 Act s 91(1), (2), (5) (amended by Statistics and Registration Service Act 2007 Sch 2 para 6).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/7. ENFORCEMENT AND ANCILLARY POWERS/342. Disclosure of information to tax authorities in other member states.

### **342. Disclosure of information to tax authorities in other member states.**

No obligation as to secrecy imposed by statute or otherwise precludes the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> or an authorised officer of the Commissioners from disclosing to the competent authorities of another member state any information required to be so disclosed by virtue of the Mutual Assistance Directive<sup>2</sup>; but neither the Commissioners nor an authorised officer may disclose any information in pursuance of the Mutual Assistance Directive unless satisfied that the competent authorities of the other state are bound by, or have undertaken to observe, rules of confidentiality with respect to the information that are not less strict than those applying to it in the United Kingdom<sup>3</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 Finance Act 2003 s 197(1). The 'Mutual Assistance Directive' means EC Council Directive 77/799 (OJ L336, 27.12.77, p 15) concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (amended by EC Council Directive 92/12 (OJ L76, 23.3.92, p 1), EC Council Directive 2003/93 (OJ L264, 15.10.2003, p 23), EC Council Directive 2004/45 (OJ L127, 29.4.2004, p 70), EC Council Directive 2004/106 (OJ L359, 4.12.2004, p 30)); Finance Act 2003 s 197(4) (as amended by the Mutual Assistance Provisions Order 2003, SI 2003/3092, art 3; and the Mutual Assistance Provisions Order 2004, SI 2004/3207, art 2). The Treasury may by order make such provision amending this definition as appears to them appropriate for the purpose of giving effect to any Council Directive adopted after 16 April 2003 amending or replacing the Mutual Assistance Directive: Finance Act 2003 s 197(5). Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons: s 197(6).

3 Ibid s 197(2). Nothing in s 197 (as amended) permits the Commissioners or an authorised officer of the Commissioners to authorise the use of information disclosed by virtue of the Mutual Assistance Directive otherwise than for the purposes of taxation or to facilitate legal proceedings for failure to observe the tax laws of the receiving state: Finance Act 2003 s 197(3).

## **UPDATE**

### **342 Disclosure of information to tax authorities in other member states**

NOTE 2--In relation to Gibraltar, see Case C-349/03 *EC Commission (supported by Kingdom of Spain, intervener) v United Kingdom* [2006] STC 1944, EC].

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(1) VAT AND DUTIES TRIBUNALS/343. Establishment of VAT and duties tribunals.

## 8. APPEALS

### (1) VAT AND DUTIES TRIBUNALS

#### 343. Establishment of VAT and duties tribunals.

For the purpose of hearing appeals in respect of a range of matters relating to value added tax, VAT and duties tribunals<sup>1</sup> have been established for England and Wales, Scotland and Northern Ireland<sup>2</sup>. The Lord Chancellor determines the number of VAT and duties tribunals that should be established, which sit at such times and at such places as he may from time to time determine<sup>3</sup>.

The tribunals are supervised by the Council on Tribunals<sup>4</sup>. The appropriate tribunal centre<sup>5</sup> for any appeal is the tribunal centre for the time being appointed by the president<sup>6</sup> for the area in which is situated the address to which the disputed decision<sup>7</sup> was sent by the Commissioners for Her Majesty's Revenue and Customs or the tribunal centre to which the appeal against the disputed decision may be transferred<sup>8</sup>.

1 VAT tribunals were renamed VAT and duties tribunals by the Finance Act 1994 s 7(1), (2) (repealed by the Value Added Tax Act 1994 s 100, Sch 15) and this change is preserved by the Value Added Tax Act 1994 s 82(1), Sch 12 para 1(2); thus for any reference in the Value Added Tax Act 1994 Sch 12 to VAT tribunals there is, as from the commencement of Sch 12 (as amended), to be substituted a reference to VAT and duties tribunals: Sch 12 para 1(2). Any reference in the Value Added Tax Act 1994 to a tribunal is a reference to a tribunal constituted in accordance with s 82(1), Sch 12 (as amended), and that Schedule has effect generally with respect to appointments to, and the procedure and administration of, the tribunals: s 82(1). The tribunals continue to have jurisdiction in relation to matters relating to VAT conferred on them by Pt V (ss 82-87) (as amended) (see PARA 346 et seq post) and jurisdiction in relation to matters relating to customs and excise conferred by the Finance Act 1994 Pt I Ch II (ss 7-18) (as amended): Value Added Tax Act 1994 s 82(2). Any reference in any enactment or any subordinate legislation to a value added tax tribunal (or to a VAT tribunal) is to be construed in accordance with Sch 12 para 1(1)-(3), and cognate expressions are to be construed accordingly: Sch 12 para 1(4).

Officers and staff may be appointed under the Courts Act 2003 s 2(1) (see COURTS) for carrying out the administrative work of the tribunals in England and Wales: Value Added Tax Act 1994 s 82(3) (as amended by the Courts Act 2003 s 109(1), Sch 8 para 363). The Lord Chancellor may enter into contracts with such persons as he sees fit for the provision by those persons or by sub-contractors of theirs of officers and staff for carrying out the administrative work of, in England and Wales, any tribunal constituted in accordance with the Value Added Tax Act 1994 Sch 12 (as amended): Contracting Out (Administrative and Other Court Staff) Order 2001, SI 2001/3698, art 3(b) (amended by virtue of SI 2003/1887).

2 Value Added Tax Act 1994 Sch 12 para 1(1), (2). Information about the tribunals is contained in the Department of Constitutional Affairs Explanatory Leaflet *VAT and Duties Tribunals: Appeals and Applications to the Tribunals* (2005).

3 See the Value Added Tax Act 1994 Sch 12 para 4 (prospectively renumbered Sch 12 para 4(1) by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 235, 237(1), (3)(a)). As from a day to be appointed, the powers of the Lord Chancellor under the Value Added Tax Act 1994 Sch 12 para 4(1) may be exercised only after consulting the Lord Chief Justice (Sch 12 para 4(2) (Sch 12 para 4(2)-(4) prospectively added by the Constitutional Reform Act 2005 Sch 4 Pt 1 paras 235, 237(1), (3)(b))) and the Lord Chief Justice may nominate a judicial officer holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise this function: Value Added Tax Act 1994 Sch 12 para 4(3) (as so prospectively added). At the date at which this volume states the law no such day had been appointed.

4 Ie under the Tribunals and Inquiries Act 1992 s 1, Sch 1 para 44 (substituted by the Finance Act 1994 s 7(6); and amended by the Value Added Tax Act 1994 s 100(1), Sch 14 para 12). As to the Council on Tribunals generally see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 55-57.

5 'The appropriate tribunal centre' means the tribunal centre for the time being appointed by the President for the area in which is situated the address to which the disputed decision was sent by the Commissioners or the tribunal centre to which the appeal against the disputed decision may be transferred under the Value Added Tax Tribunals Rules 1986, SI 1986/590: see r 2. 'Tribunal centre' means an administrative office of the VAT and duties tribunals: r 2 (definition amended by SI 1994/2617).

6 As to the president see PARA 344 post.

7 'Disputed decision' means the decision of the Commissioners for Her Majesty's Revenue and Customs against which an appellant or intending appellant appeals or desires to appeal to a tribunal: Value Added Tax Tribunals Rules 1986, SI 1986/590, r 2. 'Appellant' means a person who brings an appeal under the Value Added Tax Act 1994 s 83 (as amended) (see PARA 346 post), the Finance Act 1994 s 16 (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1258 et seq) or s 60 (insurance premium tax: see INSURANCE vol 25 (2003 Reissue) PARA 850), the Finance Act 1996 s 55 (landfill tax: see LANDFILL TAX vol 61 (2010) PARA 1005), the Finance Act 2000 s 30(1), (3), Sch 6 para 122 (climate change levy: see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 702), the Finance Act 2001 s 41 (aggregates levy: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 850), the Finance Act 2003 s 36 (penalties on importation and exportation: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1214) or the Export (Penalty) Regulations 2003, SI 2003/3102, reg 12 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1217): Value Added Tax Tribunals Rules 1986, SI 1986/590, r 2 (definition amended by SI 1994/2617; SI 1997/255; SI 2001/3073; SI 2002/2851; SI 2003/2757; SI 2004/1032). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 2. As to the difficulties incurred by the Commissioners in serving out of the jurisdiction see *Interbet Trading Ltd v Customs and Excise Comrs* [1977] VATTR 63; and for later proceedings when the Commissioners re-served a notice requiring the company to register for VAT at the premises of an intermediary company whose services it used see *Interbet Trading Ltd v Customs and Excise Comrs (No 2)* [1978] VATTR 235. In a case where the appellants were English subsidiaries of a company registered in Scotland, but the contracts concerned were governed by English law, the appropriate tribunal centre was held to be in England: *RBS Leasing and Services (Nos 1-4) Ltd v Customs and Excise Comrs* [2000] V & DR 33.

## UPDATE

### 343-400 Appeals

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### 343 Establishment of VAT and duties tribunals

TEXT AND NOTES 1-3--Replaced. 'Tribunal' now means the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal: Value Added Tax Act 1994 s 82 (substituted by SI 2009/56).

NOTE 3--Day now appointed: SI 2006/1014. See further Constitutional Reform Act 2005 s 19, Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(1) VAT AND DUTIES TRIBUNALS/344. The president.

### **344. The president.**

There is a president of VAT and duties tribunals who performs the functions conferred on him<sup>1</sup> in any part of the United Kingdom<sup>2</sup>, and who sits ex officio as chairman at a sitting of a tribunal<sup>3</sup>. The president is appointed by the Lord Chancellor<sup>4</sup> and must be a person who has a ten year general qualification<sup>5</sup> or who is an advocate or solicitor in Scotland of at least ten years' standing, or who is a member of the Bar of Northern Ireland or a solicitor of the Supreme Court of Northern Ireland of at least ten years' standing<sup>6</sup>.

Subject to the conditions described below, the appointment of the president is for such term and subject to such conditions as may be determined by the Lord Chancellor, and a person who ceases to hold the office of president is eligible for re-appointment<sup>7</sup>. The president may resign his office at any time and must vacate his office on the day on which he attains the age of 70, but if the Lord Chancellor considers it desirable in the public interest that the president should continue in office for a further period, he may authorise him to continue in office, either generally or for such purpose as he may notify to the president, for a period not exceeding one year and not extending beyond the day on which the president attains the age of 75<sup>8</sup>. Similarly if, on the expiry of the period for which a president is authorised to continue in office, the Lord Chancellor considers it desirable in the public interest to retain the person in office for a further period, he may authorise him to continue in office, either generally or for such purpose as he may notify to the president, for a further period not exceeding one year and not extending beyond the day on which the president attains the age of 75<sup>9</sup>.

The president is paid such salary or fees, and there may be paid to or in respect of a former president such pension, allowance or gratuity, as the Lord Chancellor may with the approval of the Treasury determine<sup>10</sup>. If a person ceases to be president of VAT and duties tribunals and it appears to the Lord Chancellor that there are special circumstances which make it right that he should receive compensation, there may be paid to that person a sum of such amount as the Lord Chancellor may with the approval of the Treasury determine<sup>11</sup>.

The Lord Chancellor may, if he thinks fit, remove the president from office on the ground of incapacity or misbehaviour<sup>12</sup>. The functions of the president may, if he is for any reason unable to act or his office is vacant, be discharged by a person nominated for the purpose by the Lord Chancellor<sup>13</sup>. The president is barred from legal practice<sup>14</sup>.

<sup>1</sup> le conferred on him by the Value Added Tax Act 1994 s 82(1), Sch 12 (as amended): see the text and notes 2-13 infra; and PARA 345 et seq post.

<sup>2</sup> Ibid Sch 12 para 2(1). For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

<sup>3</sup> See ibid Sch 12 para 6. A member of a tribunal who is overruled by the chairman's casting vote on the substantive issue should still take part in the decision on quantum: *Rahman (t/a Khayam Restaurant) v Customs and Excise Comrs* [1998] STC 826.

<sup>4</sup> Changes to the role of the Lord Chancellor have been proposed: see No 10 Downing Street press release *Modernising Government* (12 June 2003); and the Constitutional Reform Act 2005. As to the Lord Chancellor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

<sup>5</sup> le within the meaning of the Courts and Legal Services Act 1990 s 71: see LEGAL PROFESSIONS vol 465 (2008) PARA 742.

<sup>6</sup> Value Added Tax Act 1994 Sch 12 para 2(2) (Sch 12 paras 2, 3, 9 amended by the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, SI 1999/678, art 2(1), Schedule). Powers of the Lord



Chancellor under the Value Added Tax Act 1994 Sch 12 paras 2, 3 and 9 (as amended) are subject to consultation: see Sch 12 paras 2, 3, 9 (as so amended).

7 Ibid Sch 12 para 2(3) (as amended: see note 6 supra). See also note 6 supra.

8 Ibid Sch 12 para 3(3) (as amended: see note 6 supra); Judicial Pensions and Retirement Act 1993 ss 26(4), (5), 31. See also note 6 supra.

9 Ibid s 26(6) (prospectively amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 226, 228(1), (2)).

10 Value Added Tax Act 1994 Sch 12 para 3(6) (as amended: see note 6 supra). This provision, so far as relating to pensions, allowances and gratuities, does not have effect in relation to a person to whom the Judicial Pensions and Retirement Act 1993 Pt I (ss 1-18) (as amended) applies, except to the extent provided under or by that Act: Value Added Tax Act 1994 Sch 12 para 3(7). The Judicial Pensions and Retirement Act 1993 Pt I (as amended) applies to the president: see s 1(6), Sch 1 Pt II; and COURTS vol 10 (Reissue) PARA 539.

11 Value Added Tax Act 1994 Sch 12 para 3(8) (as amended: see note 6 supra). The Treasury's appointment of lay members to a tribunal does not affect the tribunal's independence and impartiality: *Ali v Customs and Excise Comrs* [2002] V & DR 71.

12 Value Added Tax Act 1994 Sch 12 para 3(4) (as amended: see note 6 supra). As from a day to be appointed, the Lord Chancellor may remove a person from office under Sch 12 para 3(4) (as amended), or nominate a person under Sch 12 para 3(5), only with the concurrence of the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland: Sch 12 para 3(5A) (Sch 12 para 3(5A) prospectively added by the Constitutional Reform Act 2005 Sch 4 Pt 1 paras 235, 237(1), (2)(a)). At the date at which this volume states the law no such day had been appointed.

13 Value Added Tax Act 1994 Sch 12 para 3(5) (as amended: see note 6 supra). See note 12 supra.

14 See the Courts and Legal Services Act 1990 s 75, Sch 11.

## UPDATE

### 343-400 Appeals

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### 344 The president

NOTES--See further Constitutional Reform Act 2005 s 19, Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

TEXT AND NOTE 6--Any appointment to the office of president in exercise of the function under the 1994 Act Sch 12 para 2(2) must be made, by virtue of the Constitutional Reform Act 2005 s 85, Sch 14 Pt 3, in accordance with ss 85-93, 96: see COURTS vol 10 (Reissue) PARA 515B.18.

1994 Act Sch 12 para 2(2) further amended: Tribunals, Courts and Enforcement Act 2007 Sch 10 para 24(2).

NOTES 9, 12--Day now appointed: SI 2006/1014.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(1) VAT AND DUTIES TRIBUNALS/345. Composition and membership of tribunals.

### **345. Composition and membership of tribunals.**

A VAT and duties tribunal consists of a chairman<sup>1</sup> sitting either with two other members or with one other member or alone<sup>2</sup>. If the tribunal does not consist of the chairman sitting alone, its decisions may be taken by a majority of votes and the chairman, if sitting with one other member, has the casting vote<sup>3</sup>. For each sitting of a tribunal the chairman is either the president<sup>4</sup> or, if so authorised by the president, a member of the appropriate panel of chairmen<sup>5</sup>; and any other member of the tribunal must be a person selected from the appropriate panel of other members<sup>6</sup>, the selection being made either by the president or by a member of the panel of chairmen authorised by the president to make it<sup>7</sup>.

There is a panel of chairmen and a panel of other members of VAT and duties tribunals for England and Wales, Scotland and Northern Ireland respectively<sup>8</sup>, and one member of each panel of chairmen is known as vice-president of VAT and duties tribunals<sup>9</sup>. Appointments to a panel of chairmen are made by the appropriate authority, that is to say, in England and Wales, the Lord Chancellor<sup>10</sup>, and appointments to a panel of other members are made by the Treasury<sup>11</sup>. No person may be appointed to a panel of chairmen of tribunals for England and Wales or Northern Ireland unless he is a person who has a seven year general qualification<sup>12</sup> or is a member of the Bar of Northern Ireland or is a solicitor of the Supreme Court of Northern Ireland of at least seven years' standing<sup>13</sup>.

Subject to the conditions described below, the appointment of a chairman of tribunals is for such term and subject to such conditions as may be determined by the Lord Chancellor, and a person who ceases to hold the office of chairman is eligible for re-appointment<sup>14</sup>. A chairman of tribunals may resign his office at any time and must vacate his office on the day on which he attains the age of 70 years, subject to the statutory power to authorise his continuance in office up to the age of 75<sup>15</sup> which also applies in respect of the president of tribunals<sup>16</sup>.

There must be paid to a chairman of VAT and duties tribunals such salary or fees, and to other members such fees, as the Lord Chancellor, with the approval of the Treasury, may determine; and there may be paid to or in respect of a former chairman of tribunals such pension, allowance or gratuity as the Lord Chancellor may with the approval of the Treasury determine<sup>17</sup>. If a person ceases to be a chairman of VAT and duties tribunals and it appears to the Lord Chancellor that there are special circumstances which make it right that he should receive compensation, there may be paid to that person a sum of such amount as the Lord Chancellor may with the approval of the Treasury determine<sup>18</sup>.

The Lord Chancellor may, if he thinks fit, remove a chairman of VAT and duties tribunals from office on the ground of incapacity or misbehaviour<sup>19</sup>. A person who holds the office of president, vice-president or full-time chairman of a tribunal is disqualified for membership of the House of Commons<sup>20</sup>. No member of a tribunal may be compelled to serve on a jury in Northern Ireland<sup>21</sup>.

All or any of the following powers of a tribunal or chairman may be exercised by the registrar<sup>22</sup> of the VAT and duties tribunals:

- 1042 (1) power to give or make any direction by consent of the parties to the appeal or application<sup>23</sup>;
- 1043 (2) power to give or make any direction on the application of one party which is not opposed by the other party to the application<sup>24</sup>;
- 1044 (3) power to issue a witness summons<sup>25</sup>;
- 1045 (4) power to postpone any hearing<sup>26</sup>; and

1046 (5) power to extend the time for the service of any notice of appeal, notice of application or other document at the appropriate tribunal centre<sup>27</sup> for a period not exceeding one month without prior notice or reference to any party or other person and without a hearing<sup>28</sup>.

The registrar has power to sign a direction recording the outcome of an appeal and any award or direction given or made by the tribunal during or at the conclusion of the hearing of an appeal<sup>29</sup> and to sign any document recording any direction given or made by him under these provisions<sup>30</sup>.

1 'Chairman' includes the president and any vice-president: Value Added Tax Tribunals Rules 1986, SI 1986/590, r 2.

2 Value Added Tax Act 1994 s 82(1), Sch 12 para 5(1).

3 Ibid Sch 12 para 5(2).

4 As to the president see PARA 344 ante.

5 Ie the panel constituted in accordance with the Value Added Tax Act 1994 Sch 12 para 7: see the text and notes 8-13 infra.

6 See note 5 supra.

7 Value Added Tax Act 1994 Sch 12 para 6.

8 Ibid Sch 12 para 7(1).

9 Ibid Sch 12 para 7(2).

10 Ibid Sch 12 para 7(3)(a). Changes to the role of the Lord Chancellor have been proposed: see No 10 Downing Street press release *Modernising Government* (12 June 2003); and the Constitutional Reform Act 2005. As to the Lord Chancellor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

11 Value Added Tax 1994 Sch 12 para 7(3) (as amended: see note 10 supra).

12 Ibid Sch 12 para 7(4)(a). A 'general qualification' is one within the meaning of the Courts and Legal Services Act 1990 s 71 (see LEGAL PROFESSIONS vol 65 (2008) PARA 742): Value Added Tax Act 1994 Sch 12 para 7(4)(a).

13 Ibid Sch 12 para 7(4)(b).

14 Ibid Sch 12 para 7(3)(a), (5) (as amended: see note 10 supra).

15 Ie the Judicial Pensions and Retirement Act 1993 s 26(4)-(6): see PARA 344 text and notes 8-9 ante.

16 See the Value Added Tax Act 1994 Sch 12 para 7(6).

17 Ibid Sch 12 para 7(8) (as amended: see note 10 supra). This provision, so far as relating to pensions allowances and gratuities, does not have effect in relation to a person to whom the Judicial Pensions and Retirement Act 1993 Pt I (ss 1-18) (as amended) applies, except to the extent provided under or by that Act: Value Added Tax Act 1994 Sch 12 para 7(9). The Judicial Pensions and Retirement Act 1993 Pt I (as amended) applies to the chairman: see s 1(6), Sch 1 Pt II (as amended).

18 Value Added Tax Act 1994 Sch 12 para 7(10) (as amended: see note 10 supra).

19 Ibid Sch 12 para 7(3)(a), (7) (as amended: see note 10 supra). As from a day to be appointed, the Lord Chancellor may, with the concurrence of the Lord Chief Justice, remove from office on the ground of incapacity or misbehaviour a chairman of VAT tribunals appointed under Sch 12 para 7(3)(a): Sch 12 para 7(7A) (prospectively substituted for Sch 12 para 7(7) by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 235, 237(1), (4)(b)). At the date at which this volume states the law, no such day had been appointed.

20 House of Commons Disqualification Act 1975 s 1, Sch 1 Pt III; and see PARLIAMENT vol 78 (2010) PARA 908.

21 Value Added Tax Act 1994 Sch 12 para 8.

22 'The registrar' means the registrar of the VAT and duties tribunals, or any member of the administrative staff of the VAT and duties tribunals authorised by the president to perform for the time being all or any of the duties of a registrar under the Value Added Tax Tribunals Rules 1986, SI 1986/590: r 2 (definition amended by SI 1994/2617).

23 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 33(1)(a).

24 Ibid r 33(1)(b).

25 Ibid r 33(1)(c).

26 Ibid r 33(1)(d).

27 As to the appropriate tribunal centre see PARA 343 ante.

28 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 33(1).

29 Ie as provided by ibid r 30(1): see PARA 368 text and note 2 post.

30 Ibid r 33(2).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### **345 Composition and membership of tribunals**

TEXT AND NOTES--Value Added Tax Act 1994 s 82 substituted (see PARA 343) and Sch 12 repealed: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/346. Decisions against which an appeal lies.

## **(2) APPEALS TO VAT AND DUTIES TRIBUNALS**

### **346. Decisions against which an appeal lies.**

Subject to certain conditions<sup>1</sup>, an appeal lies to a VAT and duties tribunal with respect to any of the following matters<sup>2</sup>:

- 1047 (1) the registration or cancellation of registration<sup>3</sup> of any person for the purposes of the Value Added Tax Act 1994<sup>4</sup>;
- 1048 (2) the VAT chargeable on the supply of any goods or services, on the acquisition of goods from another member state<sup>5</sup> or, subject to certain exceptions<sup>6</sup>, on the importation of goods<sup>7</sup> from a place outside the member states<sup>8</sup>;
- 1049 (3) the amount of any input tax<sup>9</sup> which may be credited to a person<sup>10</sup>;
- 1050 (4) any claim for a refund of VAT<sup>11</sup> where goods have been acquired from, and VAT paid in, another member state<sup>12</sup>;
- 1051 (5) a decision of the Commissioners for Her Majesty's Revenue and Customs<sup>13</sup> as to whether or not a person is to be approved as a fiscal warehousekeeper<sup>14</sup> or the conditions from time to time subject to which he is so approved, for the withdrawal of any such approval or for the withdrawal of fiscal warehouse status from any premises<sup>15</sup>;
- 1052 (6) the proportion of input tax which is allowable<sup>16</sup> as a credit<sup>17</sup>;
- 1053 (7) a claim by a taxable person<sup>18</sup> in respect of goods imported for private purposes<sup>19</sup>;
- 1054 (8) a decision of the Commissioners refusing or withdrawing authorisation to use the flat-rate scheme for small businesses<sup>20</sup> or the percentages applied under the scheme<sup>21</sup>;
- 1055 (9) a decision that an election under the payments on account provisions<sup>22</sup> ceases to have effect<sup>23</sup>;
- 1056 (10) the amount of any refunds<sup>24</sup> to persons constructing certain buildings<sup>25</sup>;
- 1057 (11) a claim for a refund<sup>26</sup> under the provisions relating to bad debt relief<sup>27</sup>;
- 1058 (12) the amount of any refunds in relation to new means of transport<sup>28</sup> supplied to other member states<sup>29</sup>;
- 1059 (13) any refusal of an application<sup>30</sup> by bodies corporate for treatment as members of a group for VAT purposes<sup>31</sup>;
- 1060 (14) the giving of notice<sup>32</sup> terminating treatment as a member of a group<sup>33</sup>;
- 1061 (15) the requirement of any security where a taxable person has failed to appoint a VAT representative<sup>34</sup> or where it appears requisite<sup>35</sup> to the Commissioners<sup>36</sup>;
- 1062 (16) any refusal or cancellation of certification for the purposes of the flat rate scheme for farmers<sup>37</sup>, or any refusal to cancel such certification<sup>38</sup>;
- 1063 (17) any liability<sup>39</sup> to a penalty or surcharge<sup>40</sup>;
- 1064 (18) a decision by the Commissioners<sup>41</sup> as to liability to a penalty for conduct attributable to the dishonesty of a named officer of a body corporate<sup>42</sup>;
- 1065 (19) an assessment in respect of failure to make VAT returns and certain other matters<sup>43</sup> or the amount of such an assessment<sup>44</sup>;
- 1066 (20) the amount of any penalty, interest or surcharge specified<sup>45</sup> in an assessment<sup>46</sup>;
- 1067 (21) the making of an assessment<sup>47</sup> under the extended time limit available in the cases of fraud or dishonesty<sup>48</sup>;

- 1068 (22) any liability arising under the joint and several liability provisions<sup>49</sup> for unpaid VAT<sup>50</sup>;
- 1069 (23) any liability of the Commissioners to pay interest in consequence of official error<sup>51</sup>, or the amount of interest so payable<sup>52</sup>;
- 1070 (24) an assessment for overpaid interest<sup>53</sup> or the amount of such an assessment<sup>54</sup>;
- 1071 (25) a claim for the crediting or repayment of an amount of overpaid VAT<sup>55</sup>, an assessment to recover an excessive repayment<sup>56</sup>, or the amount of such an assessment<sup>57</sup>;
- 1072 (26) as assessment to recover excessive repayments made in accordance with reimbursement regulations<sup>58</sup>, or the amount of such an assessment<sup>59</sup>;
- 1073 (27) any direction or supplementary direction<sup>60</sup> to treat persons as a single taxable person<sup>61</sup>;
- 1074 (28) any direction<sup>62</sup> that the value of a supply be taken to be its open market value<sup>63</sup>;
- 1075 (29) any direction<sup>64</sup> as to the value of a relevant acquisition of goods from another member state<sup>65</sup>;
- 1076 (30) any direction or assessment<sup>66</sup> under the anti-avoidance provisions relating to groups<sup>67</sup>;
- 1077 (31) any refusal to permit the value of supplies to be determined by a retail scheme method described in a published<sup>68</sup> notice<sup>69</sup>;
- 1078 (32) any refusal of authorisation or termination of authorisation in connection with the cash accounting scheme<sup>70</sup>;
- 1079 (33) any conditions imposed by the Commissioners<sup>71</sup> in a particular case in respect of self-billed invoices of the electronic production and storage of VAT invoices by means of a computer<sup>72</sup>;
- 1080 (34) a direction to exclude exemption<sup>73</sup> in anti-avoidance cases<sup>74</sup>;
- 1081 (35) any liability to a penalty for failure to notify use of a notifiable anti-avoidance scheme<sup>75</sup>, any assessment of such a penalty<sup>76</sup> and the amount of any such assessment<sup>77</sup>;
- 1082 (36) a decision of the Commissioners on a review under the Money Laundering Regulations<sup>78</sup>.

Where an appeal is against a decision of the Commissioners which depended upon a prior decision taken by them in relation to the appellant<sup>79</sup>, the fact that the prior decision is not within the above categories<sup>80</sup> does not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision<sup>81</sup>.

1 le subject to the Value Added Tax Act 1994 s 84 (as amended): see PARA 347 post.

2 The Treasury may by order provide for the matters with respect to which an appeal under *ibid* s 83 (as amended) lies to a tribunal to include such decisions of the Commissioners under that or any other order under s 28 (see PARA 252 post) as may be specified in the order: s 28(2AA) (added by the Finance Act 1997 s 43). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

The tribunal had no general supervisory jurisdiction over the administrative decisions of the Commissioners of Customs and Excise: *Dollar Land (Feltham) Ltd, Dollar Land (Cumbernauld) Ltd, Dollar Land (Calthorpe House) Ltd v Customs and Excise Comrs* [1995] STC 414 (following *Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd* [1981] AC 22, [1980] 2 All ER 72, HL; and disapproving *Food Engineering Ltd v Customs and Excise Comrs* [1992] VATTR 327). Thus no appeal lies to the tribunal except in relation to the matters listed in the Value Added Tax Act 1994 s 83 (as amended); eg there is no appeal against a refusal of the Commissioners to make a refund under s 33 (as amended) (see PARA 304 ante). The function of the tribunal is appellate, but the powers of the tribunal in any particular case depend upon an examination of the decision against which the appeal is brought.

As to where the tribunal has been held to have a supervisory jurisdiction under what is now s 83 (as amended) see *Customs and Excise Comrs v Save and Prosper Group Ltd* [1979] STC 205 (Value Added Tax Act 1994 s

83(k) (see head (13) in the text)); *Mr Wishmore Ltd v Customs and Excise Comrs* [1988] STC 723; *Customs and Excise Comrs v Peachtree Enterprises Ltd* [1994] STC 747 (Value Added Tax Act 1994 s 83(l) (see head (15) in the text)); *Food Engineering Ltd v Customs and Excise Comrs* supra (Value Added Tax Act 1994 s 83(n) (see head (17) in the text)); *Chamberlain v Customs and Excise Comrs* [1989] STC 505 (Value Added Tax Act 1994 s 83(u) (see head (27) in the text)); *Moore v Customs and Excise Comrs* [1989] VATTR 276 (Value Added Tax Act 1994 s 83(v) (see head (28) in the text)); *Pollitt v Customs and Excise Comrs* (1990) VAT Decision 4463, [1990] STI 177; *Low v Customs and Excise Comrs* (1991) VAT Decision 5536, [1991] STI 165; *Wadlewski v Customs and Excise Comrs* (1995) VAT Decision 13340, [1995] STI 1255 (Value Added Tax Act 1994 s 83(x) (see head (31) in the text)); *Mainline Fabrications v Customs and Excise Comrs* (1992) VAT Decision 7010 (unreported) (Value Added Tax Act 1994 s 83(y) (see head (32) in the text)). All these cases must, however, be read in the light of *Dollar Land (Feltham) Ltd, Dollar Land (Cumbernauld) Ltd, Dollar Land (Calthorpe House) Ltd v Customs and Excise Comrs* supra, in which *Food Engineering Ltd v Customs and Excise Comrs* supra and the tribunal cases which followed it were expressly disapproved. See also *Tricell UK Ltd v Customs and Excise Comrs* (2003) VAT Decision 18127, [2003] V & DR 333 (distinguished on another point in *Evolink Ltd v Customs and Excise Comrs* (2003) VAT Decision 18207, [2003] STI 1800).

If there is no right of appeal to a tribunal, it may be that an application may be made to the High Court for judicial review of the Commissioners' decision: see *R (on the application of Sagemaster plc) v Customs and Excise Comrs* [2004] EWCA Civ 25, [2004] 2 CMLR 141, [2004] STC 813 (where it was held that the tribunal had no jurisdiction to consider arguments relating to the English law doctrine of legitimate expectation but an application for judicial review was appropriate). See also PARA 370 note 2 post. As to the role and function of VAT and duties tribunals generally see *Georgiou (t/a Marios Chipperry) v Customs and Excise Comrs* [1995] STC 1101 at 1107 et seq; affd [1996] STC 463, CA. Under the previous legislation (ie the Value Added Tax Act 1983 s 40 (repealed)), an appeal only lay to the tribunal against a decision of the Commissioners with respect to one of the matters specified in that provision. The words 'a decision of the Commissioners' have been omitted from the consolidated provision (ie the Value Added Tax Act 1994 s 83 (as amended)) and it is a matter of debate whether, in consequence, an appeal can be brought without awaiting a decision of the Commissioners. In practice, it is difficult to see how an appeal could properly be constituted without some form of lis between the appellant and the Commissioners.

3 As to registration and deregistration see the Value Added Tax Act 1994 s 3, Schs 1-3 (as amended); and PARA 64 et seq ante.

4 Ibid s 83(a). A decision by the Commissioners as to the accounting periods to be adopted by the taxpayer and the method of paying VAT does not constitute a decision as to registration, even though the requirements in question are set out on the certificate of registration: *Punchwell Ltd v Customs and Excise Comrs* [1981] VATTR 93.

5 As to the charge to tax on such acquisitions see the Value Added Tax Act 1994 s 10; and PARA 19 ante. For the meaning of 'another member state' see PARA 4 note 15 ante.

6 No appeal lies with respect to the subject-matter of any decision which by virtue of ibid s 16 (application of customs enactments: see PARA 115 ante) is one to which the Finance Act 1994 s 14 applies (decisions subject to review: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1241 et seq), unless the decision: (1) relates exclusively to one or both of the following: (a) whether or not the Value Added Tax Act 1994 s 30(3) (zero-rating of specified imported goods: see PARA 190 ante) applies in relation to the importation of the goods in question; and (b) if it does not, the rate of tax charged on those goods; and (2) is not one in respect of which notice has been given to the Commissioners under the Finance Act 1994 s 14 (requirement for review of a decision: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1241 et seq) requiring them to review it: Value Added Tax Act 1994 s 84(9).

7 As to general provisions relating to imported goods see ibid s 15; and PARA 113 ante.

8 Ibid s 83(b). As to the conditions with which the appellant must comply in order for an appeal made under s 83(b) to be entertained see s 84(3); and PARA 347 post. As to the territories included in, or excluded from, the member states for VAT purposes see PARA 16 ante. The tribunal does not have power to substitute its opinion for that of the Commissioners as to what facts are sufficient to justify the making of an assessment: *Cumbræ Properties (1963) Ltd v Customs and Excise Comrs* [1981] STC 799; *Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd* [1981] AC 22, [1980] 2 All ER 72, HL. As to the periods within which the Commissioners must make their assessment see PARA 299 ante. An appeal under the Value Added Tax Act 1994 s 83(b) lies not only on the amount of VAT charged following an assessment but also as to whether there was any supply at all: *R v London VAT Tribunal and Customs and Excise Comrs, ex p Theodorou* [1989] STC 292. For the meaning of 'supply' see PARA 27 ante.

No appeal lies under the Value Added Tax Act 1994 s 83(b) in respect of the correct VAT treatment of future supplies as an appeal must relate to a supply made, in respect of which the Commissioners have determined the amount of VAT payable: *Odhams Leisure Group Ltd v Customs and Excise Comrs* [1992] STC 332; *Morgan (t/a Parochial Church Council of Emmanuel Church, Northwood, Middlesex) v Customs and Excise Comrs* [1973] VATTR 76; *Strangewood v Customs and Excise Comrs* [1988] VATTR 35 (where the Commissioners deliberately

avoided making any decision as to the appellant's claim for repayment of input tax whilst they continued investigations into his affairs); and see *Anglia Energy Conservation Ltd v Customs and Excise Comrs* (1996) VAT Decision 14216, [1996] STI 1428.

9 For the meaning of 'input tax' see PARAS 4, 215 ante. A person may only deduct VAT incurred by him on supplies of goods or services if those goods or services are used or are to be used by him in making taxable supplies. Expenditure on luxuries, amusements or entertainment will be particularly carefully scrutinised by the Commissioners and if they decide that the expenditure was not strictly business expenditure, input tax treatment will be denied: see Customs and Excise Leaflet 700/55/93 *VAT Input Tax Appeals: Luxuries, Amusements and Entertainment*. The importance of this in the context of appeals is that there is only a limited right of appeal against a denial or restriction of input tax credit on the supply, acquisition or importation of something in the nature of a luxury, amusement or entertainment. As to such cases see the Value Added Tax Act 1994 s 84(4); and PARA 347 post.

10 Ibid s 83(c). See *Customs and Excise Comrs v C & A Modes* [1979] STC 433. It appears that the tribunal has a supervisory jurisdiction under the Value Added Tax Act 1994 s 83(c) over a decision by the Commissioners not to accept alternative evidence as sufficient to support an input tax claim: *Kohanzad v Customs and Excise Comrs* [1994] STC 967; *Richmond Resources Ltd (in liquidation) v Customs and Excise Comrs* (1995) VAT Decision 13435, [1995] STI 1374; cf *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941, CA; *Customs and Excise Comrs v R & R Pension Fund Trustees* [1996] STC 889 at 896-897 per Buxton J; and see note 2 supra. In *Kamare Properties Ltd v Customs and Excise Comrs* (2004) VAT Decision 18470, [2004] STI 1008, the Commissioners wrote to the appellant intimating that they were investigating its repayment claims, but would be disputing them. It was held that this constituted an appealable decision.

11 Ie under regulations made under the Value Added Tax Act 1994 s 13(5) (see PARA 19 ante).

12 Ibid s 83(d).

13 Ie under ibid s 18A (as added): see PARA 147 ante.

14 For the meaning of 'fiscal warehousekeeper' see PARA 147 note 7 ante.

15 Value Added Tax Act 1994 s 83(da) (added by the Finance Act 1996 s 26(1), Sch 3 para 12).

16 Ie under the Value Added Tax Act 1994 s 26: see PARA 217 ante.

17 Ibid s 83(e).

18 Ie under ibid s 27: see PARA 118 ante. For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante.

19 Ibid s 83(f).

20 Ie the scheme set out in ibid s 26B (as added): see PARA 259 et seq ante.

21 See ibid s 83(fza) (added by the Finance Act 2002 s 23(2)). Where an appeal is brought against such a decision as is mentioned in the Value Added Tax Act 1994 s 83(fza) (as added) or, to the extent that it is based on such a decision, against an assessment, the tribunal will not allow the appeal unless it considers that the Commissioners could not reasonably have been satisfied that there were grounds for the decision: s 84(4ZA) (added by the Finance Act 2002 s 23(3)).

22 Ie an election under the Value Added Tax (Payments on Account) Order 1993, SI 1993/2001, art 12A (as added): see PARA 254 ante.

23 See the Value Added Tax Act 1994 s 83(fa) (added by the Value Added Tax (Payments on Account) (Appeals) Order 1997, SI 1997/2542, art 2).

24 Ie refunds allowable under the Value Added Tax Act 1994 s 35 (as amended): see PARA 306 ante.

25 Ibid s 83(g).

26 Ie under ibid s 36 (see PARA 307 ante) or under the Value Added Tax Act 1983 s 22 (repealed): Value Added Tax Act 1994 s 83(h).

27 Ibid s 83(h).

28 Ie under ibid s 40: see PARA 310 ante. For the meaning of 'new means of transport' see PARA 19 note 7 ante.



- 29 Ibid s 83(j).
- 30 Ie under ibid s 43B(1) or (2) (as added and amended): see PARA 75 ante.
- 31 Ibid s 83(k) (s 83(k) substituted, and s 83(ka) added, by the Finance Act 1999 s 16, Sch 2 para 3).
- 32 Ie under the Value Added Tax Act 1994 s 43C(1) or (3) (as added and amended): see PARA 75 ante.
- 33 Ibid s 83(ka) (as added: see note 31 supra).
- 34 Ie a requirement of security under ibid s 48(7): see PARA 71 ante.
- 35 Ie under ibid s 58, Sch 11 para 4(1A) (as added), (2) (as substituted): see PARA 216 ante.
- 36 Ibid s 83(l) (amended by the Finance Act 2003 s 17(1), (6)). It has been said that the jurisdiction of the tribunal on an appeal against such a decision is supervisory in nature: see *Dollar Land (Feltham) Ltd, Dollar Land (Cumbernauld) Ltd, Dollar Land (Calthorpe House) Ltd v Customs and Excise Comrs* [1995] STC 414 at 418-419 per Judge J; and *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952, CA, per Neill LJ. There is no right of appeal against a requirement of security on the repayment of input tax under the Value Added Tax Act 1994 Sch 11 para 4(1): *Strangewood Ltd v Customs and Excise Comrs* [1988] VATTR 35; and see PARA 216 ante.
- 37 Ie a refusal or cancellation of certification under the Value Added Tax Act 1994 s 54: see PARA 88 et seq ante.
- 38 Ibid s 83(m).
- 39 Ie by virtue of any of the provisions of ibid ss 59-69A (as amended): see PARAS 321-333 ante. An appeal made under s 83(n) (as amended) may not be entertained by a tribunal unless the requirements of s 84(3) have been satisfied: see PARA 347 post. As to the powers of a tribunal when an appeal is brought against a decision of a kind within s 83(n) see *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941, CA; cf *Dollar Land (Feltham) Ltd, Dollar Land (Cumbernauld) Ltd, Dollar Land (Calthorpe House) Ltd v Customs and Excise Comrs* [1995] STC 414 at 418-419 per Judge J.
- 40 Value Added Tax Act 1994 s 83(n) (amended by the Finance Act 2000 s 137(1), (5)). As to the conditions with which the appellant must comply in order for an appeal made under the Value Added Tax Act 1994 s 83(n) (as amended) to be entertained see s 84(3); and PARA 347 post.
- 41 Ie a decision under ibid s 61 in accordance with s 61(5): see PARA 322 ante.
- 42 Ibid s 83(o).
- 43 Ie an assessment under: (1) ibid s 73(1) or (2) in respect of a period for which the appellant has made a return (see PARA 294 ante); or (2) s 73(7), s 73(7A) (as added) or s 73(7B) (as added) (see PARA 294 ante); or (3) s 75 (see PARAS 295, 299 ante): s 83(p)(i)-(iii) (amended by the Finance Act 1996 Sch 3 para 12). Where the Commissioners reduce the amount of an assessment in accordance with the Value Added Tax Act 1994 s 73(9) (as amended) after an appeal has been made, and issue a notice of the amended assessment, there is a single appeal covering both assessments rather than a separate right of appeal against the amended assessment. Accordingly, if a tribunal dismisses the appeal against the original assessment because the disputed tax has not been paid or deposited (see PARA 347 post), there is no residual right of appeal in relation to the amended assessment: *Sitar Tandoori Restaurants v Customs and Excise Comrs* [1993] STC 582.
- 44 Value Added Tax Act 1994 s 83(p) (as amended: see note 43 supra). As to the conditions with which the appellant must comply in order for an appeal made under s 83(p) (as amended) to be entertained see s 84(3); and PARA 347 post. Where, on an appeal against a decision with respect to any of the matters mentioned in s 83(p) (as amended), it is found that the amount specified in the assessment is less than it ought to have been, and the tribunal gives a direction specifying the correct amount, the assessment has effect as an assessment of the amount specified in the direction, and that amount is deemed to have been notified to the appellant: s 84(5). The power to increase assessments under s 84(5) should not normally be exercised by the tribunal on its own initiative (although simple arithmetical errors may be corrected by this means): *Elias Gale Racing v Customs and Excise Comrs* [1999] STC 66.
- 45 Ie under the Value Added Tax Act 1994 s 76 (as amended): see PARA 298 ante.
- 46 Ibid s 83(q). As to the conditions with which the appellant must comply in order for an appeal made under s 83(q) to be entertained see s 84(3); and PARA 347 post. As to mitigation of penalties see s 70 (as amended); and PARA 329 ante. Without prejudice to the power to mitigate, nothing in s 83(q) confers on a tribunal any power to vary an amount assessed by way of penalty or by way of interest or surcharge except to the extent

necessary to reduce it to the amount which is appropriate under ss 59-70 (as amended); and 'penalty' includes an amount assessed by virtue of s 61(3) or s 61(4)(a) (see PARA 322 ante): s 84(6). As to the burden of proof on an appeal against an assessment under s 60 see s 60(7); and PARA 321 ante.

47    Ie on the basis set out in *ibid* s 77(4) (as amended): see PARA 299 ante.

48    *Ibid* s 83(r).

49    Ie by virtue of *ibid* s 77A (as added) (see PARA 287 ante).

50    *Ibid* s 83(ra) (added by the Finance Act 2003 s 18(2)). As to the conditions with which the appellant must comply in order for an appeal made under the Value Added Tax Act 1994 s 83(ra) (as added) to be entertained see s 84(3); and PARA 347 post.

51    Ie a liability to pay interest under *ibid* s 78 (as amended): see PARA 313 ante.

52    *Ibid* s 83(s).

53    Ie under *ibid* s 78A (as added): see PARA 314 ante.

54    *Ibid* s 83(sa) (added by the Finance Act 1997 s 45(2)). See PARA 314 ante.

55    Ie under the Value Added Tax Act 1994 s 80 (as amended): see PARA 311 ante.

56    Ie under *ibid* s 80(4A) (as added and substituted): see PARA 311 ante.

57    *Ibid* s 83(t) (amended by the Finance Act 1997 s 47(7), (9); and by the Finance (No 2) Act 2005 s 4(1), (5)(a)).

58    Ie under the Value Added Tax Act 1994 s 80B(1) or s 80B(1B) (as added): see PARA 312 ante.

59    *Ibid* s 83(ta) (added by the Finance Act 1997 s 46(2); and amended by the Finance (No 2) Act 2005 s 4(1), (5)(a)).

60    Ie made under the Value Added Tax Act 1994 s 3, Sch 1 para 2 (as amended): see PARA 68 ante.

61    *Ibid* s 83(u). Where there is an appeal against a decision to make a direction under s 83(u) the tribunal will not allow the appeal unless it considers that the Commissioners could not reasonably have been satisfied that there were grounds for making the direction: s 84(7) (amended by the Finance Act 1997 s 31(3)). The test on an appeal is whether no reasonable body of Commissioners could properly have formed the view that they did: see *Chamberlain v Customs and Excise Comrs* [1989] STC 505.

62    Ie a direction made under the Value Added Tax Act 1994 s 19, Sch 6 paras 1, 1A or 2 (as amended): see PARAS 96-97 ante. An appeal may also lie under the Value Added Tax Act 1983 Sch 4 para 2 (repealed) as to the value of imported goods: see the Value Added Tax Act 1994 s 83(v).

63    *Ibid* s 83(v) (amended by the Finance Act 2004 s 22(1), (3)). See also *Moore v Customs and Excise Comrs* [1989] VATTR 276.

64    Ie under the Value Added Tax Act 1994 s 20, Sch 7 para 1: see PARA 109 ante.

65    *Ibid* s 83(w).

66    Ie under *ibid* s 43(9), Sch 9A (as added and amended): see PARA 207 ante.

67    *Ibid* s 83(wa) (added by the Finance Act 1996 s 31(3)). Where there is an appeal against a decision to make such a direction, the cases in which the tribunal must allow the appeal include (in addition to the case where the conditions for the making of the direction were not fulfilled), the case where the tribunal is satisfied, in relation to the relevant event by reference to which the direction was given, that: (1) the change in the treatment of the body corporate; or (2) the transaction in question, had as its main purpose or, as the case may be, as each of its main purposes a genuine commercial purpose unconnected with the fulfilment of the condition specified in the Value Added Tax Act 1994 Sch 9A para 1(3) (as added) (see PARA 207 ante): s 84(7A) (added by the Finance Act 1996 s 31(4)).

68    Ie a notice published under the Value Added Tax Act 1994 s 58, Sch 11 para 2(6): see PARA 245 ante.

69    *Ibid* s 83(x). As to retail schemes see PARA 199 et seq ante.

70 Ibid s 83(y). The cash accounting scheme is made under Sch 11 para 2(7): see PARA 245 ante. As to the cash accounting scheme see PARA 249 ante.

71 Ie requirements imposed by the Commissioners in a particular case by virtue of ibid Sch 11 para 2B(2)(c) (as added) (see PARA 246 ante) or Sch 11 para 3(1) (as substituted) (see PARA 280 ante).

72 Ibid s 83(z) (substituted by the Finance Act 2002 s 24(4)(b)).

73 Ie under the Value Added Tax Act 1994 Sch 11A para 8 (as added): see PARA 291 ante.

74 Ibid s 83(za) (s 83(za), (zb) added by the Finance Act 2004 s 19(1), Sch 2 Pt 2 para 4).

75 Ie under the Value Added Tax Act 1994 Sch 11A para 10(1) (as added): see PARA 292 ante.

76 Ie under ibid Sch 11A para 12(1) (as added): see PARA 292 ante.

77 Ibid s 83(zb) (as added: see note 74 ante). As to the conditions with which the appellant must comply in order for an appeal made under s 83(zb) (as added) to be entertained see s 84(3); and PARA 347 post. Without prejudice to the power to mitigate, nothing in s 83(zb) (as added) confers on a tribunal any power to vary an amount assessed by way of penalty except in so far as it is necessary to reduce it to the amount which is appropriate under Sch 11A para 11 (as added) (see PARA 293 post): s 84(6A) (added by the Finance Act 2004 s 19(1), Sch 2 Pt 2 para 5(1), (3)).

78 Value Added Tax Act 1994 s 83(zz) (added by the Money Laundering Regulations 2001, SI 2001/3641, reg 17; and substituted by the Money Laundering Regulations 2003, SI 2003/3075, reg 29, Sch 2 Pt 1 para 1). A review under the Money Laundering Regulations is a review under the Money Laundering Regulations 2003, SI 2003/3075, reg 21.

79 For the meaning of 'appellant' see PARA 343 note 7 ante.

80 Ie under the Value Added Tax Act 1994 s 84: see PARA 347 post.

81 Ibid s 84(10). In this way the tribunal is given a power which its ostensible lack of a supervisory jurisdiction would otherwise preclude: see *Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd* [1981] AC 22, [1980] 2 All ER 72, HL; *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 945, CA, per Neill LJ. Thus the tribunal may allow an appeal against the more recent, appealable, decision, but not against the earlier decision outside the scope of the Value Added Tax Act 1994 s 83 (as amended) upon which the more recent decision depended: see '*XL*' (*Stevenage*) *Ltd v Customs and Excise Comrs* [1981] VATTR 192 at 196; *Grimsby and District Sunday Football League v Customs and Excise Comrs* [1982] VATTR 210. In exercising this jurisdiction, the tribunal should only allow the appeal if it comes to the conclusion that there has been a wrongful exercise of discretion by the Commissioners: *Pinetree Housing Association Ltd v Customs and Excise Comrs* [1983] VATTR 227, following *Charles Osenton & Co v Johnston* [1942] AC 130 at 138, [1941] 2 All ER 245 at 250, HL, per Viscount Simon LC; *Blue Boar Property and Investment Co Ltd v Customs and Excise Comrs* [1984] VATTR 12; *Bardsley v Customs and Excise Comrs* [1984] VATTR 171; *Brookes v Customs and Excise Comrs* [1994] VATTR 35; and *Shepherd v Customs and Excise Comrs* [1994] VATTR 47. A decision of the Commissioners as to the application of an extra-statutory concession is incapable of being a prior decision within the Value Added Tax Act 1994 s 84(10): *Customs and Excise Comrs v Arnold* [1996] STC 1271 per Hidden J, disapproving *British Teleflower Service Ltd v Customs and Excise Comrs* (1996) VAT Decision 13756, [1996] STI 290.

## UPDATE

### 343-400 Appeals

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### 346 Decisions against which an appeal lies

TEXT AND NOTES--Value Added Tax Act 1994 s 83 now s 83(1) (amended by Finance Act 2009 s 77(4); and SI 2009/56). In the Value Added Tax Act 1994 ss 84-87, a reference to a decision with respect to which an appeal under s 83 lies, or has been made, includes any matter listed in s 83(1) (see heads (1)-(39)), whether or not described there as a decision: s 83(2) (added by SI 2009/56).

An appeal also lies against any decision of the Commissioners to refuse to make a repayment under a scheme under the Value Added Tax Act 1994 s 39 (see PARA 309): s 83(1).

Also, heads (37) a direction under the Value Added Tax Act 1994 Sch 11 para 6A (see PARA 238) (s 83(1)(zza) (added by Finance Act 2006 s 21(4)(b)); (38) a decision of the Commissioners about the application of regulations under the Finance Act 2002 s 135 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1699A) in connection with VAT (including, in particular, a decision as to whether a requirement of the regulations applies and a decision to impose a penalty) (Value Added Tax Act 1994 s 83(1)(zc) (added by Finance Act 2007 s 93(8)); (39) any refusal of the Commissioners to grant any permission under, or otherwise to exercise in favour of a particular person any power conferred by any provision of the Value Added Tax Act 1994 Sch 10 paras 1-34 (see PARAS 157-159) (s 83(1)(wb) (added by SI 2008/1146)). Nothing in head (38) is to be taken to confer on a tribunal any power to vary an amount assessed by way of penalty except so far as it is necessary to reduce it to the amount which is appropriate under regulations made under the Finance Act 2002 s 135: Value Added Tax Act 1994 s 84(6B) (added by Finance Act 2007 s 93(9)). Where there is an appeal against a decision to make such a direction, the tribunal must not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for making the direction, and the direction has effect pending the determination of the appeal: Value Added Tax Act 1994 s 84(7B) (added by Finance Act 2006 s 21(5); and amended by SI 2009/56).

Where there is an appeal under head (39), the tribunal must not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for refusal, and the refusal has effect pending the determination of the appeal: Value Added Tax Act 1994 s 84(7ZA) (added by SI 2008/1146; and amended by SI 2009/56).

Provision similar to that applying more generally for customs and excise purposes (see Finance Act 1994 ss 15A-15F) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1240) is now made for decisions to be reviewed by HM Revenue and Customs before an appeal is taken to the tribunal: see Value Added Tax Act 1994 ss 83A-83F (ss 83A-83G added by SI 2009/56).

TEXT AND NOTE 1--Now, subject to Value Added Tax Act 1994 ss 83G, 94: s 83(1) (amended by SI 2009/56).

NOTE 6--Value Added Tax Act 1994 s 84(9) amended: SI 2009/56.

NOTE 10--No appeal lies where the Commissioners, without making a decision to refuse repayment, delay repayment of all or part of a claim pending investigation: see *Touchwood Services Ltd v Revenue and Customs Comrs* [2007] EWHC 105 (Ch), [2007] STC 1425.

NOTE 21--Value Added Tax Act 1994 s 84(4ZA) amended: SI 2009/56.

NOTE 39--Refers also to Value Added Tax Act 1994 s 69B (see PARA 331): s 83(n) (amended by Finance Act 2006 s 21(4)(a)).

TEXT AND NOTE 78--Head (36) omitted: SI 2007/2157.

TEXT AND NOTE 79--Value Added Tax Act 1994 s 84(10) amended: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/347. Pre-conditions to the entertainment of an appeal.

### **347. Pre-conditions to the entertainment of an appeal.**

Prima facie, an appeal<sup>1</sup> may not be entertained<sup>2</sup> unless the appellant<sup>3</sup> has made all the returns which he is required to make<sup>4</sup> and has paid the amounts of value added tax shown in those returns as payable by him<sup>5</sup>. This provision applies to all appeals brought under any of the prescribed heads<sup>6</sup> but the prohibition is not absolute, and the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup> can therefore waive it<sup>8</sup>.

Where the appeal is against a decision with respect to certain specified matters<sup>9</sup>, it may not be entertained unless: (1) the amount which the Commissioners have determined to be payable as VAT<sup>10</sup> has been paid or deposited with them; or (2) on being satisfied that the appellant would otherwise suffer hardship the Commissioners agree, or the tribunal decides, that the appeal should be entertained notwithstanding that that amount has not been paid or deposited<sup>11</sup>. Where on an appeal it is found that the whole or part of any amount so paid or deposited is not due, or that the whole or part of any VAT credit due to the appellant has not been paid, so much of that amount as is found not to be due or not to have been paid is to be repaid (or, as the case may be, paid) with interest at such rate as the tribunal may determine; and where the appeal has been entertained notwithstanding that an amount determined by the Commissioners to be payable as VAT has not been paid or deposited and it is found on the appeal that that amount is due, the tribunal may, if it thinks fit, direct that the amount is to be paid with interest at such rate as may be specified in the direction<sup>12</sup>.

A tribunal can hear an appeal brought by a person who is not a taxable person<sup>13</sup>; and, in particular, an appeal may be brought by the recipient of a supply if he can establish that any tax chargeable on it has been paid by him and that he has a sufficient interest in obtaining a decision thereon<sup>14</sup>.

Where:

- 1083 (a) there is an appeal against a decision of the Commissioners with respect to, or to so much of any assessment as concerns, the amount of input tax<sup>15</sup> that may be credited to any person or the proportion of input tax allowable<sup>16</sup>;
- 1084 (b) that appeal relates, in whole or in part, to any determination by the Commissioners either as to the purposes for which any goods or services were used, or were to be used, by any person or as to whether, or to what extent, the matters to which any input tax was attributable were or included matters other than the making of certain supplies made or to be made by the taxable person in the course or furtherance of his business<sup>17</sup>; and
- 1085 (c) VAT for which, in pursuance of that determination, there is no entitlement to a credit is VAT on the supply, acquisition or importation of something in the nature of a luxury, amusement or entertainment<sup>18</sup>,

the tribunal may not allow the appeal or, as the case may be, so much of it as relates to that determination, unless it considers that the determination is one which it was unreasonable to make or which it would have been unreasonable to make if information brought to the attention of the tribunal that could not have been brought to the attention of the Commissioners had been available to be taken into account when the determination was made<sup>19</sup>.

An appeal against an assessment which is a recovery assessment<sup>20</sup> or against the amount of such an assessment, cannot be entertained unless the amount notified by the assessment has been paid or deposited with the Commissioners or on being satisfied that the appellant would otherwise suffer hardship, the Commissioners agree, or the tribunal decides, that the appeal should be entertained notwithstanding that that amount has not been so paid or deposited<sup>21</sup>.

1    le an appeal under the Value Added Tax Act 1994 s 83 (as amended): see PARA 346 ante.

2    A tribunal 'entertains' an appeal either where the Commissioners raise the issue of competency under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 6 (see PARA 351 post), and that issue is decided in the taxpayer's favour or, where no issue of competency is raised, from the date of service of the notice of hearing in accordance with r 23 (see PARA 363 post): *Customs and Excise Comrs v Hubbard Foundation Scotland* [1981] STC 593, Ct of Sess. If the Commissioners serve a notice under what is now the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 6, a preliminary hearing will be arranged to consider the matter; if the appellant applies for a direction that his appeal be entertained without payment or deposit of the tax, the hearing of that application will be arranged, where possible, at the same time as the preliminary hearing; and if the appellant's application is dismissed, the tribunal may adjourn the consideration of the question of competency in order to allow the appellant time to pay or deposit the disputed tax: *Practice Note* [1981] VATTR 65.

As to allowing an appeal against a decision, or an assessment based on such a decision, as mentioned in the Value Added Tax Act 1994 s 83(fza) (as added) see PARA 346 note 21 ante. Where an appeal is brought against the refusal of an application such as is mentioned in s 43B(1) or (2) (as added) (see PARA 75 ante) on the grounds stated in s 43B(5)(c) (as added) (see PARA 75 ante): (1) the tribunal must not allow the appeal unless it considers that the Commissioners could not reasonably have been satisfied that there were grounds for refusing the application; (2) the refusal has effect pending the determination of the appeal; and (3) if the appeal is allowed, the refusal is deemed not to have occurred (s 84(4A) (s 84(4A)-(4D) added by the Finance Act 1999 s 16, Sch 2 para 4). Where an appeal is brought against the giving of a notice under the Value Added Tax Act 1994 s 43C(1) or (3) (as added) (see PARA 75 ante) the notice has effect pending the determination of the appeal, and if the appeal is allowed, the notice is deemed never to have had effect (s 84(4B) (as so added)). Where an appeal is brought against the giving of a notice under s 43C(1) (as added) (see PARA 75 ante), the tribunal must not allow the appeal unless it considers that the Commissioners could not reasonably have been satisfied that there were grounds for giving the notice (s 84(4C) (as so added)). Where an appeal is brought against the giving of a notice under s 43C(3) (as added) (see PARA 75 ante), and the grounds of appeal relate wholly or partly to the date specified in the notice, the tribunal must not allow the appeal in respect of the date unless it considers that the Commissioners could not reasonably have been satisfied that it was appropriate (s 84(4D) (as so added)). Where an appeal is brought against a requirement imposed under s 58, Sch 11 para 4(2) (b) (see PARA 286 ante) that a person give security, the tribunal will allow the appeal unless the Commissioners satisfy the tribunal that there has been an evasion of, or an attempt to evade, VAT in relation to goods or services supplied to or by that person, or it is likely, or without the requirement for security it is likely, that VAT in relation to such goods or services will be evaded (s 84(4E) (s 84(4E), (4F) added by the Finance Act 2003 s 17(1), (7)). In this provision, a reference to evading VAT includes a reference to obtaining a VAT credit that is not due or that is in excess of what is due: Value Added Tax Act 1994 s 84(4F) (as so added).

3    For the meaning of 'appellant' see PARA 343 note 7 ante.

4    le is required to make under the Value Added Tax Act 1994 Sch 11 para 2(1): see PARA 245 ante. As to VAT returns see PARA 247 et seq ante.

5    Ibid s 84(2) (amended by the Finance Act 1995 ss 31, 162, Sch 29 Pt VI(4)). The requirement is that the taxpayer has paid all amounts which he acknowledges are due by his inclusion of them in his VAT returns. Unless, therefore, the Commissioners exercise their discretion to waive the requirement, the tribunal may not entertain the appeal merely because the appellant would suffer hardship if he were obliged to make payment of the amount shown as due (eg because he is not permitted to operate the cash accounting scheme and has not received payment of the VAT shown as due in his return): *R v London VAT Tribunal and Customs and Excise Comrs, ex p Theodorou* [1989] STC 292 at 296-297, disapproving *R v VAT Tribunal, ex p Happer* [1982] 1 WLR 1261, [1982] STC 700, and *R v VAT Tribunal, ex p Minster Associates* [1988] STC 386. See also *R v VAT Tribunal, ex p Cohen* [1984] STC 361n (irregularity of proceeding by way of judicial review from decision of the tribunal not to entertain an appeal). However, it has been held that where the appellant is a person other than the supplier (eg the recipient of the supply) the Value Added Tax Act 1994 s 84(2) (as so amended) does not apply to the appeal: see *Processed Vegetable Growers Association Ltd v Customs and Excise Comrs* [1973] VATTR 87.

6    le all the heads within the Value Added Tax Act 1994 s 83 (as amended): see PARA 346 ante.

7    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

8 *Gittins v Customs and Excise Comrs* [1974] VATTR 109.

9 le a decision with respect to any of the matters specified in the Value Added Tax Act 1994 s 83(b) (see PARA 346 head (2) ante), s 83(n) (as amended) (see PARA 346 head (17) ante), s 83(p) (as amended) (see PARA 346 head (19) ante), s 83(q) (see PARA 346 head (20) ante), s 83(ra) (as added) (see PARA 346 head (22) ante) or s 83(zb) (as added) (see PARA 346 head (35) ante): s 84(3). It has been held that where the Commissioners issue an assessment to recover input tax allegedly wrongly deducted by the trader, the tribunal is entitled to entertain the appeal notwithstanding that the trader did not pay or deposit the tax, since the appeal was against the amount of the input tax to which the appellant was entitled to credit (under s 83(c)) and not an appeal against the assessment within the scope of s 83(p) (as amended). This remains the case notwithstanding the amendment to the provisions for assessment by the introduction of what is now s 73(2) (see PARA 294 ante): see *Boltgate Ltd v Customs and Excise Comrs* [1982] VATTR 120; *Brian Gubby Ltd v Customs and Excise Comrs* [1985] VATTR 59; *Trust Securities Holdings Ltd v Customs and Excise Comrs* [1990] VATTR 1. In *Widnell Group v Customs and Excise Comrs* (1997) VAT Decision 15170, [1997] STI 1490, the provisions of the Value Added Tax Act 1994 s 84(2), (3) were construed to provide the Commissioners with a power that could be waived and failure to apply for a direction for the appeal to be dismissed before the commencement of the substantive appeal was considered waiver of the default by the appellant. The hardship rules do not apply where the Commissioners have refused a repayment: *Tricell UK Ltd v Customs and Excise Comrs* (2003) VAT Decision 18127, [2003] V & DR 333.

10 Surcharges recoverable as tax under the Value Added Tax Act 1994 s 76(9) (see PARA 298 ante) are not 'VAT' for this purpose: *Widnell Group v Customs and Excise Comrs* (1997) VAT Decision 15170, [1997] STI 1490.

11 Value Added Tax Act 1994 s 84(3) (amended by the Finance Act 2003 s 18(3); and the Finance Act 2004 s 19(1), Sch 2 Pt 2 para 5(1), (2)). The Value Added Tax Act 1994 s 84 (as amended) is limited in its application to appeals by persons accountable for the tax in dispute (*Processed Vegetable Growers Association Ltd v Customs and Excise Comrs* [1973] VATTR 87 at 96-97), so that third parties may appeal without satisfying the conditions of the Value Added Tax Act 1994 s 84(3). The tribunal does not have power to require the appellant to deposit part of the tax in dispute if it considers that he could pay that amount but no more without suffering hardship: *Don Pasquale (a firm) v Customs and Excise Comrs* [1990] STC 556, CA (not followed in *Customs and Excise Comrs v Le Rififi Ltd* [1995] STC 103, CA, so far as *Don Pasquale (a firm) v Customs and Excise Comrs* supra decided that the standard form of notice of assessment used to notify a number of assessments constituted a global assessment for the purposes of VAT). As to global assessments see PARA 299 ante. See also *National Galleries of Scotland v Customs and Excise Comrs* (2003) VAT Decision 18413, [2004] STI 506 (interest awarded on repayment supplement but, pending resolution of disputed figures, taxpayer chose not to receive repayment, as Commissioners threatened to charge interest of figures resolved in their favour following repayments: interest under the Value Added Tax Act 1994 s 84(8) not due in respect of repayable amount).

12 Value Added Tax Act 1994 s 84(8).

13 A considerable number of the grounds of appeal (see *ibid* s 83 (as amended); and PARA 346 ante) relate to claims for refunds of tax by persons who will not be registered for VAT. For the meaning of 'taxable person' see PARAS 18 note 4, 63 ante; and as to registration for VAT see PARA 64 et seq ante.

14 An appellant has a sufficient interest if he can show that the tax chargeable on the supply under a contract was to be added to the money otherwise payable under it; or if he can show that there were future supplies of a like nature to be made between the parties: *Processed Vegetable Growers Association Ltd v Customs and Excise Comrs* [1973] VATTR 87. See also *Cameron v Customs and Excise Comrs* [1973] VATTR 177; *Gumbrell & Dodson Bros v Customs and Excise Comrs* [1973] VATTR 171. Where the recipient has no legal right to recover the disputed VAT from the supplier, she has no or insufficient interest to maintain an appeal (*Payton v Customs and Excise Comrs* [1974] VATTR 140); but it may be that if an appeal were successful the supplier would hold any repayment on constructive trust for the appellant (see *Williams & Glyn's Bank Ltd v Customs and Excise Comrs* [1974] VATTR 262; *JC Skeffington v Customs and Excise Comrs* LON/74/35 (VAT Decision 102A, unreported)). An appellant who is a recipient of a supply has sufficient interest to bring an appeal when he has deposited the VAT with the Commissioners upon their promise to repay if he is successful: *Gilbourne v Customs and Excise Comrs* [1974] VATTR 209; *Williams & Glyn's Bank Ltd v Customs and Excise Comrs* supra. In a case where the Commissioners decided that a property management company was supplying its services to the owner of the managed premises rather than to the tenants it was held the owner did not have sufficient interest to appeal against that decision: *Kingsley-Smith v Customs and Excise Comrs* (1996) VAT Decision 13787, [1996] STI 406.

15 For the meaning of 'input tax' see PARAS 4, 215 ante.

16 Value Added Tax Act 1994 s 84(4)(a). The proportion of input tax allowable is that allowable under s 26: see PARA 217 ante.

17 *Ibid* s 84(4)(b). The making of supplies under s 84(4)(b) are those specified in s 26(2): see PARA 217 ante.

18 Ibid s 84(4)(c). See PARA 346 note 9 ante.

19 Ibid s 84(4). Section 84(4) is not to be construed as implying that the Commissioners' decision as to whether something is a luxury, amusement or entertainment is conclusive, as such a construction would be incompatible with express mandatory provisions of EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes art 17(2), (6): see *Myatt and Leason v Customs and Excise Comrs* (1996) VAT Decision 13780, [1996] STI 404.

20 le an assessment made under the Value Added Tax Act 1994 s 78A(1) (as added) (see PARA 314 ante), s 80(4A) (as added) (see PARA 311 ante) or s 80B(1) (as added) (see PARA 311 ante): s 78A(5) (s 78A added by the Finance Act 1997 s 45(1), (4)); the Value Added Tax Act 1994 s 80(4C) (added by the Finance Act 1997 s 47(6), (8)); the Value Added Tax Act 1994 s 80B(2) (s 80B added by the Finance Act 1997 s 46(2)).

21 Value Added Tax Act 1994 s 84(3A) (added by the Finance Act 1997 s 45(3), (5)).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### **347 Pre-conditions to the entertainment of an appeal**

TEXT AND NOTES--Where the appeal is against an assessment which is a recovery assessment for the purposes of the Value Added Tax Act 1994 s 84, or against the amount of such an assessment, it cannot be entertained unless the amount notified by the assessment has been paid or deposited with HM Revenue and Customs. However, in a case where the amount determined to be payable has not been so paid or deposited, an appeal may still be entertained if the Commissioners are satisfied (on the application of the appellant) or, if they are not so satisfied, the tribunal decides (again on the application of the appellant) that the requirement to pay or deposit the amount determined would cause the appellant undue hardship: s 84(3A), (3B) (s 84(3A) substituted, s 84(3B) added, by SI 2009/56). Notwithstanding the provisions of the Tribunals, Courts and Enforcement Act 2007 ss 11 (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.7) and 13 (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.8), the decision of the tribunal as to the issue of hardship is final: Value Added Tax Act 1994 s 84(3C) (added by SI 2009/56).

TEXT AND NOTES 1-5, 12--Value Added Tax Act 1994 s 84(2), (8) repealed: SI 2009/56.

NOTE 2--References to the Commissioners are now to HMRC: Value Added Tax Act 1994 s 84(4), (4A), (4C), (4D) amended: SI 2009/56.

TEXT AND NOTE 11--Value Added Tax Act 1994 s 84(3) substituted: SI 2009/56.

NOTE 19--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

TEXT AND NOTE 21--Value Added Tax Act 1994 s 84(3A) substituted: see TEXT AND NOTES.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/348. Settling appeals by agreement.

### **348. Settling appeals by agreement.**

Subject to certain conditions<sup>1</sup>, where a person gives notice of appeal<sup>2</sup> and, before the appeal is determined by a VAT and duties tribunal<sup>3</sup>, the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> and the appellant come to an agreement<sup>5</sup> (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated as upheld without variation, or as varied in a particular manner, or as discharged or cancelled, the same consequences ensue for all purposes as would have ensued if, at the time when the agreement was reached, a tribunal had determined the appeal in accordance with the terms of the agreement, including any terms as to costs<sup>6</sup>. This provision will not, however, apply if within 30 days of the date of the agreement the appellant gives notice in writing to the Commissioners that he wishes to repudiate or resile from the agreement<sup>7</sup>.

Where an agreement is not in writing, the above provisions do not apply unless the fact that an agreement was reached, and the terms agreed, are confirmed by notice in writing given by the Commissioners to the appellant or by the appellant to the Commissioners; and references in those provisions to the time when the agreement was come to are to be construed as references to the time of the giving of that notice of confirmation<sup>8</sup>.

Where a person who has given a notice of appeal notifies the Commissioners, whether orally or in writing, that he desires not to proceed with the appeal, and 30 days have elapsed since the giving of the notification without the Commissioners giving to the appellant notice in writing indicating that they are unwilling for the appeal to be treated as withdrawn, the above provisions have effect as if, at the date of the appellant's notification, the appellant and the Commissioners had reached an agreement, orally or in writing, that the decision under appeal should be upheld without variation<sup>9</sup>.

1    Ie subject to the provisions of the Value Added Tax Act 1994 s 85: see the text and notes 2-9 infra.

2    Ie under *ibid* s 83 (as amended): see PARA 346 ante.

3    As to VAT and duties tribunals see PARA 343 et seq ante; and as to the procedure on an appeal see PARA 349 et seq post.

4    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5    For these purposes, references to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant extend to agreements which are come to with, and to the giving of a notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal: Value Added Tax Act 1994 s 85(5). For the meaning of 'appellant' see PARA 343 note 7 ante.

6    Ibid s 85(1). 'Costs' include fees, charges, disbursements, expenses and remuneration: Value Added Tax Tribunals Rules 1986, SI 1986/590, r 2. As to costs generally see PARA 367 post.

7    See the Value Added Tax Act 1994 s 85(2). As to service of notices see PARA 340 ante. Thus the appellant, and the appellant alone, is allowed a 'cooling-off period'. The Commissioners do not have any right to resile from or to repudiate the agreement: *Lamdec Ltd v Customs and Excise Comrs* [1991] VATTR 296. However, it may be that the ordinary law of contract applies to agreements under the Value Added Tax Act 1994 s 85 as it apparently applies to agreements made under the Taxes Management Act 1970 s 54, whereby rectification can be ordered of defective agreements; in which case an agreement under the Value Added Tax Act 1994 s 85 might also be declared to be void or voidable for fraud or mistake: see *R v Inspector of Taxes, ex p Bass Holdings Ltd, Richart (Inspector of Taxes) v Bass Holdings Ltd* [1993] STC 122. See further INCOME TAXATION vol 23(2) (Reissue) PARA 1767. See also *R (on the application of DFS Furniture Co plc) v Customs and Excise Comrs* [2002] EWHC 807 (Admin), [2002] STC 760.

8 Value Added Tax Act 1994 s 85(3).

9 Ibid s 85(4). As to the application of s 85 to appeals in relation to landfill tax see the Finance Act 1996 s 56(8); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1267; LANDFILL TAX vol 61 (2010) PARA 901 et seq.

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### **348 Settling appeals by agreement**

TEXT AND NOTE 4--Reference to the Commissioners for Her Majesty's Revenue and Customs is now to HMRC: Value Added Tax Act 1994 s 85(1) (amended by SI 2009/56).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/349. Rules of procedure before VAT and duties tribunals.

### **349. Rules of procedure before VAT and duties tribunals.**

The Lord Chancellor<sup>1</sup> may make rules<sup>2</sup> with respect to the procedure to be followed on appeals to, and in other proceedings before, VAT and duties tribunals<sup>3</sup>, and such rules may include provisions:

- 1086 (1) for limiting the time within which appeals may be brought<sup>4</sup>;
- 1087 (2) for enabling hearings to be held in private in such circumstances as may be determined by or under the rules<sup>5</sup>;
- 1088 (3) for parties to proceedings to be represented by such persons as may be determined by or under the rules<sup>6</sup>;
- 1089 (4) for requiring persons to attend to give evidence<sup>7</sup>;
- 1090 (5) for discovery and for requiring persons to produce documents<sup>8</sup>;
- 1091 (6) for the payment of expenses and allowances to persons attending as witnesses or producing documents<sup>9</sup>;
- 1092 (7) for the award and recovery of costs<sup>10</sup>;
- 1093 (8) for authorising the administration of oaths to witnesses<sup>11</sup>; and
- 1094 (9) with respect to the joinder of appeals brought by different persons where a notice of penalty is served<sup>12</sup> and the appeals relate to, or to different portions of, the basic penalty referred to in the notice<sup>13</sup>.

A person who fails to comply with a direction or summons issued by a VAT and duties tribunal<sup>14</sup> is liable to a penalty not exceeding £1,000<sup>15</sup>. This penalty may be awarded summarily by a tribunal notwithstanding that no proceedings for its recovery have been commenced<sup>16</sup>. An appeal from the award of a penalty under this provision lies to the High Court<sup>17</sup>, and on such an appeal the court may either confirm or reverse the decision of the tribunal or reduce or increase the sum awarded<sup>18</sup>. A penalty awarded by virtue of these provisions is recoverable as if it were VAT due from the person liable to the penalty<sup>19</sup>.

A tribunal may, however, of its own motion or on the application of any party to an appeal or application, waive any breach or non-observance of the procedural rules or of any decision or direction of a tribunal on such terms as it may think just<sup>20</sup>.

Where the parties to an appeal or application have agreed upon the terms of any decision or direction to be given by a tribunal, a tribunal may give a decision or make a direction in accordance with those terms without a hearing<sup>21</sup>.

1 Changes to the role of the Lord Chancellor have been proposed: see No 10 Downing Street press release *Modernising Government* (12 June 2003); and the Constitutional Reform Act 2005. As to the Lord Chancellor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. Powers of the Lord Chancellor under the Value Added Tax Act 1994 s 61, Sch 12 paras 2, 3 and 9 are subject to consultation: see Sch 12 paras 2, 3, 9 (amended by virtue of the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, SI 1999/678, art 2(1), Schedule).

2 In the exercise of the power so conferred the Value Added Tax Tribunals (Amendment) Rules 1994, SI 1994/2617 were made and came into force on 1 November 1994: see r 1. In addition, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax Tribunals Rules 1986, SI 1986/590 (amended by SI 1986/2290; SI 1991/186; SI 1994/2617; SI 1997/255; SI 2001/3073; SI 2002/2851; SI 2003/2757; and SI 2004/1032), have effect as if so made. See further PARAS 343, 348 ante, 350 et seq post.

- 3 Value Added Tax Act 1994 s 82(1), Sch 12 para 9 (as amended: see note 1 supra). As to VAT and duties tribunals see PARA 343 et seq ante.
- 4 Ibid Sch 12 para 9(a). See the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 4; and PARA 350 post.
- 5 Value Added Tax Act 1994 Sch 12 para 9(b). See the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 24; and PARA 365 post.
- 6 Value Added Tax Act 1994 Sch 12 para 9(c). See the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 25; and PARA 365 post.
- 7 Value Added Tax Act 1994 Sch 12 para 9(d). See the Value Added Tax Tribunals Rules 1986, SI 1986/590, rr 22, 26 (both as amended); and PARAS 361, 364 post.
- 8 Value Added Tax Act 1994 Sch 12 para 9(e). See the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 20 (as amended), r 21 (as amended), r 21A (as added); and PARAS 358-360 post.
- 9 Value Added Tax Act 1994 Sch 12 para 9(f). See the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 22 (as amended); and PARA 361 post.
- 10 Value Added Tax Act 1994 Sch 12 para 9(g). See the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 30 (as amended); and PARA 368 post. As to the meaning of 'costs' see PARA 348 note 6 ante.
- 11 Value Added Tax Act 1994 Sch 12 para 9(h). See the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 28(2); and PARA 366 post.
- 12 Ie under the Value Added Tax Act 1994 s 61: see PARA 322 ante.
- 13 Ibid Sch 12 para 9(j). See also the Department of Constitutional Affairs Explanatory Leaflet *VAT and Duties Tribunals: Appeals and Applications to the Tribunals* (2005) (although this has no binding force); and see *Practice Notes* [1973] VATTR 215 on procedure on appeals and applications to tribunals, together with certain simple precedents. The Department for Constitutional Affairs has also produced various forms which may be used to make an appeal (Trib 1); to comply with the requirement to serve a list of documents (Trib 2); to make a witness statement (Trib 3); or to make an application (Trib 5). It is not necessary to use the forms, provided that the appellant or other party complies with the requirements of the Value Added Tax Tribunals Rules 1986, SI 1986/590 (as amended).
- 14 Ie issued under rules made under the Value Added Tax Act 1994 Sch 12 para 9 (as amended). See note 3 supra.
- 15 Ibid Sch 12 para 10(1). The Commissioners may also be made subject to a penalty under this provision: *Freight Transport Leasing Ltd v Customs and Excise Comrs* [1992] VATTR 176; *Wine Warehouses Europe Ltd v Customs and Excise Comrs* [1993] VATTR 307.
- 16 Value Added Tax Act 1994 Sch 12 para 10(2).
- 17 As to appeals to the High Court see PARA 370 post.
- 18 Value Added Tax Act 1994 Sch 12 para 10(3).
- 19 Ibid Sch 12 para 10(4).
- 20 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 19(5).
- 21 Ibid r 17.

## UPDATE

### 343-400 Appeals

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### 349 Rules of procedure before VAT and duties tribunals

TEXT AND NOTES--Repealed: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/350. Serving notice of appeal.

### 350. Serving notice of appeal.

An appeal to a VAT and duties tribunal is brought by a notice of appeal served<sup>1</sup> at the appropriate tribunal centre<sup>2</sup>. The notice of appeal must be signed by or on behalf of the appellant<sup>3</sup> and must:

- 1095 (1) state the appellant's name and address<sup>4</sup>;
- 1096 (2) state the date (if any) with effect from which the appellant was registered for tax and the nature of his business<sup>5</sup>;
- 1097 (3) state the address of the office of the Commissioners for Her Majesty's Revenue and Customs<sup>6</sup> from which the disputed decision<sup>7</sup> was sent<sup>8</sup>;
- 1098 (4) state the date of the document containing that decision and the address to which it was sent<sup>9</sup>;
- 1099 (5) have attached to it a copy of the document containing the disputed decision<sup>10</sup>; and
- 1100 (6) set out, or have attached to it a document containing, the grounds of appeal, including, in the case of a reasonable excuse appeal<sup>11</sup>, particulars of the excuse relied on<sup>12</sup>.

The notice of appeal must also have attached to it a copy of any letter from the Commissioners extending the appellant's time to appeal against the disputed decision and a copy of any further letter from the Commissioners notifying him of a date from which his time to appeal against the disputed decision is to run<sup>13</sup>.

Subject to: (a) the Commissioners' power to extend the time within which the appellant must serve his notice of appeal<sup>14</sup>; and (b) decisions confirmed by the Commissioners<sup>15</sup>, that notice must be served at the appropriate tribunal centre before the expiration of 30 days after the date of the document containing the disputed decision of the Commissioners<sup>16</sup>.

A proper officer<sup>17</sup> must send an acknowledgment of the service of the notice of appeal at the appropriate tribunal centre to the appellant and a copy of the notice of appeal and any accompanying documents to the Commissioners, and the acknowledgment and the copy of the notice of appeal must state the date of service and the date of notification of the notice of appeal<sup>18</sup>.

Except in the case of a decision or direction of a tribunal<sup>19</sup>, for the purposes of determining the issues in dispute or of correcting an error or defect in an appeal or application or intended appeal, a tribunal may at any time, either of its own motion or on the application of any party to the appeal or application or any other person interested, direct that a notice of appeal, notice of application, statement of case, reply, particulars or other document in the proceedings be amended in such manner as may be specified in that direction on such terms as it may think fit<sup>20</sup>.

1 As to service see the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 31 (as amended); and PARA 362 post.

2 Ibid r 3(1). For the meaning of 'appropriate tribunal centre' see PARA 343 note 5 ante. No appeal lies against a decision sent to an address at a place for which no tribunal centre has been appointed: *Interbet Trading Ltd v Customs and Excise Comrs* [1977] VATTR 63; *Interbet Trading Ltd v Customs and Excise Comrs (No 2)* [1978] VATTR 235.

A tribunal, on the application of a party to an appeal, may direct that the appeal and all proceedings in it be transferred to the tribunal centre specified in that direction, whereupon, for the purposes of the Value Added Tax Tribunals Rules 1986, SI 1986/590 (as amended), the tribunal centre specified in the direction becomes the appropriate tribunal centre for the appeal and all proceedings in it, without prejudice to the power of a tribunal to give a further direction relating to the appeal under this provision: r 15. As to the parties to an appeal see PARA 356 post.

3 For the meaning of 'appellant' see PARA 343 note 7 ante.

4 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 3(2)(a).

5 Ibid r 3(2)(aa) (added by SI 1994/2617).

6 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

7 For the meaning of 'disputed decision' see PARA 343 note 7 ante.

8 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 3(2)(b).

9 Ibid r 3(2)(c).

10 Ibid r 3(2)(d) (amended by SI 1994/2617).

11 A 'reasonable excuse appeal' is an appeal which, according to the notice of appeal or other document received from the appellant at the appropriate tribunal centre, is against a decision of the Commissioners with respect to any liability or the amount of any penalty or surcharge on grounds confined to those set out in the Value Added Tax Act 1994 s 59(7) (see PARAS 332-333 ante), s 62(3) (see PARA 323 ante), s 63(10) (see PARA 324 ante), s 64(5) (see PARA 325 ante), s 65(3) (see PARA 326 ante), s 66(7) (see PARA 327 ante), s 67(8) (see PARA 328 ante), s 68(4) (see PARA 330 ante) or s 69(8) (see PARA 331 ante); or in the Finance Act 1994 s 10(1) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1218), s 11(4) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1223) or Sch 7 paras 14(3), 15(5), 16(4), 17(3), 18(2), 19(4) (see INSURANCE vol 25 (2003 Reissue) PARA 854); or in the Finance Act 2000 Sch 6 paras 41(4), 55(5), 90(4), 100(4), 101(4), 114(4), 124(4), 125(7) (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 673 et seq); or in the Finance Act 2001 ss 25(4), 33(4), or Sch 4 para 1(5), Sch 5 para 15(4), Sch 6 paras 1(4)(a), (b), 2(7), 4(5)(a), (b), Sch 7 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 836 et seq); or in the Finance Act 2003 s 27 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1211) or the Export (Penalty) Regulations 2003, SI 2003/3102, reg 3 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1217): Value Added Tax Tribunals Rules 1986, SI 1986/590, r 2 (definition substituted by SI 1994/2617).

12 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 3(2)(e).

13 Ibid r 3(3).

14 If, during the period of 30 days after the date of the document containing the disputed decision, the Commissioners notify the appellant by letter that his time to appeal against the disputed decision is extended until the expiration of 21 days after a date set out in that letter, or to be set out in a further letter to him, a notice of appeal against that disputed decision may be served at the appropriate tribunal centre at any time before the expiration of the period of 21 days set out in the letter or further letter: *ibid* r 4(2). For the tribunal's power to extend time limits (to which this regulation is no longer expressly subject) see r 19 (as amended) and PARA 357 post.

15 Where a decision is deemed to have been confirmed by the Commissioners under the Value Added Tax Act 1994 s 15(2) (see PARA 113 ante), the Finance Act 1996 s 54(8) (see LANDFILL TAX vol 61 (2010) PARA 1003), the Finance Act 2000 Sch 6 para 121(8) (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 701), the Finance Act 2001 s 40(8) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 850), the Finance Act 2003 s 35(4) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1214) or the Export (Penalty) Regulations 2003, SI 2003/3102, reg 11(4), a notice of appeal must be served at the appropriate tribunal centre before the expiration of 75 days after the day on which the review was required: Value Added Tax Tribunals Rules 1986, SI 1986/590, r 4(3) (added by SI 2002/2851; and amended by SI 2003/2757; and SI 2004/1032).

16 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 4(1).

17 'Proper officer' means a member of the administrative staff of the VAT and duties tribunals appointed by a chairman to perform the duties of a proper officer under the Value Added Tax Tribunals Rules 1986, SI 1986/590 (as amended): see r 2 (amended by SI 1994/2617).

18 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 5 (amended by SI 1991/186). 'Date of notification', in relation to any document, means the date on which a proper officer sends that document, or a copy of that document to any person under the Value Added Tax Tribunals Rules 1986, SI 1986/590 (as amended): see r 2 (definition added by SI 1991/186; and amended by SI 1997/255).

19 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 14(2).

20 Ibid r 14(1).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

#### **350 Serving notice of appeal**

TEXT AND NOTES--An appeal under the Value Added Tax 1994 s 83 (see PARA 346) must be made to the tribunal before the end of the period of 30 days beginning with (1)(a) in a case where the appellant is the person (P) to whom notice of the decision has been given, the date of the document in which he was so notified; and (b) in any other case, the date when the person concerned become aware of the decision; or (2) if later, the end of the relevant period (ie the period of 30 days from the acceptance of HM Revenue and Customs' offer of a review or from the appellant's request for a review): s 83G(1), (2) (ss 83A-83G added by SI 2009/56). In a case where HM Revenue and Customs is required to undertake a review under the Value Added Tax 1994 s 83C, an appeal may not be made until the conclusion date; and must then be made within the period of 30 days beginning with that date; and where a review is requested under s 83E, an appeal may not be made unless HM Revenue and Customs has decided not to undertake a review or, if a review is undertaken, until the conclusion date, and must then be made within the period of 30 days beginning with the date on which the decision was made or, as the case may be, with the conclusion date: s 83G(3), (4). Where no notice is of the conclusions of a review by HM Revenue and Customs, it is treated as having confirmed the decision and HM Revenue and Customs is then required to give notice of the conclusion which is treated as having been so reached. In such a case, an appeal may be made at any time from the end of the period of 45 days (or such longer period as HM Revenue and Customs may allow) beginning with the date on which the offer of review was accepted, the request for review was made, or the decision not to review was taken, to the date 30 days after the conclusion date. In each case, the appeal tribunal may extend the period: s 83G(5), (6). 'Conclusion date' means the date of the document notifying the conclusion of the review: s 83G(7).



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/351. Notice that an appeal does not lie or cannot be entertained.

### **351. Notice that an appeal does not lie or cannot be entertained.**

Where the Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> contend that an appeal does not lie to, or cannot be entertained by, a VAT and duties tribunal they must serve a notice to that effect at the appropriate tribunal centre<sup>2</sup> containing the grounds for that contention and applying for the appeal to be struck out or dismissed<sup>3</sup> as soon as practicable after the receipt by them of the notice of appeal<sup>4</sup>. Any such notice served by the Commissioners must be accompanied by a copy of the disputed decision<sup>5</sup> unless a copy of it has been served previously at the appropriate tribunal centre by either party to the appeal<sup>6</sup>. In a reasonable excuse<sup>7</sup> or mitigation<sup>8</sup> appeal the hearing of any such application made by the Commissioners may immediately precede the hearing of the substantive appeal<sup>9</sup>. A proper officer<sup>10</sup> must send a copy of any notice or certificate served and of any accompanying document or documents to the appellant<sup>11</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

2 As to the appropriate tribunal centre see PARA 343 ante; and as to the service of notices see PARA 362 post.

3 As to the dismissal of an appeal see the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 18; and PARA 354 post.

4 Ibid r 6(1).

5 For the meaning of 'disputed decision' see PARA 343 note 7 ante.

6 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 6(1). As to the parties to the appeal see PARA 356 post.

7 For the meaning of 'reasonable excuse appeal' see PARA 350 note 11 ante.

8 A 'mitigation appeal' is an appeal which, according to the notice of appeal or other document received from the appellant at the appropriate tribunal centre, is against a decision of the Commissioners with respect to the amount of a penalty on grounds confined to those set out in the Finance Act 1985 s 13(4) (repealed) (in respect of penalties imposed before 27 July 1993), or with respect to the amount of a penalty or (as the case may be) interest solely under the Value Added Tax Act 1994 s 70 (see PARA 329 ante); the Finance Act 1994 s 8(4) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1208); or s 64, Sch 7 para 13 (see INSURANCE vol 25 (2003 Reissue) PARA 854); or the Finance Act 1996 s 60, Sch 5 paras 25 or 28 (see LANDFILL TAX vol 61 (2010) PARA 996 et seq); or the Finance Act 2000 s 30(1), (3), Sch 6 para 104 (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 692); the Finance Act 2001 s 46(1) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 842); or the Export (Penalty) Regulations 2003, SI 2003/3102, reg 5 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1217); Value Added Tax Tribunals Rules 1986, SI 1986/590, r 2 (definition amended by SI 1997/255; SI 2001/3073; SI 2002/2851; SI 2003/2757; SI 2004/1032). For the meaning of 'appellant' see PARA 343 note 7 ante.

9 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 6(3).

10 For the meaning of 'proper officer' see PARA 350 note 17 ante.

11 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 6(4).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/352. Procedure after service of notice of appeal.

### **352. Procedure after service of notice of appeal.**

Unless a VAT and duties tribunal otherwise directs, in appeals other than reasonable excuse<sup>1</sup>, mitigation<sup>2</sup> and evasion penalty<sup>3</sup> appeals the Commissioners for Her Majesty's Revenue and Customs<sup>4</sup> must, within the period of 30 days after: (1) the date of notification<sup>5</sup> of the notice of appeal; (2) the date of notification of the notice of withdrawal of an application to have the appeal struck out or dismissed<sup>6</sup>; or (3) the date on which a direction in the appeal is released dismissing any such application<sup>7</sup>, whichever is the latest, serve at the appropriate tribunal centre<sup>8</sup> a statement of case in the appeal setting out the matters and facts on which they rely to support the disputed decision<sup>9</sup> and the statutory provision under which the tax or penalty is assessed (or as the case may be, demanded) or the decision is made<sup>10</sup>.

Any statement of case served by the Commissioners<sup>11</sup> must be accompanied by a copy of the disputed decision unless a copy of that decision has been served previously at the appropriate tribunal centre by either party to the appeal<sup>12</sup>. In a reasonable excuse or mitigation appeal the Commissioners must serve a copy of the disputed decision at the appropriate tribunal centre as soon as practicable after they have received the copy of the notice of appeal unless a copy of that decision has been so served previously by the appellant<sup>13</sup>. A proper officer<sup>14</sup> must send: (a) an acknowledgement of the service at the appropriate tribunal centre of any statement of case, defence, reply or particulars in any appeal to the party serving it or them; and (b) a copy of that document or particulars and any other accompanying document to the other party to the appeal<sup>15</sup>.

A tribunal may at any time direct a party to an appeal to serve further particulars of his case at the appropriate tribunal centre for the appeal within such period from the date of that direction (not being less than 14 days) as it may specify in the direction<sup>16</sup>.

1 For the meaning of 'reasonable excuse appeal' see PARA 350 note 11 ante.

2 For the meaning of 'mitigation appeal' see PARA 351 note 8 ante.

3 An 'evasion penalty appeal' is an appeal against an assessment to a penalty under the Value Added Tax Act 1994 s 60 (see PARA 321 ante) or s 61 (see PARA 322 ante), or under the Finance Act 1994 s 8 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 1208-1209) or s 64, Sch 7 para 12 (see INSURANCE vol 25 (2003 Reissue) PARA 854), or under the Finance Act 1996 s 60, Sch 5 paras 18 or 19 (see LANDFILL TAX vol 61 (2010) PARAS 987, 988), or under the Finance Act 2000 s 30(1), (3), Sch 6 paras 98 or 99 (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 690), or under the Finance Act 2001 s 18, Sch 6 paras 7 or 8 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 834, 842), or under the Finance Act 2003 s 25 or s 28 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 1210-1211) which is not solely a mitigation appeal and any accompanying appeal by the appellant against an assessment for the amount of tax alleged to have been evaded by the same conduct as that in the appeal against the assessment to a penalty: Value Added Tax Tribunals Rules 1986, SI 1986/590, r 2 (definition added by SI 1994/2617; and amended by SI 1997/255; SI 2001/3073; SI 2002/2851; SI 2003/2757). For the meaning of 'the appellant' see PARA 343 note 7 ante.

4 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

5 As to the meaning of 'date of notification' see PARA 350 note 18 ante.

6 Ie an application under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 6: see PARA 351 ante.

7 Ie in accordance with *ibid* r 30 (as amended): see PARA 368 post.

8 As to the appropriate tribunal centre see PARA 343 ante.

9 For the meaning of 'disputed decision' see PARA 343 note 7 ante.

10 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 8 (amended by SI 1991/186; SI 1994/2617; SI 2003/2757). The purpose of the statement of case is to let the appellant know the way in which the Commissioners wish to put their case: *GUS Merchandise Corpn Ltd v Customs and Excise Comrs, Customs and Excise Comrs v GUS Merchandise Corpn Ltd* [1992] STC 776 at 781. The Commissioners may not always be allowed to amend a statement of case: see *Optimum Personnel Evaluation (Operations) Ltd v Customs and Excise Comrs* (1987) VAT Decision 2334 (unreported); *Vorngrove Ltd v Customs and Excise Comrs* (1984) VAT Decision 1733 (unreported). The Commissioners can be put on terms: see *Dormers Builders (London) Ltd v Customs and Excise Comrs* [1986] VATTR 69. Where on an appeal against a decision with respect to an assessment or a demand notice (defined by the Finance Act 2003 s 30(1) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1213)), the Export (Penalty) Regulations 2003, SI 2003/3102, reg 6(1) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1217) or the amount of an assessment the Commissioners wish to contend that an amount specified in the assessment or, as the case may be, demand notice is less than it ought to have been, they must so state in their statement of case in that appeal, indicating the amount of the alleged deficiency and the manner in which it has been calculated: Value Added Tax Tribunals Rules 1986, SI 1986/590, r 8A (added by SI 1997/255; and amended by SI 2003/2757; SI 2004/1032).

11 le under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7 (as amended) (see PARA 353 post) or r 8: r 10(1).

12 Ibid r 10(1). As to the parties to the appeal see PARA 356 post.

13 Ibid r 10(2).

14 For the meaning of 'proper officer' see PARA 350 note 17 ante.

15 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 10(3).

16 Ibid r 9 (amended by SI 1997/255). For guidance on applications see *Kashmir Tandoori v Customs and Excise Comrs* (1998) VAT Decision 15363, [1998] V & DR 104.

## UPDATE

### 343-400 Appeals

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/353. Statement of case, defence and reply in an evasion penalty appeal.

### **353. Statement of case, defence and reply in an evasion penalty appeal.**

Unless a VAT and duties tribunal otherwise directs, in an evasion penalty appeal<sup>1</sup>:

- 1101 (1) the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> must, within 42 days of the date of notification<sup>3</sup> of the notice of appeal<sup>4</sup> or the withdrawal or dismissal of any application made by them<sup>5</sup>, whichever is the later, serve at the appropriate tribunal centre<sup>6</sup> a statement of case in the appeal setting out the matters and facts on which they rely for the making of the penalty assessment, (or, as the case may be, the ascertainment of the penalty) and (where it, too, is disputed) the making of the assessment for (or, as the case may be, the ascertainment of) the tax alleged to have been evaded by the same conduct<sup>7</sup>;
- 1102 (2) the statement of case must include full particulars of the alleged dishonesty and must state the statutory provision under which the penalty or tax is assessed or the decision is made<sup>8</sup>;
- 1103 (3) the appellant<sup>9</sup> must, within 42 days of the date of notification of that statement of case, serve at the appropriate tribunal centre a defence to it setting out the matters and facts on which he relies for his defence<sup>10</sup>; and
- 1104 (4) the Commissioners may, within 21 days of the date of notification of the defence, serve at the appropriate tribunal centre a reply to the defence and must do so if it is necessary thereby to set out specifically any matter or any fact showing illegality, or which: (a) they allege makes the defence not maintainable; (b) if not specifically set out, might take the appellant by surprise; or (c) raises any issue of fact not arising out of the statement of case<sup>11</sup>.

At any hearing of an evasion penalty appeal the Commissioners are not required to prove, or to bring evidence relating to, any matter or fact which is admitted by the appellant in his defence<sup>12</sup>. Every statement of case, defence and reply must be divided into paragraphs numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph<sup>13</sup>. Each such document must contain in summary form a brief statement of the matters and facts on which the party relies but not the evidence by which those facts are to be proved<sup>14</sup>. A party may raise a point of law in such documents<sup>15</sup>.

1 For the meaning of 'evasion penalty appeal' see PARA 352 note 3 ante.

2 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 As to the meaning of 'date of notification' see PARA 350 note 18 ante.

4 As to the notice of appeal see PARA 350 ante.

5 I.e. the withdrawal or dismissal of any application made by the Commissioners under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 6 (see PARA 351 ante). As to the withdrawal or dismissal of an application see PARA 354 post.

6 As to the appropriate tribunal centre see PARA 343 ante.

7 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7(1)(a) (amended by SI 1991/186; SI 1994/2617; SI 2003/2757). An extension of the time limit for serving a statement of case will not be granted as a matter of

course, eg where Customs has lost some of the paperwork: see *Sonat Offshore (UK) Ltd v Customs and Excise Comrs* (1996) VAT Decision 14021 (unreported).

- 8 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7(1)(aa) (added by SI 1994/2617).
- 9 For the meaning of 'appellant' see PARA 343 note 7 ante.
- 10 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7(1)(b) (amended by SI 1991/186).
- 11 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7(1)(c) (amended by SI 1991/186).
- 12 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7(2) (amended by SI 1994/2617).
- 13 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7(3).
- 14 Ibid r 7(4).
- 15 Ibid r 7(5).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/354. Power of tribunal to strike out or dismiss an appeal.

### **354. Power of tribunal to strike out or dismiss an appeal.**

A VAT and duties tribunal must strike out an appeal where no appeal against the disputed decision<sup>1</sup> lies to a tribunal, and must dismiss an appeal where it cannot be entertained by a tribunal<sup>2</sup>. A tribunal may dismiss an appeal for want of prosecution where the appellant<sup>3</sup> or the person to whom the interest or liability of the appellant has been assigned or transmitted, or upon whom that interest or liability has devolved, has been guilty of inordinate or inexcusable delay<sup>4</sup>. Except where an appeal or application is allowed by consent<sup>5</sup>, no appeal may be struck out or dismissed without a hearing<sup>6</sup>. A tribunal has no jurisdiction to consider a submission of no case to answer before the commencement of the hearing<sup>7</sup>.

1 For the meaning of 'disputed decision' see PARA 343 note 7 ante.

2 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 18(1). As to when a tribunal 'entertains' an appeal see PARA 347 note 2 ante.

3 For the meaning of 'appellant' see PARA 343 note 7 ante.

4 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 18(2).

5 *Ie* in accordance with *ibid* r 17: see PARA 349 ante.

6 *Ibid* r 18(3); and see *Abedin v Customs and Excise Comrs* [1979] STC 426.

7 *Turan Cilfaoglu, Yusuf Karakus and Diss Catering Ltd v Customs and Excise Comrs* (2003) VAT Decision 18409, [2004] STI 452. However, the tribunal has power to consider a submission of no case to answer after the Commissioners have given their evidence: *Turan Cilfaoglu, Yusuf Karakus and Diss Catering Ltd v Customs and Excise Comrs* *supra*.

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/355. Withdrawal of an appeal or application.

### **355. Withdrawal of an appeal or application.**

An appellant<sup>1</sup> or applicant may at any time withdraw his appeal or application by serving at the appropriate tribunal centre<sup>2</sup> a notice of withdrawal signed by him or on his behalf, and a proper officer<sup>3</sup> must send a copy of it to the other parties to the appeal<sup>4</sup>. The withdrawal of an appeal or application under this provision does not prevent a party to it from applying<sup>5</sup> for an award or direction as to his or their costs<sup>6</sup> or for a direction<sup>7</sup> for the payment or repayment of a sum of money with interest; nor does it prevent a tribunal from making such an award or direction if it thinks fit so to do<sup>8</sup>.

1 For the meaning of 'appellant' see PARA 343 note 7 ante.

2 As to the appropriate tribunal centre see PARA 343 ante.

3 For the meaning of 'proper officer' see PARA 350 note 17 ante.

4 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 16(1) (amended by SI 1994/2617). As to the parties to the appeal see PARA 356 post.

5 Ie under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 29 (as amended): see PARA 367 post.

6 As to the meaning of 'costs' see PARA 348 note 6 ante.

7 Ie under the Value Added Tax Act 1994 s 84(8) (see PARA 347 ante), the Finance Act 1996 s 56(3), (4) or (5) (see LANDFILL TAX vol 61 (2010) PARA 1005), the Finance Act 2000 s 30(1), (3), Sch 6 para 123(4), (5) or (6) (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 702), or the Finance Act 2001 s 42(4), (5) or (6) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 850).

8 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 16(2) (amended by SI 1994/2617; SI 1997/255; SI 2001/3073; SI 2002/2851).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/356. Parties to an appeal.

### 356. Parties to an appeal.

Subject to any direction made where, in the course of proceedings, the liability or interest of the applicant passes to another person by reason of death, insolvency or otherwise<sup>1</sup>, the parties to an appeal are the appellant<sup>2</sup> and the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup>. In general only the addressee of a decision has a right of appeal<sup>4</sup>, and appeals are brought by the taxable person who, if tax is chargeable, is accountable for the tax, although a VAT and duties tribunal will entertain an appeal from another person who has sufficient legal interest to maintain the appeal<sup>5</sup>.

One or more partners in a firm which is not a legal person distinct from the partners of whom it is composed may appeal against a decision of the Commissioners relating to the firm or its business, or apply to a tribunal in an appeal or intended appeal, in the name of the firm and, unless a tribunal otherwise directs, such proceedings are to be carried on in the name of the firm, but with the same consequences as would have ensued if the appeal or application had been brought in the names of the partners<sup>6</sup>.

Where, in the course of proceedings, the liability or interest of the appellant or applicant passes to another person ('the successor') by reason of death, insolvency, or otherwise, the tribunal may direct, on the application of the Commissioners or the successor, and with the written consent of the successor, that the successor be substituted for the applicant or appellant in the proceedings<sup>7</sup>. If the tribunal is satisfied that there is no person interested in the application or appeal, or the successor fails to give written consent for his substitution in the proceedings within a period of two months after being requested to do so by the tribunal, that tribunal may, of its own motion or on application by the Commissioners and after giving prior written notice to the successor, dismiss the application or appeal<sup>8</sup>.

Neither a bankrupt nor a discharged bankrupt has any locus standi in an appeal; but the trustee in bankruptcy may assign the right of appeal to the discharged bankrupt<sup>9</sup>.

1    le any direction made under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 13 (as substituted): see the text and notes 7-8 infra.

2    For the meaning of 'appellant' see PARA 343 note 7 ante.

3    Value Added Tax Tribunals Rules 1986, SI 1986/590, r 3(4). In certain circumstances, however, a third party may intervene: see *Szwarcz v Aeresta Ltd and Customs and Excise Comrs* [1989] STC 230. Power is given to the tribunal under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 19(3) (as amended: see PARA 357 post) to join third parties to an appeal if it is necessary or expedient to ensure the speedy and just determination of that appeal; but it may be made a condition of the joinder of such a party that it should not at any stage (including on appeal) apply for its costs: *Barclays Bank plc v Customs and Excise Comrs and Visa International Service Association (third party)* [1992] VATTR 229 at 239. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4    *Davis Advertising Service Ltd v Customs and Excise Comrs* [1973] VATTR 16 (not followed in *J & W Waste Management Ltd and J & W Plant and Tool Hire Ltd v Customs and Excise Comrs* (2003) VAT Decision 18069, [2003] STI 1403 (see PARA 205 ante) (where former members of a VAT group were allowed to appeal against an assessment on the former representative member)).

5    An appellant has a sufficient interest if he can show that the tax chargeable on the supply under a contract was to be added to the money otherwise payable under it; or if he can show that there were future supplies of a like nature to be made between the parties: *Processed Vegetable Growers Association Ltd v Customs and Excise Comrs* [1973] VATTR 87. See also *Cameron v Customs and Excise Comrs* [1973] VATTR 177; *Gumbrell & Dodson Bros v Customs and Excise Comrs* [1973] VATTR 171. Where the recipient has no legal right to recover

the disputed VAT from the supplier, she has no or insufficient interest to maintain an appeal (*Payton v Customs and Excise Comrs* [1974] VATTR 140); but a supplier will hold any repayment on a successful appeal on constructive trust for the appellant (*Williams & Glyn's Bank Ltd v Customs and Excise Comrs* [1974] VATTR 262). See also *JC Skeffington v Customs and Excise Comrs* LON/74/35 (VAT Decision 102A, unreported). An appellant who is a recipient of a supply has sufficient interest to bring an appeal if he deposits the VAT with the Commissioners upon their promise to repay if he is successful: *Gilbourne v Customs and Excise Comrs* [1974] VATTR 209; *Williams & Glyn's Bank Ltd v Customs and Excise Comrs* supra. Where the Commissioners decided that a property management company was supplying its services to the owner of the managed premises rather than to the tenants it was held the owner did not have sufficient interest to appeal that decision: *Kingsley-Smith v Customs and Excise Comrs* (1996) VAT Decision 13787, [1996] STI 406.

6 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 12 (amended by SI 1994/2617).

7 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 13(1), (2) (r 13 substituted by SI 1994/2617).

8 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 13(3) (as substituted: see note 7 supra). See *L'Arôme International Ltd v Customs and Excise Comrs* (1996) VAT Decision 14419, [1996] STI 1722.

9 See *Hunt v Customs and Excise Comrs* [1992] VATTR 255.

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### 343-400 Appeals

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/357. Directions.

### **357. Directions.**

An application to a VAT and duties tribunal, made otherwise than at a hearing, for the issue of a witness summons<sup>1</sup> or a direction (including a hardship direction<sup>2</sup> or a direction for the setting aside of a witness summons) must be made by notice served<sup>3</sup> at the appropriate tribunal centre<sup>4</sup>. The notice must: (1) state the name and address of the applicant; (2) state the direction sought or details of the witness summons sought to be issued or set aside; and (3) set out, or have attached to it a document containing, the grounds of the application<sup>5</sup>.

Additionally, any notice of application by an intending appellant<sup>6</sup> must:

- 1105 (a) state the address of the office of the Commissioners for Her Majesty's Revenue and Customs from which the disputed decision<sup>7</sup> was sent<sup>8</sup>;
- 1106 (b) state the date of the disputed decision and the address to which it was sent<sup>9</sup>;
- 1107 (c) set out shortly the disputed decision or have attached to it a copy of the document containing the disputed decision<sup>10</sup>; and
- 1108 (d) have attached to it a copy of any letter from the Commissioners extending the applicant's time to appeal against the disputed decision together with a copy of any letter from the Commissioners notifying him of a date from which his time of appeal against the disputed decision is to run<sup>11</sup>.

A notice of application for a hardship direction must be served at the appropriate tribunal centre within the period for the service of the notice of appeal<sup>12</sup>. Except as provided in certain provisions relating to witness summonses and summonses to third parties<sup>13</sup>, the parties to an application are the parties to the appeal or intended appeal<sup>14</sup>, and, except as so provided, a proper officer<sup>15</sup> must send an acknowledgement of the service of a notice of application at the appropriate tribunal centre to the applicant and must also send a copy of that notice and of any accompanying documents to the other party, if any, to the application<sup>16</sup>. The acknowledgment and copy of the notice of application must state the date of service and the date of notification of the notice of application<sup>17</sup>.

Within 14 days of the date of notification of a notice of application, the other party to the application, if any, must indicate whether or not he consents to it and, if he does not consent to it, the reason why he does not so consent<sup>18</sup>.

A tribunal may of its own motion or on the application of any party to an appeal or application extend the time within which a party to the appeal or application, or any other person, is required or authorised<sup>19</sup> to do anything in relation to the appeal or application (including the time for service for a notice of application) upon such terms as it may think fit<sup>20</sup>. A tribunal may make a direction under this provision of its own motion without prior notice or reference to any party or other person and without a hearing<sup>21</sup>. Without prejudice to these provisions, a tribunal may of its own motion, or on the application of a party to an appeal or application or other person interested, give or make any direction as to the conduct of, or as to any matter or thing in connection with, the appeal or application which it may think necessary or expedient to ensure the speedy and just determination of the appeal, including the joining of other persons as parties to the appeal<sup>22</sup>.

Where a notice is served in relation to the evasion of value added tax<sup>23</sup> and appeals are brought by different persons which relate to, or to different portions of, the basic penalty referred to in

the notice, the tribunal may, of its own motion or on the application of any party to any such appeal, give any direction it thinks fit as to the joinder of the appeals<sup>24</sup>.

If any party to an appeal or application or any other person fails to comply with any direction of a tribunal, a tribunal may allow or dismiss the appeal or application<sup>25</sup>.

1 For the meaning of 'witness summons' in this context see the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 22(1); and PARA 361 post.

2 A 'hardship direction' is a direction that an appeal or an intended appeal should be entertained notwithstanding that the amount which the Commissioners for Her Majesty's Revenue and Customs have determined to be payable as tax has not been paid or deposited with them: *ibid* r 2 (definition added by SI 1991/186). As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 As to methods of service see PARA 362 post.

4 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 11(1) (amended by SI 1991/186). As to the appropriate tribunal centre see PARA 343 ante.

5 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 11(2).

6 For the meaning of 'appellant' see PARA 343 note 7 ante.

7 For the meaning of 'disputed decision' see PARA 343 note 7 ante.

8 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 11(3)(a).

9 *Ibid* r 11(3)(b).

10 *Ibid* r 11(3)(c).

11 *Ibid* r 11(3)(d).

12 *Ibid* r 11(4) (amended by SI 1991/186).

13 *Ie* the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 22 (as amended): see PARA 361 post.

14 *Ibid* r 11(5). As to the parties to an appeal see PARA 356 ante.

15 For the meaning of 'proper officer' see PARA 350 note 17 ante.

16 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 11(6)(a), (b).

17 *Ibid* r 11(6) (amended by SI 1991/186). As to the meaning of 'date of notification' see PARA 350 note 18 ante.

18 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 11(7) (amended by SI 1991/186). As to where the parties to the application are agreed upon the terms of the direction to be given by the tribunal see PARA 349 text and note 21 ante.

19 *Ie* by the Value Added Tax Tribunals Rules 1986, SI 1986/590 (as amended); or by any decision or direction of a tribunal: r 19(1).

20 *Ibid* r 19(1). As to matters to be taken into account on an application under r 19(1) see *Price v Customs and Excise Comrs* [1978] VATTR 115; *Trippett v Customs and Excise Comrs* [1978] VATTR 260. The tribunal has no jurisdiction to entertain an appeal against an assessment where the Commissioners have obtained judgment in the High Court for the sum assessed unless and until the judgment has been set aside: *Brough v Customs and Excise Comrs* MAN/77/317 (VAT Decision 562, unreported); *Ullah v Customs and Excise Comrs* (1978) VAT Decision 561 (unreported); *Digwa v Customs and Excise Comrs* [1978] VATTR 119. As to where a tribunal refused to exercise its power to extend the time within which the intending appellant could appeal because the tax in dispute had been paid to the Commissioners voluntarily under a mistake of law see *Kyffin v Customs and Excise Comrs* [1978] VATTR 175 (*William Whiteley Ltd v R* (1909) 101 LT 741 considered). Quære whether the same decision would now be reached, following *Woolwich Equitable Building Society v IRC* [1993] AC 70, [1992] 3 All ER 737, HL. See also *J Walter Thompson UK Holdings Ltd v Customs and Excise Comrs* (1996) VAT Decision 14058, [1996] STI 1102; *Jackson v Customs and Excise Comrs* [2003] EWHC 3129 (Ch), [2004] STC 164 (tribunal

chairman entitled to take into account fact that it was a common practice for Commissioners to seek extension of time).

21 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 19(2).

22 Ibid r 19(3) (amended by SI 1994/2617). See *Maharani Restaurant v Customs and Excise Comrs* [1999] STC 295 (tribunal directing joint hearing of appeals).

23 Ie under the Value Added Tax Act 1994 s 61 (see PARA 322 ante), the Finance Act 1996 s 60, Sch 5 para 19 (LANDFILL TAX vol 61 (2010) PARA 988), the Finance Act 2000 s 30(1), (2), Sch 6 para 99 (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 690), the Finance Act 2001 s 28, Sch 6 para 8 (see CUSTOMS AND EXCISE) or the Finance Act 2003 s 28 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 1210-1211).

24 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 19(3A) (added by SI 1994/2617; and amended by SI 1997/255; SI 2001/3073; SI 2002/2851; SI 2003/2757).

25 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 19(4) (amended by SI 1991/186). In Scotland a tribunal's decision to allow an appeal because the Commissioners had failed to comply with an 'unless' order has been upheld by the court (see *Customs and Excise Comrs v Young* [1993] STC 394, Ct of Sess); but the English tribunals are reluctant to allow appeals in such circumstances as they can impose a penalty on the Commissioners under the Value Added Tax Act 1994 s 82(1), Sch 12 para 10 (see PARA 349 ante).

The tribunal may also refuse the Commissioners the opportunity to amend their case, confining them to the grounds contained in their decision letter: see *Faccenda Chicken v Customs and Excise Comrs* [1992] VATTR 395 at 401 (although such a refusal was not in fact thought appropriate in that case) (followed in *Charles F Hunter Ltd v Customs and Excise Comrs* (1993) VAT Decision 11619 (unreported)). An appeal will not be allowed by reason of the failure of the Commissioners to comply with the Value Added Tax Tribunals Rules 1986, SI 1986/590 (as amended) or a direction of a tribunal unless there is a likelihood of serious prejudice to the appellant, or contumelious disobedience by the defaulting party: *Wine Warehouses Europe Ltd v Customs and Excise Comrs* [1993] VATTR 307. See also *Customs and Excise Comrs v Neways International (UK) Ltd* [2003] EWHC 934 (Ch), [2003] STC 795.

As to penalties which the tribunal may award in the event of a party's failure to comply with a direction or summons see PARA 349 text and note 15 ante.

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Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/358. Disclosure, inspection and production of documents.

### **358. Disclosure, inspection and production of documents.**

Each of the parties to an appeal<sup>1</sup> other than a reasonable excuse<sup>2</sup> or mitigation<sup>3</sup> appeal, and each of the parties to an application for a hardship direction<sup>4</sup> must, before the expiration of the prescribed time<sup>5</sup>, serve at the appropriate tribunal centre<sup>6</sup> a list of the documents in his possession, custody or power which he proposes to produce at the hearing of the appeal or application<sup>7</sup>.

Additionally, and without prejudice to the above provisions, a VAT and duties tribunal may, on the application of a party to an appeal and where it appears necessary for disposing fairly of the proceedings, direct the other party to the appeal to serve at the appropriate tribunal centre for the appeal, within such period as it may specify, a list of the documents, or any class of documents, which are or have been in his possession, custody or power relating to any question in issue in the appeal; and may at the same time or subsequently order him to make and serve an affidavit verifying that list<sup>8</sup>. If a party desires to claim that any document included in a list of documents served by him in pursuance of a such a direction is privileged from production in the appeal, that claim must be made in the list of documents with a sufficient statement of the grounds of privilege<sup>9</sup>.

A proper officer<sup>10</sup> must send a copy of any list of documents and any affidavit served under these provisions to the other party to the appeal or application and that other party is entitled to inspect and take copies of the documents set out in the list which are in the possession, custody or power of the party who made the list and are not privileged from production in the appeal, at such time and place as he and the party who served the list of documents may agree or a tribunal may direct<sup>11</sup>. At the hearing of an appeal or application, a party must produce any document included in a list of documents so served by him in relation to that appeal or application which is in his possession, custody or power and is not privileged from production when called upon to do so by the other party to the appeal or application<sup>12</sup>.

1 As to the parties to an appeal see PARA 356 ante.

2 For the meaning of 'reasonable excuse appeal' see PARA 350 note 11 ante.

3 For the meaning of 'mitigation appeal' see PARA 351 note 8 ante.

4 For the meaning of 'hardship direction' see PARA 357 note 2 ante.

5 A list of documents must be served: (1) in the case of an evasion penalty appeal, within a period of 15 days after the last day for the service by the Commissioners for Her Majesty's Revenue and Customs of any reply pursuant to the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7(1)(c) (as amended) (see PARA 353 ante); (2) in any other appeal except a reasonable excuse appeal or a mitigation appeal, within a period of 30 days after: (a) the date of notification of the notice of appeal; (b) the date of notification of the notice of withdrawal of any application under r 6 (see PARA 351 ante) in the appeal; or (c) the date on which a direction dismissing any application under r 6 in the appeal is released in accordance with r 30 (as amended) (see PARA 368 post), whichever is the latest; (3) in an application for a hardship direction, within a period of 30 days after the date of notification of the application: r 20(2) (amended by SI 1991/186; SI 1994/2617). For the meaning of 'evasion penalty appeal' see PARA 352 note 3 ante; and as to the meaning of 'date of notification' see PARA 350 note 18 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

6 As to the appropriate tribunal centre see PARA 343 ante.

7 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 20(1) (amended by SI 1991/186). The list of documents to be served by the Commissioners in accordance with this provision must contain a reference to the documents relied upon in reaching a decision on a review under the Finance Act 1994 s 15 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1253) or s 59 (see INSURANCE vol 25 (2003 Reissue) PARA 849), the Finance Act 1996 s 54 (see LANDFILL TAX vol 61 (2010) PARA 1003), the Finance Act 2000 s 30(1), (3), Sch 6 para 121 (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 701), the Finance Act 2001 s 40, the Finance Act 2003 s 33 or the Export (Penalty) Regulations 2003, SI 2003/3102, reg 9 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1217); Value Added Tax Tribunals Rules 1986, SI 1986/590, r 20(1A) (added by SI 1994/2617; and amended by SI 1997/255; SI 2001/3073; SI 2002/2851; SI 2003/2757; SI 2004/1032).

Failure to include a document in a list does not preclude the document's admission before the tribunal. The High Court may remit a case to the tribunal for rehearing if it refuses to admit documents whose existence has only come to light shortly before the hearing. The tribunal has a discretion as to whether or not to admit documents not contained on a party's list, but must exercise this discretion rationally and in accordance with the principles of natural justice: see *GUS Merchandise Corpn Ltd v Customs and Excise Comrs*, *Customs and Excise Comrs v GUS Merchandise Corpn Ltd* [1992] STC 776. The Commissioners are entitled to rely on documents before the tribunal which were not included in their list without making an application under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 19 (as amended) (see PARA 357 ante) if the documents in question only became relevant when the appellant advanced a fresh argument at the hearing: *Koca v Customs and Excise Comrs* [1996] STC 58.

8 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 20(3).

9 Ibid r 20(4).

10 For the meaning of 'proper officer' see PARA 350 note 17 ante.

11 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 20(5).

12 Ibid r 20(6).

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### 343-400 Appeals

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### 358 Disclosure, inspection and production of documents

NOTE 7--Also, in reaching a decision on a review under the Control of Cash (Penalties) Regulations 2007, SI 2007/1509, reg 4(5) is added to the list: SI 1986/590 reg 20(1A) (amended by SI 2007/2251).

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### **359. Witness statements.**

A party to an appeal<sup>1</sup> may, within the prescribed time<sup>2</sup>, serve at the appropriate tribunal centre<sup>3</sup> a statement in writing (a 'witness statement') containing evidence proposed to be given by any person at the hearing of the appeal<sup>4</sup>. A witness statement must contain the name, address and description of the person proposing to give the evidence contained in it and must be signed by him<sup>5</sup>. A proper officer<sup>6</sup> must send a copy of a witness statement served at the appropriate tribunal centre to the other party to the appeal, and that copy must state the date of service and the date of notification of the witness statement and must contain, or be accompanied by, a note to the effect that, unless a notice of objection to it is served, the witness statement may be read at the hearing of the appeal as evidence of the facts stated in it without the person who made it giving oral evidence at the hearing<sup>7</sup>.

If a party objects to a witness statement being read at the hearing of the appeal as evidence of any fact stated in it, he must serve a notice of objection to the witness statement at the appropriate tribunal centre not later than 14 days after the date of notification of that witness statement, whereupon a proper officer must send a copy of the notice of objection to the other party and the witness statement must not be read or admitted in evidence at the hearing although the person who signed it may give evidence orally at the hearing<sup>8</sup>. Subject to this provision and unless a tribunal otherwise directs, a witness statement signed by any person and duly served is admissible in evidence at the hearing of the appeal as evidence of any fact stated in it of which oral evidence by him at that hearing would be admissible<sup>9</sup>.

1 As to parties to an appeal see PARA 356 ante.

2 A witness statement must be served: (1) in the case of an evasion penalty appeal, before the expiration of 21 days after the last day for the service by the Commissioners for Her Majesty's Revenue and Customs of a reply pursuant to the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 7(1)(c) (as amended) (see PARA 353 ante); (2) in the case of a mitigation appeal or a reasonable excuse appeal, before the expiration of 21 days after the date of notification of the notice of appeal; and (3) in the case of any other appeal, before the expiration of 21 days after the date of notification of the Commissioners' statement of case: r 21(6) (amended by SI 1991/186; SI 1994/2617). For the meaning of 'evasion penalty appeal' see PARA 352 note 3 ante; for the meaning of 'mitigation appeal' see PARA 351 note 8 ante; for the meaning of 'reasonable excuse appeal' see PARA 350 note 11 ante; and as to the meaning of 'date of notification' see PARA 350 note 18 ante. As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

3 As to the appropriate tribunal centre see PARA 343 ante.

4 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 21(1).

5 Ibid r 21(2).

6 For the meaning of 'proper officer' see PARA 350 note 17 ante.

7 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 21(3) (amended by SI 1991/186).

8 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 21(4) (amended by SI 1991/186; SI 1997/255).

9 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 21(5). Even if no witness statement is duly served, hearsay evidence may be adduced before the tribunal unless objection is raised or the tribunal decides of its own volition to exclude the evidence: *Wayne Farley Ltd v Customs and Excise Comrs* [1986] STC 487. *Hossain v Customs and Excise Comrs* [2004] EWHC 1898 (Ch), [2004] STC 1572.

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Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/360. Affidavits and depositions made in other legal proceedings.

### **360. Affidavits and depositions made in other legal proceedings.**

If: (1) an affidavit or deposition made in other legal proceedings, whether civil or criminal, is specified as such in a list of documents served<sup>1</sup> by a party to an appeal<sup>2</sup> or application or in a notice<sup>3</sup> served by such a party at the appropriate tribunal centre<sup>4</sup>; and (2) it is stated in that list or notice that the party serving it proposes to give that affidavit or deposition in evidence at the hearing of the appeal or application and that the person who made that affidavit or deposition is dead or is outside the United Kingdom<sup>5</sup> or is unfit by reason of his bodily or mental condition to attend as a witness, or that, despite the exercise of reasonable diligence, it has not been possible to find him, then the affidavit or deposition is admissible<sup>6</sup> at the hearing of the appeal or application as evidence of any fact stated in it of which oral evidence by the person who made the affidavit or deposition would be admissible<sup>7</sup>.

If a party objects to an affidavit or deposition being read and admitted as evidence under these provisions, he must serve a notice of application for directions with regard to that affidavit or deposition at the appropriate tribunal centre not later than 21 days after the date of notification of the list of documents or notice<sup>8</sup>. At the hearing of such an application, a VAT and duties tribunal may give directions as to whether, and if so how and on what conditions, the affidavit or deposition may be admitted as evidence and, where applicable, as to the manner in which the affidavit or deposition is to be proved, and the affidavit or deposition is admissible as evidence to the extent and on the conditions, if any, specified in the direction but not further or otherwise<sup>9</sup>. The members of the tribunal hearing such an application must not sit on the hearing of the appeal or application to which the above-mentioned application for directions relates<sup>10</sup>.

1    Ie served under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 20(1) (as amended): see PARA 358 ante. Any such notice must be served before the expiration of 21 days after the date of notification of the notice of appeal or notice of application: r 21A(2) (r 21A added by SI 1991/186). As to the meaning of 'date of notification' see PARA 350 note 18 ante.

2    As to the parties to an appeal see PARA 356 ante.

3    Ie in the case of an appeal or application to which the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 20(1) (as amended) does not apply: r 21A(1)(a) (as added: see note 1 supra).

4    As to the appropriate tribunal centre see PARA 343 ante.

5    For the meaning of 'United Kingdom' see PARA 4 note 3 ante.

6    Ie subject to the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 21A(2)-(6) (as added): see note 1 supra; and the text and notes 7-10 infra.

7    Ibid r 21A(1) (as added: see note 1 supra). When a proper officer sends a copy of any such list or notice as is mentioned in r 21A(1) (as added) to any person pursuant to r 11(6)(b) (see PARA 357 ante) or r 20(5) (see PARA 358 ante), he must also send to that person a copy of r 21A (as added): r 21A(3) (as so added).

8    Ibid r 21A(4) (as added: see note 1 supra).

9    Ibid r 21A(5) (as added: see note 1 supra).

10   Ibid r 21A(6) (as added: see note 1 supra). As to breach of a similar requirement under the Taxes Management Act 1970 requiring the rehearing of the appeal see *Sutherland v Gustar (Inspector of Taxes)* [1994] Ch 304, [1994] STC 387, CA.

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Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/361. Witness summonses and summonses to third parties.

### **361. Witness summonses and summonses to third parties.**

Where a witness is required by a party to an appeal<sup>1</sup> or application to attend the hearing of an appeal or application to give oral evidence or to produce any document in his possession, custody or power necessary for the purpose of that hearing, a chairman<sup>2</sup> or the registrar<sup>3</sup> must, upon the application of that party, issue a summons requiring the attendance of the witness at the hearing or the production of the document, wherever the witness may be in the United Kingdom<sup>4</sup> or the Isle of Man<sup>5</sup>.

Where a party to an appeal or application desires to inspect any document necessary for the purpose of the hearing of that appeal or application which is in the possession, custody or power of any other person in the United Kingdom or the Isle of Man (whether or not that other person is a party to the appeal or application) a chairman or registrar must, upon the application of that party, issue a summons requiring either: (1) the attendance of the other person at such date, time and place as the chairman or the registrar may direct and then and there for that person to produce the document for inspection by the party or his representative and to allow the party or his representative then and there to peruse the document and to take a copy of it; or (2) the other person to post the document by ordinary post to an address in the United Kingdom or Isle of Man by first class mail in an envelope duly prepaid and properly addressed to the party requiring to inspect it<sup>6</sup>.

A chairman or the registrar may issue a summons under this provision without prior notice or reference to the applicant or any other person and without a hearing, the only party to the application being the applicant<sup>7</sup>. A summons so issued must be signed by a chairman or the registrar and must be served: (a) where the witness or third party is an individual, by leaving a copy of the summons with him and showing him the original of it; or (b) where the witness or third party is a body corporate, by sending a copy of the summons by post to, or leaving it at, the registered or principal office in the United Kingdom or the Isle of Man of the body to be served, not less than four days before the day on which the attendance of the witness or third party or the posting of the document is thereby required<sup>8</sup>. Such a summons must contain a statement, or be accompanied by a note, to the effect that the witness or third party may apply, by a notice served at the tribunal centre<sup>9</sup> from which the summons was issued, for a direction that the summons be set aside<sup>10</sup>.

A witness summons so issued for the purpose of a hearing and duly served has effect until the conclusion of the hearing at which the attendance of the witness is thereby required<sup>11</sup>. No person is, however, to be required to attend to give evidence or to produce any document at any hearing or otherwise under these provisions<sup>12</sup> which he could not be required to give or produce on the trial of an action in a court of law<sup>13</sup>; and no person is bound to attend any hearing or to produce or post any document for the purpose of a hearing or for inspection and perusal in accordance with such a summons unless a reasonable and sufficient sum of money to defray the expenses of coming to, attending at and returning from the hearing or place of inspection and perusal was tendered to him at the time when the summons was served on him<sup>14</sup>. These provisions do not permit a summons to be served on a partnership as such<sup>15</sup>.

A tribunal may, upon the application of any person served at the appropriate tribunal centre, set aside a summons so served upon him<sup>16</sup>.

1 As to the parties to an appeal see PARA 356 ante.

- 2 As to the chairman see PARA 345 ante.
- 3 As to the registrar see PARA 345 ante.
- 4 For the meaning of 'United Kingdom' see PARA 4 note 3 ante.
- 5 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 22(1).
- 6 Ibid r 22(2).
- 7 Ibid r 22(3).
- 8 Ibid r 22(4) (amended by SI 1991/186; SI 1994/2617).
- 9 As to the appropriate tribunal centre see PARA 343 ante.
- 10 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 22(4) (as amended: see note 8 supra).
- 11 Ibid r 22(5).
- 12 Ie under ibid r 22(2): see the text and note 6 supra.
- 13 Ibid r 22(6).
- 14 Ibid r 22(7). See also *Home or Away Ltd v Customs and Excise Comrs* (2002) VAT Decision 17623, [2002] STI 1309 (accountant who appeared for taxpayer at appeal hearing successfully summoned to appear for Commissioners at adjourned hearing).
- 15 *British Shoe Corpn Ltd v Customs and Excise Comrs* [1998] V & DR 348.
- 16 Value Added Tax Tribunals Rules 1998, SI 1998/590, r 22(8). The parties to an application to set aside a summons issued under this rule are the applicant and the party who obtained the issue of the summons: r 22(9).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/362. Service of notices and documents.

### **362. Service of notices and documents.**

Service of a notice of appeal, notice of application or other document is effected by handing the document to a proper officer<sup>1</sup> at the appropriate tribunal centre<sup>2</sup> or by its being received there through the post or by a facsimile of it being received there through a facsimile transmission process or telex or other means of electronic communication which produces a text of the document, in which event the document is to be regarded as sent when the text of it is received in legible form<sup>3</sup>.

Any notice of appeal, notice of application or other document<sup>4</sup> handed in or received at a tribunal centre other than the appropriate tribunal centre may be: (1) sent by post in a letter addressed to a proper officer at the appropriate tribunal centre<sup>5</sup>; (2) handed back to the person from whom it was received<sup>6</sup>; (3) sent by post in a letter addressed to the person from whom it appears to have been received or by whom it appears to have been sent<sup>7</sup>; or (4) if a facsimile of a document is received by facsimile transmission process or telex or other means of electronic communication which produces a text of the document, sent by the means by which it was received, either to a proper officer at the appropriate tribunal centre or to the person from whom it appears to have been received or by whom it appears to have been sent<sup>8</sup>.

Any document authorised or required to be sent to the Commissioners for Her Majesty's Revenue and Customs<sup>9</sup> may be sent to them by post<sup>10</sup> in a letter addressed to them at the address of the office of theirs from which the disputed decision<sup>11</sup> appears to have been sent, or handed or sent to them by post or in such manner and at such address as the Commissioners may from time to time request by a general notice served at the appropriate tribunal centre<sup>12</sup>.

Any document authorised or required to be sent to any party to an appeal or application other than the Commissioners may be sent by post: (a) in a letter addressed to him at his address stated in his notice of appeal or application; (b) in a letter addressed to any person named in his notice of appeal or application as having been instructed to act for him in connection with that appeal or application at the address stated in it; or (c) in a letter addressed to such person and at such address as he may specify from time to time by notice served at the appropriate tribunal centre<sup>13</sup>. Where, however, partners appeal or apply to a tribunal in the name of their firm, any document sent by post: (i) in a letter addressed to the firm at the address of the firm stated in the notice of appeal or notice of application; (ii) to any person named in that notice as having been instructed to act for the firm at the address given in it; or (iii) to any other address the partners may from time to time specify by notice served at the appropriate tribunal centre, is deemed to have been duly sent to all those partners<sup>14</sup>.

Subject to the above provisions, any document authorised or required to be sent to any party to an appeal or application, or to another person, may be sent by post in a letter addressed to him at his usual or last known address or addressed to him or to that other person at such address as he may from time to time specify by notice served at the appropriate tribunal centre<sup>15</sup>.

1 For the meaning of 'proper officer' see PARA 350 note 17 ante.

2 As to the appropriate tribunal centre see PARA 343 ante.

3 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 31(1) (amended by SI 1991/186; SI 2003/2757).

4 le including a facsimile of a document received by facsimile transmission process or telex or other means of electronic communication which produces a text of the document: Value Added Tax Tribunals Rules 1986, SI 1986/590, r 31(2) (substituted by SI 2003/2757; and amended by SI 2004/1032).

5 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 31(2)(a) (as substituted: see note 4 supra).

6 Ibid r 31(2)(b) (as substituted: see note 4 supra).

7 Ibid r 31(2)(c) (as substituted: see note 4 supra).

8 Ibid r 31(2)(d) (as substituted: see note 4 supra).

9 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

10 For these purposes, any reference to the sending of any document to any party to an appeal or application or to any other person by post is to be construed as including a reference to the transmission of a facsimile of that document by facsimile transmission process or telex or other means of electronic communication which produces a text of the document, in which event the document is to be regarded as sent when the text of it is received in legible form: *ibid* r 32(4) (added by SI 1991/186; and amended by SI 2003/2757). As to the parties to an appeal see PARA 356 ante.

11 For the meaning of 'disputed decision' see PARA 343 note 7 ante.

12 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 32(1).

13 Ibid r 32(2).

14 Ibid r 32(2).

15 Ibid r 32(3).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/363. Notice of hearings.

### **363. Notice of hearings.**

A proper officer<sup>1</sup> must send to the parties to the appeal<sup>2</sup> a notice stating the place where, and the date and time when, an appeal will be heard which, unless the parties otherwise agree, must be not earlier than 14 days after the date on which the notice is sent<sup>3</sup>.

Unless a VAT and duties tribunal otherwise directs, an application made at a hearing must be heard forthwith, and no notice of the hearing need be sent to the parties to it<sup>4</sup>. Subject to this, a proper officer must send a notice stating the place where, and the date and time when, an application will be heard which, unless the parties otherwise agree, must not be earlier than 14 days after the date on which the notice is sent: (1) in the case of an application for the issue of a witness summons<sup>5</sup>, to the applicant<sup>6</sup>; (2) in the case of an application to set aside the issue of a witness summons, to the applicant and the party who obtained the issue of the witness summons<sup>7</sup>; and (3) in the case of any other application, to the parties to that application<sup>8</sup>.

A proper officer must send a notice stating the place where, and the date and time when, a hearing for the purpose of giving directions relating to an appeal will take place to the parties to the appeal which, unless the parties otherwise agree, must not be earlier than 14 days after the date on which the notice is sent<sup>9</sup>.

1 For the meaning of 'proper officer' see PARA 350 note 17 ante.

2 As to the parties to an appeal see PARA 356 ante.

3 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 23(1). As to the service of notices see PARA 362 ante.

4 Ibid r 23(2).

5 As to witness summonses see PARA 361 ante.

6 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 23(3)(a).

7 Ibid r 23(3)(b).

8 Ibid r 23(3)(c).

9 Ibid r 23(4) (added by SI 1997/255).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/364. Failure to appear at a hearing.

### **364. Failure to appear at a hearing.**

If, when an appeal or application is called on for hearing, a party to it<sup>1</sup> does not appear in person or by his representative<sup>2</sup>, the VAT and duties tribunal may proceed to consider the appeal or application in the absence of that party<sup>3</sup>. If at that time no party to the hearing appears in person or by his representative, a tribunal may dismiss or strike out the appeal or application but may, on the application of any such party or of any person interested which is served at the appropriate tribunal centre<sup>4</sup> within 14 days after the decision or direction of the tribunal was released<sup>5</sup>, reinstate the appeal or application on such terms as it thinks just<sup>6</sup>.

The tribunal may set aside any decision or direction given in the absence of a party on such terms as it thinks just, on the application of that party or of any other person interested which is served at the appropriate tribunal centre within 14 days after the date when the decision or direction of the tribunal was released<sup>7</sup>; but where a party makes such an application and does not attend the hearing of it, he is not entitled to apply to have a decision or direction of the tribunal on the hearing of that application set aside<sup>8</sup>.

1 As to the parties to an appeal see PARA 356 ante.

2 As to representation at a hearing see PARA 365 post.

3 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 26(2) (r 26(2) amended, r 26(3), (4) added, by SI 1994/2617). For an example of a decision to proceed in the absence of the taxpayer see *Sandley (t/a Bemba Sandley Management Co) v Customs and Excise Comrs* [1995] STC 230n.

4 As to the appropriate tribunal centre see PARA 343 ante; and as to service of applications see PARA 362 ante.

5 It is released in accordance with the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 30 (as amended): see PARA 368 post.

6 Ibid r 26(1) (amended by SI 1991/186). Even if both parties fail to appear it is still only in exceptional circumstances appropriate to dismiss an appeal under the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 26(1) without consideration of the issues: *Hazelacre Ltd v Customs and Excise Comrs* (2000) VAT Decision 16763, [2000] V & DR 185.

7 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 26(3) (as added: see note 3 supra).

8 Ibid r 26(4) (as added: see note 3 supra).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/365. Procedure at a hearing.

### **365. Procedure at a hearing.**

The hearing of an appeal must be in public unless, on the application of a party to the appeal<sup>1</sup>, a VAT and duties tribunal directs that the whole or any part of the hearing should take place in private<sup>2</sup>. The hearing of any application made otherwise than at or subsequent to the hearing of an appeal must, however, take place in private unless a tribunal otherwise directs<sup>3</sup>. Any member of the Council on Tribunals<sup>4</sup> or the Scottish Committee of the Council on Tribunals may (in that capacity) attend the hearing of any appeal or application notwithstanding that it takes place in private<sup>5</sup>.

At the hearing of an appeal or application, any party to it other than the Commissioners for Her Majesty's Revenue and Customs<sup>6</sup> may conduct his case himself or may be represented by any person whom he may appoint for the purpose<sup>7</sup>. The Commissioners may be represented at any hearing at which they are entitled to attend by any person whom they may appoint for the purpose<sup>8</sup>.

At the hearing of an appeal or application other than an evasion penalty appeal<sup>9</sup> the tribunal must allow<sup>10</sup>:

- 1109 (1) the appellant<sup>11</sup> or applicant or his representative to open his case<sup>12</sup>;
- 1110 (2) the appellant or applicant to give evidence in support of the appeal or application and to produce documentary evidence<sup>13</sup>;
- 1111 (3) the appellant or applicant or his representative to call other witnesses to give evidence in support of the appeal or application or to produce documentary evidence, and to re-examine any such witness following his cross-examination<sup>14</sup>;
- 1112 (4) the other party to the appeal or application or his representative to cross-examine any witness called to give evidence in support of the appeal or application (including the appellant or applicant if he gives evidence)<sup>15</sup>;
- 1113 (5) the other party or his representative to open his case<sup>16</sup>;
- 1114 (6) the other party to give evidence in opposition to the appeal or application and to produce documentary evidence<sup>17</sup>;
- 1115 (7) the other party or his representative to call other witnesses to give evidence in opposition to the appeal or application or to produce documentary evidence and to re-examine any such witness following his cross-examination<sup>18</sup>;
- 1116 (8) the appellant or applicant or his representative to cross-examine any witness called to give evidence in opposition to the appeal or application (including the other party to it if he gives evidence)<sup>19</sup>;
- 1117 (9) the other party or his representative to make a second address closing his case<sup>20</sup>; and
- 1118 (10) the appellant or applicant or his representative to make a final address closing his case<sup>21</sup>.

At the hearing of an evasion penalty appeal the tribunal must follow the same procedure as is set out in heads (1) to (10) above with the prescribed modifications<sup>22</sup>.

At the hearing of an appeal or application, the chairman<sup>23</sup> and any other member of the tribunal may put any question to any witness called to give evidence at it, including a party to the appeal or application if he gives evidence<sup>24</sup>. Subject to the above provisions, a tribunal may regulate its own procedure as it may think fit, and in particular may determine the order in which the matters mentioned in heads (1) to (10) above<sup>25</sup> are to take place<sup>26</sup>. A chairman or the

registrar<sup>27</sup> may postpone the hearing of any appeal or application<sup>28</sup>, and a tribunal may adjourn the hearing of any appeal or application on such terms as it may think just<sup>29</sup>.

1 As to the parties to an appeal see PARA 356 ante.

2 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 24(1).

3 Ibid r 24(2). The tribunal may, however, publish its decision if it thinks fit: *RMSG v Customs and Excise Comrs* (1994) VAT Decision 11921, [1994] STI 686.

4 As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 55-57.

5 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 24(3). Hearings of appeals should, whenever possible, be in public: see *Guy Butler (International) Ltd v Customs and Excise Comrs* [1974] VATTR 199. A direction that the whole or part of a hearing should be in private will only be made in exceptional circumstances, such as where the disclosure of confidential information would harm an appellant in his business, or if the evidence to be given would involve such disclosure of a process as would prejudice the appellant's competitive position: *Consortium International Ltd v Customs and Excise Comrs, Consortium Communications International Club v Customs and Excise Comrs* (1979) VAT Decision 824 (unreported). Where a tribunal has directed that the hearing of the appeal be in private it would, nevertheless, be contrary to natural justice for the other party's expert witness to be excluded from the proceedings: *R v Manchester VAT Tribunal, ex p Customs and Excise Comrs* (February 1982, unreported, QB).

6 As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

7 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 25(a).

8 Ibid r 25(b).

9 For the meaning of 'evasion penalty appeal' see PARA 352 note 3 ante.

10 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 27(1) (amended by SI 1994/2617).

11 For the meaning of 'appellant' see PARA 343 note 7 ante.

12 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 27(1)(a).

13 Ibid r 27(1)(b).

14 Ibid r 27(1)(c) (as amended: see note 10 supra).

15 Ibid r 27(1)(d).

16 Ibid r 27(1)(e).

17 Ibid r 27(1)(f).

18 Ibid r 27(1)(g).

19 Ibid r 27(1)(h).

20 Ibid r 27(1)(i).

21 Ibid r 27(1)(j).

22 See *ibid* r 27(2) (substituted by SI 1994/2617). That procedure applies as if there were substituted: (1) 'the Commissioners for Her Majesty's Revenue and Customs' for 'the appellant or applicant'; (2) 'their' for 'his' in heads (1), (3), (8) and (10) in the text; (3) 'in opposition to' for 'in support of' in heads (2), (3) and (4) in the text; and (4) 'in support of' for 'in opposition to' in heads (6), (7) and (8) in the text: r 27(2) (as so substituted). The procedure set out in heads (1)-(10) in the text applies with the same modifications at the hearing of an appeal against a penalty imposed under the Customs and Excise Management Act 1979 s 114(2) or the Hydrocarbon Oil Duties Act 1979 s 22 or s 23 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARAS 573-574): Value Added Tax Tribunals Rules 1986, SI 1986/590, r 27(2) (as so substituted).

23 As to the chairman see PARA 345 ante.

24 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 27(3).

25 Ie the matters mentioned in *ibid* r 27(1) and (2) (see notes 12-22 above).

26 *Ibid* r 27(4) (amended by SI 1994/2617). In particular, where a taxpayer has chosen to address the tribunal first, it is within the discretion of the tribunal to refuse or allow him to address it further in reply: *Kwik-Fit (GB) Ltd v Customs and Excise Comrs* [1998] STC 159.

27 As to the registrar see PARA 345 ante.

28 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 27(5).

29 *Ibid* r 27(6). A tribunal may refuse to adjourn a hearing and, having heard it, dismiss the appeal, if the appellant is absent and his representative is inadequately instructed or if there is a history of attempted delay by the appellant: *Whatton v Customs and Excise Comrs* [1996] STC 519.

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### **365 Procedure at a hearing**

NOTE 7--See *Khan v Revenue and Customs Comrs* [2006] EWCA Civ 89, [2006] STC 1167 (taxpayer's right to fair hearing not prejudiced by representation at VAT and duties tribunal by accountant instead of lawyer).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/366. Evidence at a hearing.

### **366. Evidence at a hearing.**

Subject to certain provisions as to witness statements<sup>1</sup> and as to the tendering of affidavits and depositions made in other legal proceedings<sup>2</sup>, a VAT and duties tribunal may direct or allow evidence of any fact to be given in any manner it thinks fit and may not refuse evidence tendered to it on the grounds only that it would be inadmissible in a court of law<sup>3</sup>.

A tribunal may require oral evidence of a witness, including a party to an appeal<sup>4</sup> or application, to be given on oath or affirmation and, for that purpose, a chairman<sup>5</sup> and any member of the administrative staff of the tribunals on the direction of a chairman has power to administer oaths or take affirmations<sup>6</sup>.

At the hearing of an appeal or application, a tribunal must allow a party to produce any document set out in his list of documents<sup>7</sup> and unless a tribunal otherwise directs: (1) any document contained in that list of documents which appears to be an original document is deemed to be an original document printed, written, signed or executed as it appears to have been; and (2) any document contained in the list of documents which appears to be a copy is deemed to be a true copy<sup>8</sup>.

1   Ie the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 21(4), (5) (r 21(4) as amended): see PARA 359 ante. The tribunal may exercise its discretion to allow evidence in the form of a statement of a person who is overseas to be given, but should, as a rule, be slow to do so: *Presman (Bullion) Ltd v Customs and Excise Comrs* [1986] VATTR 136. The weight to be accorded such evidence is a matter for the tribunal: *Bord v Customs and Excise Comrs* (1992) VAT Decision 7946, [1992] STI 879. As to the admission of documents not contained on a party's list see *GUS Merchandise Corpn Ltd v Customs and Excise Comrs*, *Customs and Excise Comrs v GUS Merchandise Corpn Ltd* [1992] STC 776.

2   Ie the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 21A (as added): see PARA 360 ante.

3   Ibid r 28(1) (amended by SI 1991/186). It has been held that evidence in the form of travaux préparatoires might be given as an aid to interpreting the EC Council Directive 77/388 (OJ L145, 13.6.77, p 1) on the harmonisation of the laws of member states concerning turnover taxes ('the Sixth Directive'): *Case 324/82 EC Commission v Belgium* [1984] ECR 1861, [1985] 1 CMLR 364, ECJ. As to the admission of hearsay evidence when an appellant's representative fails to object see *Wayne Farley Ltd v Customs and Excise Comrs* [1986] STC 487; *Hanif v Customs and Excise Comrs* (1990) VAT Decision 6430 (unreported). As to the Sixth Directive see PARA 1 note 1 ante.

4   As to the parties to an appeal see PARA 356 ante.

5   As to the chairman see PARA 345 ante.

6   Value Added Tax Tribunals Rules 1986, SI 1986/590, r 28(2).

7   Ie the list served under ibid r 20 (as amended): see PARA 358 ante.

8   Ibid r 28(3).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

**366 Evidence at a hearing**

NOTE 3--EC Council Directive 77/388 replaced: EC Council Directive 2006/112 (OJ L347 11.12.2006 p 1) on the common system of value added tax (as amended) (see PARA 2).

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/367. Awards and directions as to costs.

### 367. Awards and directions as to costs.

A VAT and duties tribunal may direct that a party to an appeal<sup>1</sup> or applicant must pay to the other party to the appeal or application: (1) within such period as it may specify, such sum as it may determine on account of the costs<sup>2</sup> of that other party of, and incidental to and consequent upon, the appeal or application; or (2) the costs of that other party of, and incidental to and consequent upon, the appeal or application to be assessed by a Taxing Master of the Supreme Court or a district judge of the High Court of Justice in England and Wales by way of detailed assessment or the taxation of such costs on such basis as it may specify<sup>3</sup>.

Any costs awarded under these provisions are recoverable as a civil debt<sup>4</sup>.

1 As to the parties to an appeal see PARA 356 ante.

2 As to the meaning of 'costs' see PARA 348 note 6 ante. Where the appellant is a litigant in person, the tribunal is restricted to the common-law award of the litigant's out of pocket expenses in accordance with *Buckland v Watts* [1970] 1 QB 27, [1969] 2 All ER 985, CA. The tribunal may not award him costs for time spent preparing for the appeal, since the Litigants in Person (Costs and Expenses) Act 1975 does not extend to the VAT and duties tribunal: *Customs and Excise Comrs v Ross* [1990] 2 All ER 65, [1990] STC 353; *Nader (t/a Try Us) v Customs and Excise Comrs* [1993] STC 806, CA; and see *Mike Kiernan's Beer Tent Co Ltd (t/a Fish and Duck) v Customs and Excise Comrs* (2003) VAT Decision 18310, [2003] STI 2208. It has been held that a company is not a litigant in person when it is represented at the hearing by one of its directors, so that costs can be recovered for time spent by the director in preparation for the appeal (*GA Boyd Building Services Ltd v Customs and Excise Comrs* [1993] VATTR 26), although the opposite conclusion was reached in *Rupert Page Developments Ltd v Customs and Excise Comrs* [1993] VATTR 152, and impliedly in *Alpha International Coal Ltd v Customs and Excise Comrs* (1994) VAT Decision 11441, [1994] STI 162 (where costs were recovered for the time spent by an accountant who happened also to be company secretary, on the ground that he was acting in his capacity as an independent agent of the company), and in *Mike Kiernan's Beer Tent Co Ltd (t/a Fish and Duck) v Customs and Excise Comrs* supra it was agreed by the Tribunal that *GA Boyd Building Services Ltd v Customs and Excise Comrs* supra was wrongly decided in the light of *Jonathan Alexander Ltd v Proctor* [1996] 2 All ER 334, [1996] 1 WLR 518. It was also held in *Mike Kiernan's Beer Tent Co Ltd (t/a Fish and Duck) v Customs and Excise Comrs* supra that the Litigants in Person (Costs and Expenses) Act 1975 does not apply to the costs of proceedings before a VAT and duties tribunal. Costs are accordingly restricted to reasonable out of pocket expenses (including costs of professional representation).

3 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 29(1) (amended by SI 2003/2757). Where a tribunal gives a direction under head (2) in the text in proceedings in England and Wales, the provisions of CPR Pt 47 and any practice directions supplementing that part, apply, with the necessary modifications, to the taxation of the costs as if the proceedings in the tribunal were a cause or matter in the Supreme Court: Value Added Tax Tribunals Rules 1986, SI 1986/590, r 29(2) (amended by SI 2003/2757). See also *Patel (t/a Rumi Clothing) v Customs and Excise Comrs* (1998) VAT Decision 15268, [1998] STI 266. There are presently two bases of costs, costs on the standard basis and costs on an indemnity basis: see CPR Pt 47; and CIVIL PROCEDURE vol 12 (2009) PARA 1779 et seq. The latter are rarely awarded by the tribunal and it is likely that they are only available to an appellant if the Commissioners have 'acted disgracefully' to such an extent as to make the case 'a wholly exceptional one': *H & B Motors (Dorchester) v Customs and Excise Comrs* (1993) VAT Decision 11209, [1993] STI 1428. Thus such costs were awarded where the Commissioners had sought to exercise powers given to them by the Value Added Tax Act 1994 s 58, Sch 11 para 4(2) (see PARA 286 ante) for an improper purpose: *VSP Marketing Ltd v Customs and Excise Comrs* (1994) VAT Decision 12636, [1994] STI 1321. See also *KTS Fashions Ltd v Customs and Excise Comrs* (1992) VAT Decision 6782, [1992] STI 174. The costs incurred in corresponding with the Commissioners cannot properly be described as costs of and incidental to and consequent on the hearing (which, in the instant case, were confined to the time spent in court, the cost of the time spent agreeing and updating the bundle, and the costs of complying with the directions given by the tribunal): *FP Whiffen Opticians (No 2) v Customs and Excise Comrs* (2005) VAT Decision 18969, [2005] STI 877.

Cost should generally follow the event; it has been held that it is improper to deny a successful appellant his costs merely because his accountants have created a substantial degree of animosity prior to the appeal by the terms in which they have corresponded with the Commissioners: *Zoungrou v Customs and Excise Comrs* [1989] STC 313. Costs may be awarded where one party concedes before the appeal is heard (*Surrey College Ltd v*

*Customs and Excise Comrs* [1992] VATTR 181); but an appeal cannot be continued after a compromise has been reached in order to obtain an award of costs; the costs must form part of the compromise (*Cadogan Club Ltd v Customs and Excise Comrs* (1978) VAT Decision 548 (unreported)).

The Commissioners do not generally seek an award of costs; but (unless the appeal involves an important point of law requiring clarification) they do so in exceptional tribunal hearings of substantial and complex cases where large sums are involved and which are comparable with High Court cases. They also consider seeking costs where the appellant has misused the tribunal procedure as, for instance, in frivolous or vexatious cases, or where he has failed to appear or to be represented at a mutually arranged hearing without sufficient explanation, or where he has first produced at a hearing relevant evidence which ought properly to have been disclosed at an earlier stage and which could have saved public funds had it been produced timeously. The Commissioners normally seek an award of costs in unsuccessful evasion penalty appeals on the ground that such cases are comparable with High Court cases: 102 HC Official Report (6th series), 24 July 1986, written answers cols 459-460; Customs and Excise Press Notice 1132 [1986] STI 574. Costs are recoverable on an indemnity basis only, and are not recoverable where the appellant has agreed that he would only be obliged to pay his representative if and to the extent that an award of costs were made in his favour: *Customs and Excise Comrs v Vaz, Portcullis (VAT Consultancy) Ltd intervening* [1995] STC 14. See also *Customs and Excise Comrs v Dave* [2002] EWHC 969 (Ch), [2002] STC 900; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1281. The Value Added Tax Tribunals Rules 1986, SI 1986/590, r 29(1) is wide enough to cover an award of indemnity costs: *Security Despatch Ltd v Customs and Excise Comrs* [2001] V & DR 392.

4 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 29(5).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.



Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/368. Decisions and directions.

### **368. Decisions and directions.**

At the conclusion of the hearing of an appeal the chairman<sup>1</sup> may give or announce the decision of the tribunal<sup>2</sup>. Where he does so at the conclusion of the hearing of a mitigation appeal<sup>3</sup> or a reasonable excuse appeal<sup>4</sup>, he may ask the parties present at the hearing whether they require the decision to be recorded in a written document<sup>5</sup>, and, if none of the parties present so requires, the appeal will be treated for the purposes of the following provisions as if it had been an application<sup>6</sup>. Subject to those exceptions, the decision of the tribunal must be recorded in a written document containing the findings of fact by the tribunal and its reasons for the decision, and that document must be signed by the chairman<sup>7</sup>.

If, however, a party to the appeal so requests by notice in writing served at the appropriate tribunal centre<sup>8</sup> within one year of the date on which the decision is released in accordance with these provisions, the outcome of the appeal, together with any award and direction as to costs<sup>9</sup>, or for the payment or repayment of any sum of money with or without interest, given or made by the tribunal during or at the conclusion of the hearing of the appeal must be recorded in a written direction which must be signed by a chairman or the registrar<sup>10</sup>.

At the conclusion of the hearing of an application, whether or not the chairman gives or announces the decision of the tribunal, the outcome of the application, together with any award or direction given or made by the tribunal during or at the conclusion of the hearing, must be recorded in a written direction which must be signed by a chairman or the registrar<sup>11</sup>. If, however, a party to the application so requests by notice in writing served at the appropriate tribunal centre within 14 days of the date on which the direction is released in accordance with these provisions, the decision of the tribunal on the application must be recorded in a written document containing the findings of fact by the tribunal and its reasons for the decision which must be signed by a chairman<sup>12</sup>. A decision should normally be issued no longer than three months after the final submissions are heard<sup>13</sup>.

A proper officer<sup>14</sup> must send a copy of the tribunal's decision and of any direction in an appeal to each party to the appeal and a duplicate of the direction and of any decision in an application to each party to the application<sup>15</sup>. Every decision in an appeal must bear the date when the copies of it are released to be sent to the parties and any direction, and all copies of any direction, recording the outcome of the appeal must state that date<sup>16</sup>. Every direction on an application must bear the date when the copies of it are released to be sent to the parties, and any decision on that application which is given or made<sup>17</sup> and all copies of it must state that date<sup>18</sup>.

A chairman or the registrar may correct any clerical mistake or other error in expressing his manifest intention in a decision or direction signed by him, but if a chairman or the registrar corrects any such document after a copy of it has been sent to a party, a proper officer must as soon as practicable thereafter send a copy of the corrected document, or of the page or pages which have been corrected, to that party<sup>19</sup>.

Where a copy of a decision or a direction dismissing an appeal or application or containing a decision or direction given or made in the absence of a party is sent to a party or other person entitled to apply<sup>20</sup> to have the appeal or application reinstated or the decision or direction set aside, the copy must contain or be accompanied by a note to that effect<sup>21</sup>.

1 As to the chairman see PARA 345 ante.

- 2 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 30(1) (amended by SI 1991/186).
- 3 For the meaning of 'mitigation appeal' see PARA 351 note 8 ante.
- 4 For the meaning of 'reasonable excuse appeal' see PARA 350 note 11 ante.
- 5 le in accordance with the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 30(1) (as amended: see note 2 supra).
- 6 Ibid r 30(8) (added by SI 1991/186; and substituted by SI 1994/2617).
- 7 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 30(1) proviso (as amended: see note 2 supra).
- 8 As to the appropriate tribunal centre see PARA 343 ante.
- 9 For the meaning of 'costs' see PARA 348 note 6 ante; and as to awards and directions as to costs see PARA 367 ante.
- 10 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 30(1) (as amended: see note 2 supra). The registrar has power to sign a direction recording the outcome of an appeal and any award or direction given or made by the tribunal during or at the conclusion of the hearing of an appeal as provided by r 30(1) (as amended): r 33(2). As to the registrar see PARA 345 ante.
- 11 Ibid r 30(2).
- 12 Ibid r 30(2) proviso (amended by SI 1991/186).
- 13 *R v Customs and Excise Comrs, ex p Dangol* [2000] STC 107.
- 14 For the meaning of 'proper officer' see PARA 350 note 17 ante.
- 15 Value Added Tax Tribunals Rules 1986, SI 1986/590, r 30(3).
- 16 Ibid r 30(4).
- 17 le under ibid r 30(2) proviso (as amended): see the text and note 12 supra.
- 18 Ibid r 30(5).
- 19 Ibid r 30(6).
- 20 le under ibid r 26 (as amended): see PARA 364 ante.
- 21 Ibid r 30(7) (amended by SI 1991/186). The tribunal has no power to reinstate an appeal which has been settled by agreement under the Value Added Tax Act 1994 s 85: *Abbey Life Japan Trust v Customs and Excise Comrs* (1993) VAT Decision 11205, [1993] STI 1406.

## UPDATE

### 343-400 Appeals

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/368A. Payment of tax on determination of appeal.

### **368A. Payment of tax on determination of appeal.**

Where on an appeal<sup>1</sup> the tribunal has determined that the whole or part of any disputed amount paid or deposited is or is not due, or the whole or part of any VAT credit due to the appellant has not been paid or was not due, so much of that amount, or of that credit, as the tribunal determines not to be due or not to have been paid must be repaid with interest<sup>2</sup>.

Where a party makes a further appeal, notwithstanding that the further appeal is pending, value added tax or VAT credits, or a credit of overstated or overpaid value added tax, is payable or repayable in accordance with the determination of the tribunal or court against which the further appeal is made; but if the amount payable or repayable is altered by the order or judgment of the tribunal or court on the further appeal, then if too much has been paid to HM Revenue and Customs it must be repaid with such interest, if any, as the tribunal or court may allow, and if too little has been paid (or the whole or part of a VAT credit was not payable) it is due or repayable, as appropriate, at the expiration of a period of 30 days beginning with the date on which HM Revenue and Customs issue to the other party a notice of the total amount payable in accordance with the order or judgment in question<sup>3</sup>.

<sup>1</sup> I.e. an appeal under the Value Added Tax Act 1994 s 83: see PARA 34.

<sup>2</sup> Ibid s 85A(1)-(3) (ss 85A, 85B added by SI 2009/56). Interest is payable at the rate applicable under the Finance Act 1996 s 197: Value Added Tax Act 1994 s 85A(2). For the meaning of 'tribunal' see PARA 343. Interest payable to HM Revenue and Customs is payable without deduction of income tax: s 85A(4). Nothing in s 85A requires HM Revenue and Customs to pay interest on any amount which falls to be increased by a supplement under s 79 (see PARA 315) or, where an amount is increased under that provision, on so much of the increased amount as represents the supplement: s 85A(5).

<sup>3</sup> Ibid s 85B(1), (2). However, if, on the application of HM Revenue and Customs, the relevant tribunal or court considers it necessary for the protection of the revenue, that court or tribunal may nevertheless give permission to withhold any payment or repayment, or require the provision of adequate security before payment or repayment is made: s 85B(3). 'Adequate security' means security that is of such amount and given in such manner as the tribunal or court may determine or, as the case may be, as HM Revenue and Customs consider adequate to protect the revenue: s 85B(8). 'Further appeal' means an appeal against the tribunal's determination of an appeal under s 83; or a decision of the Upper Tribunal or a court that arises (directly or indirectly) from that determination: s 85B(8).

If, on the application of the original appellant, HM Revenue and Customs are satisfied that financial extremity might be reasonably expected to result if payment or repayment is required or withheld as appropriate, HM Revenue and Customs may (1) decide how much, if any, of the amount under appeal should be paid or repaid as appropriate; (2) require the provision of adequate security from the original appellant; or (3) stay the requirement to pay or repay: s 85B(4), (6). If a decision has been made on such an application, the original appellant may apply to the relevant tribunal or court which, if it decides that financial extremity might be reasonably expected to result from HM Revenue and Customs' decision, it may take any of the courses of action set out in heads (1)-(3) above: s 85B(5). Once the further appeal has been determined s 85B(4)-(6) ceases to have effect; s 85B(7). 'Original appellant' means the person who made the appeal to the tribunal under s 83; and 'relevant tribunal or court' means the tribunal or court from which permission or leave to appeal is sought: s 85B(8).

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(2) APPEALS TO VAT AND DUTIES TRIBUNALS/369. Enforcement of tribunal decisions etc.

### **369. Enforcement of tribunal decisions etc.**

Where on an appeal it is found that the whole or part of any amount paid or deposited<sup>1</sup> is not due, or that the whole or part of any value added tax credit<sup>2</sup> due to the appellant has not been paid, so much of that amount as is found not to be due or not to have been paid is to be repaid (or, as the case may be, paid) with interest at such rate as the VAT and duties tribunal may determine; and where the appeal has been entertained notwithstanding that an amount determined by the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> to be payable as VAT has not been paid or deposited and it is found on the appeal that that amount is due, the tribunal may, if it thinks fit, direct that the amount is to be paid with interest at such rate as may be specified in the direction<sup>4</sup>.

Where it is found on an appeal against a decision<sup>5</sup> that the amount specified in the assessment is less than it ought to have been, and the tribunal gives a direction specifying the correct amount, the assessment has effect as an assessment of the amount specified in the direction, and that amount is deemed to have been notified to the appellant<sup>6</sup>.

If the decision of a VAT and duties tribunal<sup>7</sup> in England and Wales on an appeal under the Value Added Tax Act 1994<sup>8</sup> is registered by the Commissioners in accordance with rules of court, payment of: (1) any amount which, as a result of the decision, is, or is recoverable as, VAT due from any person; and (2) any costs<sup>9</sup> awarded to the Commissioners by the decision, may be enforced by the High Court as if that amount or, as the case may be, the amount of those costs, were an amount due to the Commissioners in pursuance of a judgment or order of the High Court<sup>10</sup>.

The tribunal has no power to direct the Commissioners to pay sums which they admit to be due to a taxpayer<sup>11</sup>.

A tribunal has power to direct a stay of proceedings on its decision on such terms as it may consider just, but should only make such a direction in exceptional circumstances and should not do so merely because one party has appealed against that decision to the High Court<sup>12</sup>.

1    Ie in accordance with the Value Added Tax Act 1994 s 84(3)(a): see PARA 347 ante.

2    As to VAT credits see PARA 216 ante.

3    As to the Commissioners for Her Majesty's Revenue and Customs and the transfer to those Commissioners of the functions of the former Commissioners of Customs and Excise see PARA 13 ante.

4    Value Added Tax Act 1994 s 84(8). As to the entertainment of an appeal without payment or deposit of tax see PARA 347 ante.

5    Ie an appeal against a decision with respect to any of the matters mentioned in *ibid* s 83(p) (as amended): see PARA 346 ante.

6    *Ibid* s 84(5).

7    Including an order (however described) made by a tribunal for giving effect to a decision: *ibid* s 87(5).

8    Ie under *ibid* s 83 (as amended): see PARA 346 ante.

9    As to the meaning of 'costs' see PARA 348 note 6 ante.

10 Value Added Tax Act 1994 s 87(1). As to the enforcement of a decision in Northern Ireland see s 87(3), (4). As to the application of s 87 to appeals in relation to landfill tax see the Finance Act 1996 s 56(8); and LANDFILL TAX vol 61 (2010) PARA 1005.

11 *Royal College of Obstetricians and Gynaecologists v Customs and Excise Comrs* (1996) VAT Decision 14558 (unreported).

12 *Thorn Electrical Industries Ltd v Customs and Excise Comrs, British Relay Ltd v Customs and Excise Comrs, Visionhire Ltd v Customs and Excise Comrs* [1974] VATTR 62.

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### **369 Enforcement of tribunal decisions etc**

TEXT AND NOTES--Repealed: SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(3) FURTHER APPEALS AND REFERENCES/370. Appeal from a VAT and duties tribunal to the High Court.

### **(3) FURTHER APPEALS AND REFERENCES**

#### **370. Appeal from a VAT and duties tribunal to the High Court.**

If any party to proceedings before a VAT and duties tribunal is dissatisfied in point of law with a decision of the tribunal he may, according as rules of court provide<sup>1</sup>, either appeal from the tribunal to the High Court or require the tribunal to state and sign a case for the opinion of the High Court<sup>2</sup>.

<sup>1</sup> See CPR Pt 52 (as added and amended), Sch 1 RSC Ord 94 rr 8(1), 9(1) (r 8 as substituted); and ADMINISTRATIVE LAW; CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq. As to the procedure on such an appeal see CIVIL PROCEDURE. The court is not entitled to reverse the tribunal's decision on the grounds that it had failed to consider new contentions which were introduced after the hearing: *Customs and Excise Comrs v A & D Goddard (a firm)* [2001] STC 725, [2001] 20 LS Gaz R 44.

<sup>2</sup> Tribunals and Inquiries Act 1992 ss 1, 11(1), Sch 1 para 44 (Sch 1 para 44 substituted by the Finance Act 1994 s 7(6); and amended by the Value Added Tax Act 1994 s 100(1), Sch 14 para 12). As to the procedure for appeals to the High Court from a tribunal see CPR Pt 52 (as added and amended); CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq.

#### **UPDATE**

#### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

#### **370-371 Further Appeals and References**

Repealed: Tribunals, Courts and Enforcement Act 2007 s 45(2), Sch 23 Pt 1; SI 2009/56.

#### **370 Appeal from a VAT and duties tribunal to the High Court**

NOTE 1--See *Megtian Ltd (in administration) v Revenue & Customs Comrs* [2010] EWHC 18 (Ch), [2010] STC 840.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(3) FURTHER APPEALS AND REFERENCES/371. Appeal from the tribunal to the Court of Appeal.

### **371. Appeal from the tribunal to the Court of Appeal.**

The Lord Chancellor may by order provide that in such classes of appeal as may be prescribed by the order, and subject to the consent of the parties and to such other conditions as may be so prescribed, an appeal from a VAT and duties tribunal is to lie to the Court of Appeal<sup>1</sup>.

If any party to proceedings before a VAT and duties tribunal is dissatisfied in point of law with a decision of the tribunal he may appeal from the tribunal direct to the Court of Appeal if: (1) the parties consent<sup>2</sup>; (2) the tribunal indorses its decision with a certificate that the decision involves a point of law relating wholly or mainly to the construction of an enactment, or of a statutory instrument, or of any of the Community Treaties or of any Community instruments, which has been fully argued before it and fully considered by it<sup>3</sup>; and (3) the leave of a single judge of the Court of Appeal has been obtained<sup>4</sup>. A party who wishes to appeal in this way must apply to the tribunal<sup>5</sup> for a certificate under head (2) above at the conclusion of the hearing or within 21 days after the date when the decision of the tribunal was released<sup>6</sup>.

1 Value Added Tax Act 1994 s 86(1). Such an order may provide that the Tribunals and Inquiries Act 1992 s 11 (which provides for appeals to the High Court from a tribunal) is to have effect, in relation to any appeal to which the order applies, with such modifications as may be specified in the order: Value Added Tax Act 1994 s 86(2). At the date at which this volume states the law, no such order had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Value Added Tax Tribunals Appeals Order 1986, SI 1986/2288 (as amended) partly has effect as if so made: see notes 2-6 infra. As from a day to be appointed, before making an order under the Value Added Tax Act 1994 s 86, the Lord Chancellor must consult the Lord Chief Justice: s 86(2A) (s 86(2A)-(2D) prospectively added by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 235, 236) and the Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise this function: Value Added Tax Act 1994 s 86(2C) (as so prospectively added). At the date at which this volume states the law, no such day had been appointed. As to appeals to the High Court see PARA 370 ante. Changes to the role of the Lord Chancellor have been proposed: see No 10 Downing Street press release *Modernising Government* (12 June 2003); and the Constitutional Reform Act 2005. As to the Lord Chancellor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

2 Value Added Tax Tribunals Appeals Order 1986, SI 1986/2288, art 2(a).

3 Ibid art 2(b).

4 Ibid art 2(2)(c). The text refers to leave obtained pursuant to the Supreme Court Act 1981 s 54(6) (repealed). As to the procedure for appeals see CPR Pt 52; and CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq.

5 Ie in accordance with the Value Added Tax Tribunals Rules 1986, SI 1986/590, r 11 (as amended): see PARA 357 ante.

6 Ibid r 30A (added by SI 1986/2290; and amended by SI 1994/2617). As to the release of the tribunal's decision see r 30 (as amended); and PARA 368 ante.

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.

### **370-371 Further Appeals and References**



Repealed: Tribunals, Courts and Enforcement Act 2007 s 45(2), Sch 23 Pt 1; SI 2009/56.

Halsbury's Laws of England/VALUE ADDED TAX (VOLUME 49(1) (2005 REISSUE))/8. APPEALS/(3) FURTHER APPEALS AND REFERENCES/372-400. References to the European Court of Justice.

### **372-400. References to the European Court of Justice.**

Where a question as to the validity and interpretation of Community law<sup>1</sup> is raised before any court or tribunal<sup>2</sup> of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the European Court of Justice to give a ruling on it<sup>3</sup>. Where any such question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice<sup>4</sup>.

These provisions are of particular significance in view of the European legislative basis of value added tax<sup>5</sup>.

1    le a question as to: (1) the interpretation of the EC Treaty; (2) the validity and interpretation of acts of the institutions of the Community and of the proposed European Central Bank; and (3) the interpretation of the statutes of bodies established by an act of the EC Council, where those statutes so provide: see the EC Treaty (Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) art 234(a)-(c) (substituted by the Maastricht Treaty Title II art G(56); formerly art 177 and renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ).

2    As to VAT and duties tribunals see PARA 343 et seq ante.

3    See the EC Treaty art 234 (as substituted and renumbered: see note 1 supra). For guidelines as to when such a reference should be made see *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 422-425, [1974] 2 All ER 1226 at 1234-1236, CA, per Lord Denning MR; and see further *Henn and Darby v DPP* [1981] AC 850 at 906, sub nom *R v Henn, R v Darby* [1980] 2 All ER 166 at 197-198, HL, per Lord Diplock; Case 283/81 *CILFIT Srl and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, [1983] 1 CMLR 472, ECJ; *Customs and Excise Comrs v ApS Samex* [1983] 1 All ER 1042, [1983] 3 CMLR 194; *Lord Bethell v Société Anonyme Belge d'Exploitation de la Navigation Aérienne (SABENA)* [1983] 3 CMLR 1; *R v Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, CA; *R v International Stock Exchange of the United Kingdom and the Republic of Ireland, ex p Else (1982) Ltd* [1993] QB 534, [1993] 1 All ER 420, CA; *BLP Group plc v Customs and Excise Comrs, Swallowfield plc v Customs and Excise Comrs* [1994] STC 41, CA; *Conoco Ltd v Customs and Excise Comrs* [1995] STC 1022. See also PARA 3 note 9 ante.

4    See the EC Treaty art 234 (as substituted and renumbered: see note 1 supra).

5    See PARA 2 ante. The determination of the correct VAT treatment of discount vouchers is exceptionally difficult and has occasioned a number of references to the European Court of Justice: see PARAS 95, 213 note 7 ante.

## **UPDATE**

### **343-400 Appeals**

Value Added Tax (Tribunals) Rules 1986, SI 1986/590, and Value Added Tax Tribunals Appeal Order 1986, SI 1986/2288, revoked: SI 2009/56.